

NYPL RESEARCH LIBRARIES



3 3433 08238290 8

REPORT

OF THE

TRIAL OF JAMES H. PECK,

JUDGE OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MISSOURI,

BEFORE THE SENATE OF THE UNITED STATES,

ON AN

IMPEACHMENT

PREFERRED BY THE HOUSE OF REPRESENTATIVES AGAINST HIM

FOR

HIGH MISDEMEANORS IN OFFICE.

BY ARTHUR J. STANSBURY.

BOSTON:
PUBLISHED BY HILLIARD, GRAY AND CO.

1833.

J. C. G. T.

Entered according to Act of Congress, in the year 1832,
BY HILLIARD, GRAY & CO.
In the Clerk's Office for the District of Massachusetts.



J. E. HINCKLEY & CO., PRINTERS,
14 WATER STREET, BOSTON.

ROY WAIN
JUN 21 1895

I N D E X .

A.

Answer of Judge Peck, -	59
Appendix, - - -	475
——— No. 2. - - -	570
Article of Impeachment, -	49

B.

Bates, Edward ; his deposition,	243
Bent, John ; his deposition,	240
Benton, Hon. Thomas H. ex- amined, - - -	285
Buchanan, Hon. James ; his argument, - - -	425

C.

Carr, William C. examined,	224
——— cross examined, -	225
——— again, - - -	256
——— explains, - - -	286
Charles, Edward, examined,	186
“Citizen,” article so signed,	50
Committee to manage the Im- peachment, - - -	48

G.

Geyer, Henry S. examined,	168
——— cross examined, -	172
——— again, - - -	281
Grants ; Spanish Regulations of, Appendix, No. 2. - - -	575

H.

Hempstead, Charles S. ex- amined, - - -	181
——— cross examined, -	183
——— again, - - -	280

Horrall, Rev. Thomas, exam-

ined, - - -	161
——— cross examined, -	162
Hough, Daniel, examined,	250
——— cross examined, -	252

I.

Impeachment of Judge Peck voted by yeas and nays, -	46
——— article of, - - -	49

K.

King, Samuel D. examined,	274
---------------------------	-----

L.

Lawless, Luke E. ; his memorial,	1
——— article in the Missouri Republican, - - -	50
——— testimony, - - -	104
——— cross examination,	108,
275, 284	
Leduc, Maria P. examined,	282
Lindell, Jesse G. examined,	227
Lucas, John B. C. examined,	221
——— explains, - - -	279

M.

McDuffie, Hon. George ; his opening argument, - - -	85
Magennis, Arthur L. examined,	163
——— cross examined, -	166
Melody, George H. C. wishes to be discharged, - - -	126
——— examined, - - -	25
——— cross examined, -	254
Memorial of L. E. Lawless,	1

TRIAL OF JUDGE PECK.

PRELIMINARY PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES.

ON the 8th day of December, 1826, the Hon. John Scott, Representative from the State of Missouri, presented in the House of Representatives of the United States the following Memorial from LUKE EDWARD LAWLESS, a citizen of that State.

To the Honorable the House of Representatives of the United States:

The petition of Luke Edward Lawless, a citizen of the State of Missouri, and of the United States,

RESPECTFULLY SHOWETH :

That, on the 30th day of March, in the present year, 1826, there appeared in the Republican, a newspaper printed in the city of St. Louis, State of Missouri, an article purporting to be the final decree or opinion of the Judge of the District Court of the United States for the District of Missouri, in the cause in which the widow and heirs of Antoine Soulard were plaintiffs, and the United States defendant.

That the said opinion was sent to the press and published at the request of James H. Peck, Judge of the aforesaid District Court, whose opinion it purported to be.

That, in fact, a final decree had been rendered by said Judge in the above cause, and an appeal taken therefrom by the plaintiffs, to the Supreme Court of the United States, previous to the publication of said opinion.

That, for the purposes of said appeal, all the necessary steps had been taken by the appellants, and said Judge Peck was no longer, at the date of said publication, invested with any judicial control or consideration of said cause.

That your petitioner having, after an attentive perusal of said published opinion, discovered, or believed that he discovered, in it, many and serious mistakes in fact and doctrine, did, on the 8th day of April, 1826, in an article signed "A Citizen," published in the Missouri Advocate and St. Louis Enquirer, a newspaper printed in the city of St. Louis, submit to the public a concise statement of some of the principal errors into which your petitioner conceived that the said Judge Peck had fallen.

That your petitioner, in making said exposition, not only availed himself of what he believed to be his right as a private citizen, but acted from a sense of duty to those numerous land claimants by whom we was employed as counsel.

That the object of your petitioner was, if possible, to counteract the effect that Judge Peck's opinion was calculated to produce on the value of the unconfirmed Spanish and French land titles, and to save the claimants from those speculators who would have availed themselves of the panic which the opinion created, to buy up those titles for an inadequate consideration.

That your petitioner believes that he has, to a considerable extent, attained this object; and therefore submits, that his conduct in publishing the article, was not only not criminal, but was meritorious.

That, in the exposition of the errors, whether in fact or in doctrine, of said opinion, your petitioner has attributed nothing to said Judge either untruly or maliciously, nor has he, in the tone and language used by him, violated any rule of courtesy or decorum.

That the opinion of Judge Peck, and the article signed "A Citizen," were, both of them, published after the court had adjourned, and out of term, the said Judge having adjourned on the 30th day of December, 1825, to sit again on the third Monday of April, being the 20th day of April, 1826.

Your petitioner further showeth, that, on the third Monday of April, 1826, being the first day of the term of the United States' District Court for the decision of land claims, immediately subsequent to the publication of the opinion of Judge Peck, a rule was made by said Judge, and served by the Deputy Marshal upon Mr. S. W. Foreman, the editor of the Missouri Advocate and St. Louis Enquirer, which rule is in the following terms:

"The court being satisfied, from the evidence of Luke E. Lawless, that Stephen W. Foreman, of this city, is the editor and publisher of the Missouri Advocate and St. Louis Enquirer, published in the said city, and that the paper of that name of the eighth of April instant, which contains a false statement of and concerning a certain judicial decision made in the case of Julia Soulard, widow, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs of Antoine Soulard, deceased, against the United States, issued from the press of the said Stephen W. Foreman, it is ordered, that the said Stephen W. Foreman show cause, on to-morrow morning, at eleven o'clock, why an attachment should not issue against him for a contempt of this court in publishing the said false statement, tending to bring odium on the court, and to impair the confidence of the public in the purity of its decisions."

In obedience to this rule, Mr. Foreman appeared, and by your petitioner, who acted as his counsel, showed against the rule, and urged that,

First. He, Judge Peck, had no jurisdiction of the matter as a contempt of court.

Secondly. That the article, in point of merits, was a correct statement of the positions and doctrines therein attributed to the Judge.

Thirdly. That the language and tone of the article signed "A Citizen," were perfectly decorous.

Your petitioner further showeth, that, in the argument and observations which he felt it his duty to submit, as counsel for the editor, he endeavored to demonstrate the truth of the article by a comparison of it with the text of the opinion, and disclaimed, in the most unequivocal manner, any contemptuous intention or feeling towards said Judge Peck, either in his judicial or his private character.

Your petitioner showeth, that the arguments and authorities submitted on behalf of the editor, produced no effect on the opinion of Judge Peck, as to the character of the article signed "A Citizen," which he persisted in considering as a contempt of court, and punishable as such.

That your petitioner, being desirous of protecting the editor from the conse-

quences of the actual issuing of an attachment against him, and being convinced, from the very virulent language and manner of the said Judge towards your petitioner, that his main object was to get hold of him as the author of the "Citizen," your petitioner consented that the editor should give up his name as author of that article.

That the editor having accordingly declared that your petitioner was the author, the conditional rule against him was discharged, and the following rule made by said Judge, and served on your petitioner :

"The court being satisfied, upon the oath of Stephen W. Foreman, made in open court, that Luke E. Lawless, an attorney and counsellor of this court, is the author of a certain publication over the signature of 'A Citizen,' in a public paper, printed in this city, by the name of the 'Missouri Advocate and St. Louis Enquirer,' issued on the 8th of April, of this instant, it is ordered, that the said Luke E. Lawless show cause forthwith, why an attachment should not be issued against him for the false and malicious statements in the said publication contained, in relation to a judicial decision of this court in the case of Julia Soulard, widow, James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs of Antoine Soulard, deceased, against the United States, lately pending and determined therein, with intent to impair the public confidence in the upright intentions of the said court, and to bring odium upon the court, and especially with intent to impress the public mind, and particularly many litigants in this court, that they are not to expect justice in the causes now pending therein, and with intent further to awaken hostile and angry feelings on the part of the said litigants against the said court ; and that he also show cause why he should not be suspended from practising in this court as an attorney and counsellor therein, for the said contempt and evil intent."

In obedience to this rule, your petitioner appeared, and, inasmuch as the Judge forbade any further discussion of the truth or merits of the article signed "A Citizen," instructed his counsel to oppose the rule on the following grounds, to wit :

1st. That, supposing the matter of the article to be false and malicious, the Judge had no jurisdiction or legal power to punish the author of it in a summary way as for a contempt.

2d. That, supposing the matter to be within the jurisdiction of the Judge as a contempt, suspension from practice as an attorney, and still less as counsellor in the United States' District Court, was not such a punishment as could be legally inflicted.

Your petitioner sheweth, that these two objections were disregarded by said Judge, and the rule for the attachment made absolute against your petitioner.

Your petitioner further sheweth, that said Judge Peck, upon making the above rule absolute, thought proper to pronounce a long speech in justification of his proceedings, in the course of which, he indulged in the most coarse and violent abuse of your petitioner, to whom, in all the various forms of language which he seemed capable of using, the said Judge imputed the crimes of falsehood, slander, calumny, and malice, and based said foul accusations exclusively upon the matter contained in the article signed "A Citizen,"—in this way making his speech a mere amplification of the abuse and scurrility contained in the rule above set forth.

That your petitioner, having listened for some time with astonishment and indignation to this malignant and most unjust attack upon his conduct and character, left the court, where he could no longer remain without giving way to feelings, which, however honorable and natural, it was matter of prudence to repress.

That, so fraught was the language and manner of the said Judge with personal insult, that your petitioner became convinced that the object in view was, to irritate your petitioner into some expression or act, in the presence of the court, which would have constituted a new and legitimate contempt, and, in that way,

to enable him, the Judge, to exercise his vengeance within the legal limits of his jurisdiction.

Your petitioner further showeth, that, whilst Judge Peck poured forth this torrent of abuse and invective, the court was crowded with people, among whom were several of the most respectable inhabitants of St. Louis.

That, by those persons, your petitioner has been informed, that, after your petitioner had retired from the court, the aforesaid Judge Peck continued for a considerable length of time to hold forth in the same insulting and acrimonious manner, and appeared to treat the subject before him, not so much with a view to discuss the real merits of it, as to vent his personal rage and malice on your petitioner, without alleging or insinuating that any other cause existed, or could be shown for such abuse, than the article in question.

That your petitioner, at the moment he was taken by the Deputy Marshal under the attachment, was occupied in the Circuit Court of the county of St. Louis, as counsel in a cause of very great importance to his client, and which your petitioner was compelled, at great risk to his client's interest, to abandon.

That your petitioner, when brought into the United States' District Court on the attachment, was asked by said Judge,

1st. Whether your petitioner wished that interrogatories should be filed ?

2d. Whether he would answer interrogatories if filed ?

3d. Whether he would purge himself of the contempt alleged against him in the rule.

That your petitioner, to these questions, replied as follows :

1st. That he did not require interrogatories to be filed.

2d. That, if interrogatories were filed, he would not answer them.

3d. That, as he had committed no contempt, he could purge himself of none.

That said Judge thereupon declared, that the refusal to answer any interrogatories that might be filed, was a great aggravation of the contempt already committed by your petitioner, and deserved a severer punishment than that which he would, possibly, have otherwise inflicted ; and, accordingly, that he, the said Judge Peck, having found your petitioner guilty of the original contempt in publishing the article signed "A Citizen," and of the aggravation of that contempt by declining to require interrogatories to be filed, and by declaring, that, if filed, he would not answer them, sentenced your petitioner to be imprisoned for twenty-four hours, and suspended from practice as attorney and counsellor at law in the District Court of the United States, for eighteen calendar months ; which decision and sentence is entered on the records of said court in the following terms, to wit :

United States,)
vs.)

Luke E. Lawless.)

Friday, April 21, 1826.

The defendant in this case having been brought into court by attachment, and the court having demanded of him whether he would answer interrogatories, or would purge himself of the contempt charged upon him, and the said defendant having refused to answer interrogatories, and having persisted in the contempt, the court doth find that the said defendant is guilty of the contempt to this court as charged in the said rule.

United States,)
vs.)

Luke E. Lawless.)

The defendant in this case having refused to answer interrogatories, and having persisted in the contempt, it is ordered, adjudged, and considered, that the said defendant be committed to prison for twenty-four hours, and that he be suspended from practising as an attorney or counsellor at law in this court, for eighteen calendar months from this day.

Your petitioner further showeth, that, under said sentence, your petitioner was forthwith lodged in the common jail of the county of St. Louis, and remain-

ed locked up there from four in the afternoon of the 21st April, 1826, until about nine o'clock at night, when he was brought before Judge Stuart, one of the Circuit Judges of the State of Missouri, on a writ of habeas corpus, and by said Judge discharged from imprisonment, on the ground that the order of commitment was a nullity, having no judicial seal or signature by which it could be authenticated.

Your petitioner showeth that, inasmuch as your petitioner was discharged from imprisonment in consequence of a mere formal defect in the order of commitment, he is still liable to be re-committed by said Judge Peck, whenever it shall please him so to do, by a warrant in proper form.

Your petitioner further showeth, that said Judge Peck, by that part of his sentence which suspends your petitioner from practice as attorney and counsellor, has not only injured your petitioner, but has violated the rights and endangered the interests of those persons (and they are numerous) who have entrusted their claims and causes in said court to your petitioner.

That your petitioner is prepared to prove, by the fullest evidence, as well written as oral, all that he has above alleged, and, for this purpose, begs leave to refer (amongst other matter) to,

1st. The opinion of Judge Peck in the cause of the widow and heirs of Soulard *vs.* United States, as published by said Judge in the Republican newspaper of the 30th March, 1826. (Marked No. 1.)

2d. The certificate on oath of the printer of the Republican. (Marked No 2.)

3d. The Missouri Advocate and St. Louis Enquirer of the 8th of April, 1826, containing the article signed "A Citizen." (Marked No. 3.)

4th. The said article signed "A Citizen," and so much of the text of the published opinion, placed in juxtaposition thereto, as will demonstrate the truth of the article, and the total absence of malice in the writer of it. (Marked No. 4.)

5th. A certified copy of the record of the District Court of the United States for Missouri, of the proceedings in this petition mentioned against the editor of the Missouri Advocate, and against your petitioner. (Marked No. 5.)

6th. A certified copy of the record of the proceedings of the Circuit Court of the county of St. Louis, State of Missouri, on the return to the writ of habeas corpus, in this petition mentioned. (Marked No. 6.)

7th. The certificate of eight respectable citizens of the State of Missouri, who were present in court when said Judge Peck reviled and insulted your petitioner, as herein before set forth. (Marked No. 7.)

8th. The testimony of other respectable citizens, who, if summoned, can prove, on their oaths, the manner and language made use of, as above alleged, by said Judge Peck, towards your petitioner.

Having thus submitted to your honorable body the facts of his case, and the evidence in support thereof, your petitioner begs leave to observe, that it appears from those facts—

1st. That the said James H. Peck has, in his capacity of Judge of a District Court of the United States, been guilty of usurping a power which the laws of the land did not give him.

2d. That said James H. Peck has exercised his power, be the same usurped or legitimate, in the case of your petitioner, in a manner cruel, vindictive, and unjust.

Wherefore, and inasmuch as the said James H. Peck has not only outraged and oppressed your petitioner as an individual citizen, but, in your petitioner's person, has violated the most sacred and undoubted rights of the inhabitants of these United States, namely, the liberty of speech and of the press, and the right of trial by jury, your petitioner prays that the conduct and proceedings in this behalf, of said Judge Peck, may be inquired into by your honorable body, and such decision made thereon as to your wisdom and justice shall seem proper.

And your petitioner, as in duty bound, will pray.

LUKE EDWARD LAWLESS.

St. Louis, Missouri, 22d September, 1826.

This memorial was referred to the Standing Committee of the House on the Judiciary ; which consisted, at that session, of Messrs. Webster, Wright, Rives, Letcher, Humphrey, Owen, and Kerr. It was accompanied by various documents, which were referred to by the memorialist in illustration and proof of his cause of complaint. Nothing was heard from the committee upon the subject referred to them until the 15th of February following, when they prayed that the petitioner have leave to withdraw his petition and documents.

Here the matter rested till the session of 1828, when, on the 29th of December, the Hon. Mr Mc Duffie, of South Carolina, again presented the same memorial, and moved its reference to the Judiciary Committee, consisting, this year, of Messrs. P. P. Barbour, Buchanan, Rives, Wickliffe, Kerr, Storrs, and Bell. But the session passed, and no report was made on the memorial.

The following session, Mr. Mc Duffie, on the 15th December, 1829, repeated the motion he had made at the last Congress, and the petition was once more referred to the Judiciary Committee, which now consisted of Messrs. Buchanan, Wickliffe, Storrs of N. York, Davis of S. Carolina, Bouldin, Ellsworth, and White of Louisiana. These gentlemen took up the subject with earnestness, and on the 7th of January ensuing, their chairman, Mr. Buchanan, moved that they be authorized to send for persons and papers. The motion was agreed to : witnesses were sent for and examined, and on the 23d of March following, Mr. Buchanan made a full report of the proceedings of the committee, exhibiting an abstract of the Soulard cause, (which had given rise to the proceedings,) together with the depositions of Luke Edward Lawless, the memorialist ; Henry S Geyer, Arthur L. Magenis, and Charles S. Hempstead, practising lawyers at the Missouri bar ; the Rev. Thomas Horrall, an Episcopal minister residing at St. Louis ; John Mullanphy ; and Edward Charles, the editor of the paper in which Mr. Lawless had published his strictures on the opinion delivered by Judge Peck in the Soulard cause. These gentlemen had been examined in the presence of the Judiciary Committee and of Judge Peck, by whom they had been cross examined ; but as all of them, save one, were afterwards examined on the trial, it is deemed unnecessary to present their examination before the committee. The report concluded with the following clause : " That, in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion that James H. Peck, Judge of the District Court of the United States for the District of Missouri, BE IMPEACHED of high misdemeanors in office."

The report was ordered to be printed ; an ineffectual attempt by Mr. Clay of Alabama to include in the order for printing the memorial of Mr. Lawless, and a letter addressed by Judge Peck to the committee, having failed.

On the 5th of April following, the Judge addressed to the House, through the speaker, the following memorial :

To the Honorable the Speaker and Members of the House of Representatives of the United States :

The memorial of James H. Peck, Judge of the District Court of the United States, for the District of Missouri,

RESPECTFULLY REPRESENTS :

That, by a report of the Committee on the Judiciary, made to your honorable body on the 23d March, 1830, on the petition of Luke E. Lawless, it is proposed that your memorialist be impeached of high misdemeanors in office.

As the report consists only of that simple proposition, without any specification of charges, or of the grounds on which the measure is recommended, your memorialist is left to collect those charges and grounds from the petition of Mr. Lawless, and the evidence accompanying the report of the committee.

By that petition and evidence, it appears that the proposed impeachment has

relation to one single charge against your memorialist, and one only, to wit : your memorialist having, in his character of Judge, in April, 1826, punished a contempt of court, committed by the said Luke E. Lawless, a practising attorney and counsellor of the court of which your memorialist is Judge, by a sentence of imprisonment for twenty-four hours, and by a suspension from practice as such attorney and counsellor in that court for eighteen months.

As the proceeding by impeachment is one of grave character, and is not less interesting to the public than to the individual who may be the subject of it, your memorialist presumes that it will not be displeasing to your honorable body to have a full view of the whole ground of this accusation, before you proceed to decide finally on the report of the committee.

In England, from which we borrow the process of impeachment, the House of Commons has been willing to receive such information from the party accused, before they will vote the impeachment. Thus, in the case of Warren Hastings, accused of high crimes and misdemeanors in his office of Governor General of Bengal, Mr. Burke presented the motion for impeachment to the House, with several articles of charge, on the 4th April, 1786. On the 26th April, the House received a petition, from Mr. Hastings, praying to be heard at the bar of the House, against the matter of the charges exhibited against him, and praying, also, for a copy of the charges ; both of which were granted. On the first of May, that gentleman was accordingly admitted to the bar of the House, where he was heard in his defence for two days : his written defence was then received, with the documents to which it referred, and a number of gentlemen were then examined as witnesses at the bar of the House, which was continued, at intervals, throughout the month. In consequence of the opportunity of defence thus allowed to Mr. Hastings, the first article in the impeachment, and that on which the accusers seemed mainly to rely, was struck from the list ; and it was not until after the severest scrutiny, and discussion which continued to the close of the session, which was resumed in the following year, and was protracted until the 10th May, 1787, that an impeachment was finally resolved on by the House of Commons. Even after all this care and circumspection in the preparatory movements, that impeachment, after a trial which hung over the nation for seven years, proved abortive, by the triumphant acquittal of Mr. Hastings on every charge.

Your memorialist has referred to this precedent simply for the purpose of showing, that the request which he is about to prefer is consonant with the practice of the British House of Commons in like cases. Even without a precedent, and on the original grounds of reason and justice, your memorialist presumes that it would not be the disposition of the House, either to burthen the nation or to harass him with a prosecution, which can be shown to be without any solid foundation either in law or right.

In saying this, he intends no disrespect to the committee which has recommended the impeachment. They had before them, as your memorialist presumes, the witnesses, only, who had been selected and summoned at the request of Luke E. Lawless himself ; nor can they, as your memorialist hopes he may add, without the imputation, and certainly without the intention of disrespect, have had an opportunity of examining, deliberately, the adjudged cases on which he grounds his principal proceedings against Mr. Lawless.

Against the *prima facie* impression to his disadvantage, arising from the fact that this committee have recommended an impeachment, he hopes, also, that he may be permitted to adduce the opposing facts, that this same petition of Luke E. Lawless was presented to this honorable House at the session of 1826-7, when the Judiciary Committee, to which it had been referred, and the chairman of which was, and is, among the most distinguished legal characters in the United States, after examining the subject, prayed to be discharged from the further consideration of it, and that the petitioner have leave to withdraw his papers. The same petition was again presented at the session of

1828--9, when the committee, (two of whom had been on the first committee) seemed to have considered it not of sufficient consequence to engage their attention, since they made no report whatever on the case.

Your memorialist is, nevertheless, sensible that the present report of the committee, connected with its accompanying evidence, (which is the effect of the witnesses called against him on the suggestion, as he presumes, of Mr. Lawless himself,) even although the case should go no further, is calculated to throw a shade on his official as well as his personal character, which a full knowledge of the case would entirely remove; and, with this view, as well as to prevent a needless consumption of the time of this House and of the honorable Senate, your memorialist humbly prays that you will permit him to lay before you a full exposition of all the facts as well as the law of this case, and that you will receive the testimony of some of the most respectable gentlemen, who witnessed the whole transaction, and who have no connexion either with your memorialist or the petitioner, to influence the statements which they will lay before the House.

Your memorialist feels the most entire confidence that, if this request shall be granted, he will be able to satisfy you that his conduct with regard to the petitioner, so far from meeting the censure of this honorable House, deserves its approbation, and that, if he had failed to adopt the measure which he did adopt, he would have been unworthy of the place which he holds in the Judiciary of the United States.

In what form you will be pleased to receive this exposition and testimony, whether by a direct address to the House, or by re-committing the subject to the Judiciary Committee, with instructions to receive and report them to the House, or, with an instruction to the committee to reconsider the subject and report anew to the House, or in whatever other form, is a matter of entire indifference to your petitioner, since he feels no other solicitude on the occasion, than that the subject itself shall be thoroughly and fully understood by the House and by the nation, on all the evidence and the law which belongs to it; and that a public discussion shall not take place on that evidence only which is now before the House, and which gives but a partial and imperfect view of the subject.

Your memorialist begs leave to suggest, that, having been all along conscious of the entire rectitude of his own motives and conduct, and having been aware, also, of the former presentation of this same petition of Mr. Lawless to this honorable House, and of the failure of these efforts to satisfy the former committees, that there was anything in the transaction to call forth the censure of this House, he had felt no solicitude on the subject, until he was informed, by a private letter from Washington, that the Judiciary Committee had moved for, and obtained, leave to send to Missouri for persons and papers, with a view to the investigation of the charge; when he thought it proper to proceed in person to Washington: he did so, and on his way, on the 23th of February, at Louisville, in Kentucky, he received a letter from the honorable chairman of the committee, dated at Washington, on the 21st of January, apprizing him that the committee had determined to investigate the subject of Mr. Lawless' complaint; that they had obtained leave from the House to send for persons and papers; and that they would receive *any explanation* which this memorialist might think proper to make, in relation to the charge.

The place and time at which your memorialist received this letter, the uncertainty of the duration of the session of Congress, the want of power to compel the attendance of witnesses from the State of Missouri, and his conviction that the permission to examine counter testimony would not be considered as coming within the scope of that *explanation* which the committee had declared themselves willing to receive, left to your memorialist no course but to proceed to Washington with as little delay as possible, and with no other means of explanation than such as he bore about him. He reached this city on the 9th of March,

and on the 10th, addressed a letter to the honorable chairman, simply requesting that he might be present at the examination of the witnesses summoned in support of Mr Lawless' petition, and have permission to cross-examine them.

On the evening of Sunday, the 14th of March, your memorialist received the answer of the honorable chairman, (dated on the 13th) by which he was informed that the committee would, on Monday, (the day after the receipt of the letter) receive any explanation in writing relative to the charge preferred by Mr Lawless, which your memorialist might think proper to communicate; and that, after having made such communication in answer to the charge, your memorialist would be permitted to cross-examine such witnesses as might be examined for the purpose of sustaining it.

Your memorialist begs leave to observe, that, being afflicted with an inflammation and weakness of the eyes, which compelled him to have recourse to an *amanuensis*; being now in a place in which he is a stranger; and the explanation which he was expected to make, calling, in his opinion, for an extended statement of facts, and for a minute reference to law authorities in support of his judicial decision, which authorities he had no means of commanding; the few hours allowed him for making this explanation, rendered the task a perfectly hopeless one. The committee, no doubt, thought the time amply sufficient. As the charge was a single one, they naturally enough supposed that the explanation must be brief. But if this honorable House shall be pleased to receive that exposition which your memorialist has prayed leave to offer, you will be satisfied, that, though the charge be single, yet the facts out of which it has grown, and the principles of law involved in it, are multifarious, and that the case cannot be fairly understood without a full developement of all those facts and principles. It is proper, also, to add, that the committee themselves extended the time for making this explanation for several days. Yet such was still the haste, and such the disadvantages under which your memorialist was compelled to prepare the statement, that he was constrained to submit, as part of it, crude *memoranda*, not designed for such a purpose, with an appendage equally crude; and he doubts whether his narrative could be read, or, if read, could have been clearly intelligible to the committee. Your memorialist was desirous that his explanation of the case should have been fully read and understood by the committee before the examination of the witnesses was taken up, in order that the committee might have a distinct view of the points in issue between the petitioner and your memorialist, and be thus the better able to direct their own examination, as well as to take the points and appreciate the force of the cross-interrogatories which your memorialist intended to propound; but to his great regret, on the very morning on which he handed in his statement, which was on Friday, 19th March, (and which was as early as it was possible, in the nature of things, for him to prepare the statement, even in that crude form,) the honorable committee, without reading the statement, proceeded immediately to examine the witnesses.

It is true, also, that your memorialist was permitted to cross-examine, to a certain extent, the witnesses who had been summoned and examined in support of the charge, but this cross-examination was much restricted by frequent objections, and by the strong desire evinced by the committee to get through the examination at least within the two remaining days of the week. And your memorialist having been more than once admonished that he was there, *ex gratia*, felt himself checked and restrained from extending the cross-examination to points which seemed to him to belong to the inquiry; so that his having been permitted to be present, under such circumstances, is rather a disadvantage to him than a benefit, because it gives to the transaction all the semblance of a free and full investigation of the whole case, without the reality. Your memorialist does not make this remark in censure of the honorable committee; on the contrary, considering the proceeding, as they manifestly seemed to do, as being analogous to an inquiry by a grand jury, and to be governed by the same rules, your memo-

rialist is sincerely satisfied that it was their purpose to treat him, as, in this view of the subject, they did, in fact, treat him, with great liberality and indulgence.

But your memorialist submits, with great respect, that the proceeding of the House of Representatives, in inquiring whether they will, or will not, institute an impeachment, is not to be governed by those strict rules which confine a grand jury to *ex parte* evidence. It was not the course pursued by the House of Commons of Great Britain, in the case of Warren Hastings, to which he has referred, and in which the House, before they voted the impeachment, heard not only the defence, but the testimony of his witnesses.

In the digested report of the committee of the House of Commons, which follows the report of the arguments of the managers who conducted that impeachment, it will be seen, too, that, in the estimation of that committee, the proceedings of courts of law furnish no rule whatever for the proceedings in an impeachment; the latter being governed by no other law or custom than the *lex et consuetudo parliamenti*, which left the House at perfect liberty to pursue the great ends of justice untrammelled by any other rules than those which reason and public utility prescribe, and of which they have left us a practical commentary in the privilege of defence and counter testimony accorded to Mr. Hastings, preliminary to the vote of impeachment.*

Your memorialist submits, with great deference, to the consideration of this honorable House, that the great purposes proposed to be attained by the process of impeachment, can be secured in no other way than by resorting to this measure in those cases only which demand a public example in the punishment of the offender. A resort to it in cases in which there is no probability that the impeachment can be ultimately maintained, though its effects on the individual who is the subject of it would be to harass him with wanton cruelty, and to break down his spirit of independence, by encouraging the assaults of private and personal malignity; yet its effects on the public would be to destroy all the solemnity and efficacy of the measure; to remove its terrors, and to render it so common and unproductive of any great result, as rather to throw ridicule on this great feature of the constitution, than to surround it with that awe which properly belongs to it.

In the present instance, although the petitioner, Mr. Lawless, has attempted to give solemnity to his complaint, by representing the freedom of the press, the right of trial by jury, and the liberty of the American citizen, to have been violated in his person, in the summary punishment for a contempt of court, inflicted on him, yet your memorialist has no fear of satisfying this honorable House, if an opportunity shall be afforded him, that these are the trite topics continually resorted to, and resorted to in vain, in Great Britain, whenever the courts of that country have found it necessary to punish summarily, a contempt—the rights secured to the subject by the *Magna Charta* of that kingdom being no less dear to them, nor less strongly guaranteed, than those in our constitution; that it would be a prostitution of these sacred principles to apply them to such a case as this; that the court has done no more, in this case, than has been continually done, without censure, in contempts of an inferior character, in the courts both of England and of this country, and of the very State where this was done; and that, if the power exercised by your memorialist, be denied to the courts of the United States, they are deprived of that salutary power of self-protection, which, we are told on the highest authority, that all courts have possessed, from time immemorial, which it is indispensable to their existence that they should possess; and, deprived of which, courts must lose all their value, and sink into inevitable contempt and insignificance.

Your memorialist, therefore, respectfully prays, that your honorable body will receive from him a written exposition of the whole case, embracing both

* See the History of the Trial of Warren Hastings, published at London, for J. Detrett, 1796, Supplement, page 1 to 41.

the facts and the law, and give him, also, process to call his witnesses from Missouri in support of his statement, before any discussion or vote shall be taken on the evidence as it is now presented with the report of the committee. In the hope that the case may be permitted to take this course, he is now proceeding, with all possible despatch, to prepare the statement in a form which may fit it for the reception of this honorable House, and he hopes to have it ready in a few days.

If this prayer cannot be granted, his hope and prayer is, that your honorable body will, if it meet your own approbation, vote the impeachment at once, without any discussion on that partial evidence which presents a garbled view of the subject, greatly to the prejudice of your memorialist, and that he may have as speedy an opportunity as the nature of the case will allow, to exhibit, before the tribunal of the Senate and before his country, the entire transaction, in all its parts, as it really occurred; being conscious and confident that, to ensure his acquittal from all censure in the minds of all honorable men, accustomed to discussions of this kind, the case requires only to be fully understood.

And in the strong hope that the one or the other of these prayers will be granted, your memorialist, as in duty bound, will ever pray.

JAMES H. PECK.

This memorial was followed, on the 14th of the same month, by the following Letter and Explanations.

SIR: Permit me, through you, to avail myself of the permission of the Hon. House of Representatives, by their resolution of Wednesday last, to present to that body my explanation in answer to the charges preferred against me by Luke E. Lawless, Esq. with the documents referred to in that explanation.

With great respect,

Your obedient servant,

JAMES H. PECK.

To the HON. ANDREW STEVENSON,
*Speaker of the House of Representatives of the
Congress United States.*

*To the Honorable the Speaker and Members of the House of Representatives of
the United States:*

James H. Peck, Judge of the District Court of the United States for the District of Missouri, availing himself of the permission granted by this Hon. House, on Wednesday last, to present any argument on the law and matters of fact now in evidence before the House, which he may think proper, in answer to the charges preferred against him by Luke E. Lawless, Esq. begs leave to represent, that the complaint of the petitioner grows out of the notice which the court felt itself constrained to take of certain strictures published by the petitioner in a Missouri newspaper, on an opinion delivered by the court in 1826, in the case of Soulard's heirs against the United States—a Spanish land claim presented for judicial decision, under the act of Congress of the 26th May, 1824.

To enable the House to understand these charges, and the answers which it is proposed to give them, it becomes necessary to take a cursory glance at the character of these claims, and the general legislation of Congress with regard to them, and then to present a distinct view of the opinion of the court in Soulard's case, and the character of the strictures on that opinion, published by the petitioner, which the court considered and punished as a contempt.

It is known to the House, that the province of Louisiana belonged originally to France; was ceded to Spain in 1762, though possession was not taken by Spain under that treaty, until 1769. That in 1800, the province was re-ceded by Spain to France, by the treaty of St. Ildefonso; the Spanish authorities,

nevertheless, retaining possession until and after the cession by France to the United States, by the treaty of Paris, of 30th April, 1803.

By the third article of this latter treaty, the United States stipulate that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess; and in execution of this article, so far as it respected real property, Congress immediately proceeded to establish, in various parts of the province, Boards of Commissioners, to examine and report upon all claims for lands made by the inhabitants under French or Spanish titles. The claimants were all required to present their claims to these Boards within a limited time, under the penalty of having them perpetually barred; but the time was opened and extended by successive acts, and the most liberal provisions were made for the protection of all *bona fide* titles. Amidst all this liberality, however, Congress showed, by their laws, that they were perfectly aware of the temptation thus held up to the cupidity of adventurers inhabiting a frontier country, far removed from the restraints of their former European sovereigns, and, as is usual in such situations, not under the constant dominion of those moral restraints which prevail in ancient and long established settlements. This people, too, it was natural to believe, had had that salutary pride of character, which is the best pledge and preservative of moral purity, greatly weakened, if not destroyed, by the manner in which they had seen themselves transferred, and re-transferred, from master to master, like cattle bought and sold in the market; and Congress gave warning of the mischiefs which they apprehended, and which historical events, recently disclosed, prove that they had good reason to apprehend, by requiring the Boards of Commissioners to note especially, in every case, all *false, fraudulent* and *antedated* claims. These laws are now collected in the volume compiled under the direction of this House, on the subject of public lands, and they carry their own commentary on their face.

The Boards of Commissioners were continued in operation for many years; but, notwithstanding the warning continually given, and repeated by the acts of Congress to all claimants, to present their claims, under the penalty of having them forever barred, it was still found, after the Boards had closed, that there were yet other claimants, who, under various excuses, had omitted to present their claims to the Commissioners, and who now presented them to Congress, and importuned that body for relief.

These petitions finally produced the act of the 26th May, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri, and Territory of Arkansas, to institute proceedings to try the validity of their claims." By the first section of this act, all persons claiming lands in Missouri, by virtue of any French or Spanish grant, &c. *legally made, &c.* before the 10th March, 1804, by the *proper authorities*, to any person resident, &c. and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the Government under which the same originated, were authorized to present a petition to the District Court of Missouri, setting forth the nature of their claims, &c.; and by the second section of the act, the court were required, *in all cases, to refer, in their decree, to the treaty, law, or ordinance*, under which the claim was confirmed or decreed against.

These provisions clearly indicated an apprehension, on the part of Congress, that claims might be presented on titles *not legally made by the proper authorities*, and that their confirmation might be urged on grounds, other than those solid grounds of *treaty, law, or ordinance*, which alone Congress authorized the Judge to regard as grounds of confirmation.

The duties thus thrown upon the Judge, to investigate, in every case, the authority of the officer from whom the alleged title proceeded, and to examine the treaties, laws, and ordinances, under which alone the confirmation could be claimed, called him into a field of inquiry entirely new to the profession of law in the United States; and it was indispensably necessary to a just discharge of

these duties, that he should be put in possession of all the French and Spanish laws and regulations which bore upon the subject of the grant of lands in that province. As his judicial conduct is in question in this proceeding, it may not be deemed irrelevant to state, that, in order to fit himself for a conscientious and correct discharge of these important duties, and to enable him to do right to the suitors, as well as to the United States, as soon as he became apprized of the passage of the law of 26th May, 1824, and had time to look around him, to see what materials of information were within his own reach, he addressed several letters to the Secretary of State of the United States, (of which he begs leave to annex copies, marked A,) requesting to be furnished with all the laws, royal orders, and regulations, of France and Spain, which affected the grant of royal domain in Louisiana, and specifying such of them as his researches had led him to believe did exist. In consequence of these applications, one royal order only, that of the 24th August, 1770, which may be more particularly noticed by-and-by, was ultimately procured; but even that came too late to assist him in the decision of the case of Soulard's heirs: had it arrived before that time, it would have furnished a new ground in confirmation of his decision in that cause.

For the purpose of carrying into effect the provisions of the act of 1824, the Judge of the District of Missouri was required to hold his sessions at three different places in that State; and it was with good reason anticipated that very numerous claims would be presented before the court for consideration and decision.

It is deemed important, as having an immediate bearing on the inquiry before the House, to present, more distinctly, a view of the number, as well as character, of the claims—all of which involved the very question decided in the case of Soulard's heirs, and which was forced upon the consideration of the court, by the act of Congress, to wit: *the authority of the respective officers to issue the several documents on which these claims rested.*

In order to give the House this view in the best mode which is now in the power of the Judge, he begs leave, in the first place, to refer them to the schedule C, hereto annexed, which is an authenticated abstract of claims, taken from the Registry of Surveys for the several districts of Upper Louisiana, *exclusive of that of New Madrid.* Of these claims, a considerable number had been confirmed by the several Boards of Commissioners and the Recorder of Land Titles: the precise number so confirmed, the Judge has not the means of ascertaining at this time, but the whole residue which remained unconfirmed, were authorized, by the act of Congress, to be brought before the court, and might be reasonably presumed to be so intended to be brought before it, and many of them did, in fact, afterwards compose the docket.

This schedule, numerous as it is, it will be observed, is confined to claims which purported to have been *surveyed under the French and Spanish Governments*, and by the same officer, continued under the American Government.

In addition to these, there were other *surveys*, which had been subsequently made, under the orders of the several Boards of Commissioners, of which there were, also, unconfirmed claims, within the jurisdiction of the court.

And, in further addition, were all the *unsurveyed* claims, which had been rejected by the Commissioners; of the number of which, some idea may be formed by the list contained in the record of the case of the heirs of Macky Wherry, which accompanies this statement, and is marked B; and it is material to remark, that it relates to the unsurveyed claims in *one district only, out of four.*

The Judge considers himself as speaking within the limits of moral certainty, when he expresses the belief, that, at the time of the decision of Soulard's case, the claims of various kinds, under Spanish concessions, or orders of survey, either surveyed, or unsurveyed, which existed in the State, and which were properly within the jurisdiction of the court, under the act of 1824, amounted, in numbers to thousands. That many of these claims were, and are good, and

worthy of confirmation, the Judge is ready to believe ; and, of the sincerity of this belief, he has given proof, by the fact of his having decreed in favor of some of them. But that there *were* others of an opposite character, the previous legislation of Congress, and the reports of the Boards of Commissioners, had authorized him to believe ; and discoveries, which have been recently brought before Congress, and the nation, from a part of the territory embraced by the act of 1824, concurring with the evidence in the case just alluded to, of the heirs of Mackey Wherry against the United States, which has been lately decided in the District Court of Missouri, [the opinion delivered in which case accompanies the record thereof, Document B,] rendered it impossible for charity herself to doubt, that, among those claimants, there were some who were disposed to take an unfair advantage of the good faith with which Congress were carrying into effect the third article of the treaty of 1803.

These claimants, so formidable in numbers, and some of them, at least, it is to be feared, still more formidable by the absence of moral restraint, and by their frontier habits of life, took care to interest in their success many of the gentlemen of the bar, whose compensation, from the evidence reported by the Judiciary Committee, it is presumable was contingent, and who, having, therefore, large interests at stake on the result, felt, very naturally, a degree of solicitude for the event not less keen than that of their clients.

What kind of Judge would have best suited the views of some of the claimants it is needless to remark. But it is proper to remark that it called for no common degree of constitutional firmness, as well as calmness, for a Judge to keep his balance against such an array of power ; and that it was not in such a situation, nor in such circumstances, that the court was to relax any of those means of self-protection, with which they are clothed by the law of the land ; but that, on the contrary, the occasion pre-eminently demanded the firm and fearless exercise of judicial independence, and the rigorous application of all necessary and proper measures to preserve the authority of the court against those rude assaults, which there was too much reason to apprehend from the resentment of excited and disappointed suitors, emboldened by their numbers, embarked in a common cause, and by that propensity to the summary process of self redress, which is known to characterize those new and distant settlements. The House will perceive that the situation of the Judge was new and peculiarly trying, and that it would be unfair to compare it with that of a Judge administering the law in a single case, and in a long settled country, where the people are accustomed to the curb of the law, and where the respect for courts is habitual.

He does not make this remark with the view of excusing or extenuating any breach of judicial propriety : for it will be seen in the sequel, that his course of action has been governed by the same rules which govern all courts in like cases ; but simply with the view of showing the House that the situation was one which forbade the exercise of that forbearance and indulgence, which, he may venture to say, (because it is partly in proof), is in far better accordance with his natural disposition and habits, than that course which he felt himself constrained, by a sense of duty, to adopt in this instance.

It was not anticipated, that the whole of the claims which existed in the State, and which properly belonged to the jurisdiction of the court, under the act of 1824, would be brought at once before that tribunal, because the presentation of unsettled claims for millions of acres, after the Boards of Commissioners had been so long in operation, would have been, of itself, calculated to startle the nation, and to awaken suspicions, and beget prejudices extremely unpropitious to the claims ; and those which were good would have been endangered by their association with those which were of an opposite character. Ordinary skill dictated the policy, therefore, of bringing these claims gradually and cautiously before the court, and of putting forward only so many as were necessary to test and settle the principles on which the decision of the main body, held in reserve,

depended. This course is understood to have been pursued. The Judge annexes hereto, marked E, a list of the cases brought before the Court of St. Louis, being one of the three places in that State at which the Judge was required to hold his sessions for the trial of these claims. Of the one hundred and ninety-eight cases which compose this docket, it will be observed that the petitioner, Mr. Lawless, is concerned as attorney and counsel in more than one-third of them. Soulard's case is among these, and is considered, and, as the Judge is informed and believes, was admitted in the argument of it before the Supreme Court, to stand at the head of a list (not before the court) which amounts to millions of acres.

This case of Soulard was the first on the docket which was called for trial. It was elaborately argued at the March term of 1825, by Mr. Lawless and his associate, for the petitioner, and by the District Attorney and Mr. John B. C. Lucas, for the United States. Mr. Lucas, holding the degree of a Doctor of the Civil Law in France, and having been all along a member of the Board of Commissioners for the examination of these claims, was supposed to be well qualified to aid the court in the investigation of a subject so entirely new to it; and the court was willing to receive light from any quarter within its reach. He was, moreover, interested in the principles involved in the case, having been cited before the court in another case, to defend rights adverse to some of the claimants.

The court having been thus placed in possession of all the arguments of the counsel, *pro et con*, held the case under advisement until the term previous to December, 1825, when it found itself constrained to come to the conclusion that the claim was invalid, for want of authority in the officer to make the concession. The opinion was not in writing; it was delivered *viva voce*, but *in extenso*, and substantially with the same train of reasoning, and under the same arrangement in which it now appears in the report of the Judiciary Committee. But although the opinion was then pronounced, the decree was not then enrolled, owing to the absence of the leading counsel, who was Mr. Lawless; but, at the request of his associate, was postponed till December, in order that he might be present to prepare the case for an appeal to the Supreme Court.

At the request of several members of the bar, and, among others, of Mr. Geyer, as he admits in his evidence, this opinion was published. It had been a common thing in every part of the United States, as well as in England, to publish the decisions of courts on new questions of law; the court, therefore, perceived nothing unusual or unreasonable in the request of the bar, that this opinion might be published; on the contrary, there seemed to be a peculiar propriety in the publication in this instance, because the opinion had been placed on grounds which had not been fully discussed at the bar, and the court was, therefore, desirous of having it understood, that, notwithstanding this decision, those grounds would still be considered as open to discussion in any future claim which might come before the court: for the court was willing to correct, with candor, any error into which it might have fallen, to the prejudice of the land claimants; and if error had been committed in Soulard's case, the mischief was not irreparable, because an appeal had carried that case to a tribunal where all errors were sure of correction.

The decision of the court was published in the "Missouri Republican" of the 30th March, 1826; on the 8th of April following, appeared the article signed "A Citizen," in the "Missouri Advocate and St. Louis Enquirer." These two newspapers proceeded from rival presses in the same town, had taken opposite sides in the political discussions of the day, and, it is to be presumed, therefore, were supported, in general, by different subscribers; so that the two publications would fall into the hands of different readers, and very few of those who read the "Citizen" would take the trouble to look up the opposite paper and read the opinion. Besides, the "Citizen" is a shorter article; had the poignancy of ridicule on a Judge to give it zest, and recommend it to the general

reader ; and, with regard to the great body of the land claimants—formidable both by their numbers and influence in society—it addressed itself to their prejudices, and was sure to find that ready welcome, and to command that entire faith and confidence, which men are always ready to yield to what flatters their interests.

The Judge was willing to make every reasonable allowance for that disappointment and chagrin which he knew that his decision must have inflicted on the land claimants and their counsel ; and, had the publication been a decent and respectful discussion of the soundness of the opinion, and the *subject-matter* had not been still *sub judice in the same tribunal*, though in *different names*, and in a *different tribunal* between the *same parties*, the liberty of the press might have been successfully invoked for its protection. But it is no such discussion. It is no discussion at all. The author does not profess to reason on the subject. The publication consists entirely of a tissue of *assumptions*, which it imputes to the Judge, not one of which is true in point of fact, in the light in which it is presented ; several of which are directly the reverse of what the Judge did decide ; and several others the pure coinage of the author's own brain, having no foundation whatever, either in the opinion or the case.

To a person acquainted with the subject-matter of the opinion, (as it is the purpose of this address that this honorable House shall be, and without which it will be impossible that they can decide intelligently on the subject before them,) it will be seen that the *assumptions* thus imputed to the Judge, rise in a sort of ascending *climax* from the beginning to the end, increasing in absurdity as they advance, and some of them so glaringly and ridiculously absurd, as to have satisfied any reader, who believed the statement, that the Judge was totally destitute either of common sense or common honesty. Indeed, the author has taken care to spice the publication with divers covert insinuations to this effect, as if afraid that the mere charge of these preposterous *assumptions* on the Judge would not be enough to awaken the contempt of the reader, without the aid of this further quickening.

It is true there is nothing gross in the language of the publication ; for vulgar ribaldry is not the language of a satirist who understands his art. It was not the form but the substance which the court considered and treated as a contempt. It was the string of legal absurdities imputed to the court, calculated to excite the contempt and indignation of the public at large against the tribunal ; to prejudice the public mind with regard to the claims of the same character yet remaining for decision before the same court ; to impair the confidence of the suitors in the purity and intelligence of the tribunal before which the claims were depending ; to awaken their resentment against the Judge, who alone composed the court, and thus to restrain the court in the free, and fearless, and independent exercise of its judgment in the remaining cases :—It is this which *was* considered, and which *is still* considered, as a contempt of the court, punishable by the summary process of attachment ; and this the more especially, when the contempt is considered as having been committed by an officer of the court, pursuing his practice therein under its protection, and bound, therefore, to treat it and its decisions with respect.

As the question here is, whether the court was correct in regarding the publication signed "A Citizen," as a contempt, it becomes important, and, indeed, indispensable, to understand the opinion of which that stricture professes to be a fair analysis, with the view of comparing the analysis with the opinion, and thus arriving at the object and character of the publication ; after which, the objections will be considered of its having been a publication out of term time, and with regard to a case which had been finally disposed of by the court.

To understand the opinion, it is necessary that the House should know something of the case in which the opinion was pronounced, and of the peculiar law which was to govern the decision.

With regard to the case. Antoine Soulard claimed ten thousand arpents of

land, under a concession made to him in 1796 by Don Zenon Trudeau, the Lieutenant Governor of Upper Louisiana, then called Illinois, and now Missouri. The Lieutenant Governor resided at St. Louis, and held his appointment under a commission from the Governor of Louisiana, residing at New Orleans. The form of the commission was before the court, and does not specify the powers of the Lieutenant Governor. The concession made by Trudeau to Soulard was for *public services*, and the kind of public services in consideration of which the concession was made, as they are to be collected from the evidence, (for the concession and the petition on which it was founded were not produced, being stated by Soulard to have been destroyed through mistake,) were services in the various characters of surveyor of Upper Louisiana, for which, it was said, he had received only the fees of office, of deputy adjutant for a time, and of assistant, or, as one of the witnesses stated it, the right arm of the Lieutenant Governor.

The questions pressed upon the consideration of the court by the act of Congress, were, whether this concession was legally made by a person duly authorized to make it, and whether there was any treaty, law, or ordinance, to which the court could refer, in its decree, as the basis of a confirmation of the claim.

There was no treaty affecting the case, except the treaty of 1803, which has been mentioned, and which left these questions entirely open.

The next, and the main question was, whether there was any Spanish law or ordinance which authorized the concession ?

With regard to Spanish law, it was known that, long before the acquisition of Louisiana, Spain had held extensive possessions in America, and that, for the government of those possessions, the King of Spain had published a code of laws, under the title of "Laws of the Indies," of which the royal ordinance of 1754, which regulated the grants of the royal domain, constituted a part.

One question in the case was, whether, on the acquisition of Louisiana by Spain, in 1762, the previous laws of Spain, with regard to the possessions in the Indies, attached at once upon the newly acquired province by their own proper force, or whether the laws of the former sovereign remained, until they should be displaced by a positive edict introducing those of Spain.

In considering this question, it appeared further, that, in 1769, Spain, for the first time, took possession of the province, under General O'Reilly, who was also, by special commission, invested with extraordinary powers as Governor and Captain General of the Province, and that, on the 18th February, 1770, this officer had promulgated at New Orleans, the regulations which bear his name, and which were expressly and exclusively directed to the regulations of grants of the royal domain. These regulations differed fundamentally from the laws of the Indies. By the latter, lands were granted only *on sale*, and with a view to revenue ; by those of O'Reilly, which looked to the speedy settlement of the province, lands were *given* to settlers in proportion to their force, or means of cultivation, or to graziers in proportion to the number of their stock ; no one regulation, however, contemplated *a gift of land as a reward for services of any kind*. The process in granting the lands, too, was entirely different under the regulations of O'Reilly from that which had prevailed either under the antecedent government of France, or that which prevailed by the laws of the Indies. O'Reilly simplified the process greatly, and placed the granting power immediately and exclusively in the hands of the Governor General.

In the year 1797, Governor Gayoso published additional regulations, preserving the features and policy of O'Reilly's, and certainly not authorizing the granting of lands for services.

In 1798, by an order of the King of Spain, the granting power was taken out of the hands of the Governor, and placed in those of an Intendant, and Morales was the person first appointed to that office.

In the year 1799, he published his regulations, in the preamble to which he recites, that he had examined with the greatest attention the regulations of

O'Reilly and Gayoso, as preparatory to those which he was about to publish, giving no intimation of the existence of regulations by any other Governor. But in this same preamble he conveys the first and only intelligence which the Judge, or, he believes, any member of the profession had received of the existence of a royal order, affecting, in any manner, the grant of lands, posterior in date to the regulations of O'Reilly; and he refers to it in this way: After reciting that the King had been pleased to declare and order, that the Intendant be put in possession of the privilege to divide and grant all kinds of land belonging to his crown, he adds, "which right, after his order of the 24th August, 1770, belonged to the civil and military government."

The use which has been made of this order in the publication of "A Citizen," and the necessity of giving the House full information with regard to the character of that stricture, renders it proper that they should be further informed with regard to the royal order of the 24th August, 1770.

Morales had given notice that such an order existed, but of what nature or what was its extent, was entirely unknown at the time of the decision of Soulard's case. Morales had said nothing of it but that, under it, the right of granting lands belonged to the Governor, which was precisely the effect of O'Reilly's regulations in the preceding February; and Morales had referred to these regulations, without any intimation that they had been altered by the royal order of the August following, so as to countenance the inference that the sole object of the order might have been to confirm O'Reilly's regulations, instead of changing them in any particular. Since the decision of Soulard's case, a copy of the order itself has been obtained from Madrid, on the request of Judge Peck, before noticed, and it is discovered that his conjecture in relation to the order was not incorrect. The order, as procured from Spain, is now in the Department of State, and a translation of it, with some inaccuracies, is among the archives of this House, being "Document 121, Private Land Claims in Florida, 20th Congress, 2d Session," and more generally known by the name of Col. White's Collection of the Spanish Land Laws. On reference to this document, it will be seen that this royal order of 24th August, 1770, so far from altering or enlarging the regulations of O'Reilly, is a simple confirmation of them, and it directs that Louis de Unzaga, the Governor, to whom it is addressed, and his successors in the said government, shall have the sole power of distributing the royal lands, "*conforming, in all respects, as long as his Majesty shall not make any other provisions, to the said instructions dated from that city, [New Orleans, erroneously translated this city,] on the 18th February, of this year;*" this being the date of the promulgation of O'Reilly's regulations at New Orleans. An abstract of all the claims confirmed by the Governor of Louisiana has been furnished to the Treasury Department, by which it appears that the first grant was made by Unzaga, in 1771, and on the margin of that abstract, it is stated, from that time down to a period just preceding the regulations of Gayoso, that the grants are made on the conditions set forth in the royal order of the 18th February, 1770; by which it is manifest, that Unzaga considered O'Reilly's regulations, as thus ratified, with relation back to their date, and as taking, from that date, the dignity of a royal order.

The House is now prepared for an examination of the opinion, with a view to a comparison of it with the representation made in the article signed "A Citizen."

That article commences with a misrepresentation, which is a fair specimen of the ingenuousness to be expected in the sequel. The Judge, in the close of his opinion, in explanation of the extensive range which he had taken in this discussion, finishes with this sentence: "The decision of most of the points, therefore, having proceeded chiefly upon grounds which had been little, or not at all, examined in the argument in the cause, it is deemed proper to remark that counsel will not be excluded from again stirring any of the points which have been here decided, when they may hereafter arise in any other cause." No man of ordinary intelligence could possibly have been mistaken in the meaning of

this sentence ; much less could a professional man, acquainted in the slightest degree with the practice of his profession, have mistaken it. Now mark how the " Citizen " takes it up, in allusion to this sentence : for there is no other to which he could possibly have had an allusion. He says, " I observe that, although the Judge has *thought proper* to decide against the claim, he leaves the grounds of his decree *open for further discussion*. *Availing myself, therefore, of this permission,*" &c. Now, what reader of this piece, who had not read *the opinion*, could doubt that Judge Peck had invited and challenged a discussion of the soundness of his opinion *in the public prints*; an act, of itself, so utterly inconsistent with the gravity and dignity of the judicial character, that, if Judge Peck had, in truth, been guilty of it, (more especially in the circumstances in which the undecided claims of the same character then stood) he would have proved himself unworthy of the office which he holds ; yet such is the imputation on him in the introduction of the article signed " A Citizen."

The author, as if conscious of this perversion of the obvious meaning of the Judge, and that the act which he was about to do required some better apology, puts a bold face on the matter, and adds, " And considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by, its operation, I beg leave to point the public attention to *some of the principal errors* which I think that I have discovered in it."

It was not, then, for the candid purpose of convincing the Judge of his error, and inducing him respectfully to reconsider his opinion in reference to any future claim involving the same principles ; it was not for the purpose of obtaining redress in the particular case, because that had been sought by appeal to the Supreme Court, where all errors committed by the Judge below could be legally and regularly, and without any breach of respect, pointed out and redressed ; but for the purpose of disburthening the griefs of an injured party (whose griefs had, at that very time, been carried by appeal to the court of last resort, and were there depending,) and pointing the public attention to the errors committed by the Judge, that this article was published. But why point the attention of the public to these errors at this time, and in this form ? Not with reference to the case of Soulard, because that had been decided, and the errors of that decision, if any had been committed, were in the proper course for redress. If it was with reference to Soulard's case, therefore, the motive could have been no other than one of personal vengeance against the court, or the Judge of the court, and this perfectly wanton and unnecessary, so far as the ultimate fate of the claim is concerned ; because, if the decision had been the other way, there can be no doubt but that the United States would have appealed to the Supreme Court. But we are relieved from the necessity of all scrutiny into motives, because Mr. Lawless, in his evidence before the Judiciary Committee, has stated that the object of the publication was to produce an effect, not on Soulard's claim, but on other claims in which he was counsel, and which were still depending before the Court. His evidence on this subject is of so singular a character, as to call for particular notice. In his direct evidence (page 29 of the report of the committee) he says : " In that case, [Soulard's] I had been employed as counsel for the petitioner in that court. I had also been employed in several other causes of a *similar* character." Here, appearing to recollect that the *similarity of the causes* still depending, with the cause of Soulard, which had been decided, might subject his publication to the censure of being intended to have an influence upon causes still pending in court, he adds, " When I say a *similar* character, I mean, founded upon unconfirmed French or Spanish titles. *The similarity of character consisted only in being founded in an incomplete title* ; because I consider the case of the heirs of Soulard as *peculiar and original* in its leading characteristics." In a few more sentences, he adds : " Those errors [in the opinion] appear to me to have a fatal effect, *if they should be established into law*, upon that particular claim, and upon almost every other claim that was presented, or could be presented, to the court, under the

law of 1824, *which authorized Judge Peck to adjudicate.*" But if the claim of Soulard was *peculiar and original* in its characteristics, how could the decision of *that claim* have a *fatal effect*, even if it should be *established into law*, (which by the way it could only be by the affirmance of the decision by the Supreme Court) "upon almost every other claim that was presented or could be presented before that court," *such other claims being of a character different from that of Soulard?* The *errors of Judge Peck*, even if they should be *established into law* by the Supreme Court, could not possibly have a *fatal effect* on other claims of a different character, and, consequently, turning on different principles; and the leading *characteristics* of Soulard's claim, we are assured, were *peculiar and original*. Even although these other claims of a different character were, in the first instance, to be *adjudicated* by Judge Peck, after his *errors* in Soulard's case should have been *established into law*, by the Supreme Court, still, if, in these new cases, turning on different principles, his perverse and habitual propensity to error (which seems to be the insinuation) should plunge him into new errors, still those errors could not have a fatal effect while there was a court of revision above, until these *new errors* should, in their turn, be also *established into law*.

The witness could scarcely have intended to pay Judge Peck so high a compliment, as to imply that the Supreme Court of the United States would follow his track through all these causes, and *establish his errors into law* as fast as he should commit them.

It is manifest that the witness was embarrassed by his consciousness, on the one hand, that the point decided in Soulard's case identified it with others still depending in court, and that the nominal attack on that decision, not only had an immediate bearing on cases still *sub judice*, but that its *public effect was intended for these cases alone*, and not for that which had been decided; while, on the other hand, he was desirous of screening himself under a supposed principle of law, that, as the case which was the subject of his publication, had been finally decided, and had passed out of the court, having left no kindred cases behind it, he was no longer subject to the process of attachment for a contempt in having made a publication with regard to a case still pending before the court.

We have a further elucidation of this subject in his cross examination, at page 35 of the report. He is there asked whether he had not an interest in Soulard's case, and in other unconfirmed claims brought or to be brought before the court? He answers, that he had. He is asked again, "Were there not a number of causes before the court at the time of the publication, *depending upon the principles of that determined*, and involving other principles not decided in that case?" He answers, "*I believe there were.*" And yet he had before said, that the leading *characteristics* of Soulard's case were *peculiar and original*, and that it had *no similarity with any of her cases, except the being an incomplete claim*. He is asked, again, "*Were there not other causes depending, involving other principles than those decided, the merits of which were attempted to be impressed upon the public in the publication?*" This pinching question he answers in the following words: "My object in the publication was to show that Judge Peck had taken several positions, in doctrine and in fact, which, should they be sustained, would, in my opinion, *be fatal to the great majority of the claims*, and which, in my opinion, were erroneous. *I was counsel in a great number of the claims depending at the date of the article.*"

We have here, under the pressure of this question, a readmission of the fact that the *positions taken by Judge Peck* in Soulard's case were *fatal to the great majority of the claims*, which they could be upon no other principle than *their identity*; and that the *object of the publication* was to show that such would be the effect of the decision *on the pending claims*, some of which had been previously admitted to *depend on the very principles* settled in Soulard's case.

We have here the avowed object of the publication, and a key to that sentence in the *exordium* to the "Citizen," which has led to this commentary.

The writer proposes to point the attention of the public to *some of the principal errors* in the opinion of the Judge, *with a view to affect the opinion of that public with relation to the claims which were still pending.* More of this hereafter.

The author proceeds : " In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into *any demonstration or reasoning on the subject.* This would require more space than a newspaper allows, and, besides, is not (as regards most of the points) *absolutely necessary.*" In this, at least, the author is correct ; and he has stated his proposition in a tone so subdued as to give it all the effect of the keenest irony : for, if the Judge had really made the *assumptions* which the author has imputed to him, not only was demonstration *wholly unnecessary*, but their absurdity is so glaring as to have rendered all reasoning to prove it, folly and insult to the understanding of the reader. The author's fault consists, not in failing to demonstrate that what he has alleged would have been error, but in stating, in the confident tone which he has assumed, and which is so well calculated to impose on the reader, that the errors which he specifies were, in fact, committed by the Judge, when, in truth, the opinion warrants no such statement.

The questions on this part of the case are—

1. Whether the opinion of the court was misrepresented in the article signed "A Citizen ;" and

2. Whether this misrepresentation was a contempt, for which the offender was liable to an attachment, and to be put to answer interrogatories.

The Judge maintains the affirmative of both these propositions : and now to the proof.

The charging part of the article proceeds in these words : " Judge Peck, in this opinion, seems to me to have erred in the following *assumptions*, as well of fact as of doctrine :

" 1. That, by the ordinance of 1754, a sub-delegate was prohibited from making a grant *in consideration of services rendered or to be rendered.*"

The Judge affirms that he made no such *assumption*, and took no such *position*.

In his examination before the Judiciary Committee, the accusing witness produced the newspapers in which the opinion of the Judge, and his strictures, respectively, were published, having marked, as he says, the passages in each, so as to place in juxtaposition the charge and its correspondent proof ; and, in support of his first charge, he is thus discovered to rely on the following sentence in the Judge's opinion : " He, the sub-delegate, is not made the judge of the value of services *of the nature of those* upon which the concession in question is alleged to have been issued."

Now, it is manifest that the single sentence in the opinion on which the accuser relies to support his first charge, disproves it. The charge accuses the Judge of assuming, " that, by the ordinance of 1754, a sub-delegate was *prohibited* from making a grant *in consideration of services rendered or to be rendered.*" What reader would not understand from this statement that the Judge had declared that ordinance to contain a *positive prohibition* on the sub-delegate from making a grant in consideration of services *of any kind, rendered or to be rendered?* The charge is direct and express, as to the *prohibition ; general and universal*, as to the *services* : whereas the sentence quoted from the opinion avers no more than that, by that ordinance, the sub-delegate was not made *the judge of the value of services of the nature of those on which Soulard's concession is alleged to have been issued ;* which implies that *there were services* of which the sub-delegate was, by that ordinance, made the judge ; and thus disproves the sweeping charge in the article.

But is this a proper mode of representing the opinion of a Judge ? tearing a single sentence from the context, and then misrepresenting even that single sentence ? No court would suffer evidence to be thus garbled, nor an authority to be thus mangled ; and the counsel who should attempt it would do it at the peril of his character. The sentence quoted belongs to an important discussion, of

a higher character, the whole of which must be taken together, in order to ascertain the meaning of the Judge.

The counsel for the claimant had maintained that the royal order was in force in Louisiana, and that this concession authorized the reward for services which had been made by the Lieutenant Governor, Trudeau, to Soulard. The first question was examined by the Judge at much length, and by all the lights within his reach. The discussion extends from page 5 to 12 of the report of the committee. His conclusion is, that the order was not in force in that province until partially introduced by *Morales*. In the course of the discussion, he takes up the powers of the sub-delegate under that order. He shows that the order professed to detail the whole duties and powers of that officer, and did detail them with minute specification; giving all his duties and powers to *sell* and *compound* for land, in every supposable case; and, with regard to *granting land in reward of services*, recognizing that power only in the seventh and eighth sections of the order, by which the Judge admitted that the sub-delegate was authorized to grant land as a reward *for the services therein mentioned*. But, inasmuch as the order professed to give the whole powers of the sub-delegates, and gave no power to give lands as a reward for services, except in the cases mentioned in those sections, his conclusion was, that the ordinance *contained no authority* to a sub-delegate to grant lands in reward of any other services, of which description were those rendered by Soulard. The question was not whether the order *prohibited* such a grant as this, but whether it *authorized* it. The claimant, relying on that order, was bound to show that it authorized it, so as to enable the court to refer, in its decree, to that order, as the basis of confirmation. He did not show it: for there was no such authority there; and this was all that the court said on this point. The whole paragraph from which the complainant has taken his sentence is found in page 12. And this conclusion, thus reached by a process of reasoning on the order, which seems irrefragable, is gravely perverted by the accuser into an *assumption*, on the part of the Judge, that, "by the ordinance of 1754, a sub-delegate was prohibited from making a grant *in consideration of services rendered or to be rendered.*"

If it should be suggested that "A Citizen," although his language is general *as to all services*, must be considered as meaning the kind of services, on which the concession in Soulard's case was founded, the answer is obvious, that he must be considered as meaning whatever a reader of that article must have understood him to mean.

If he had stated in the article the kind of services on which Soulard's concession was founded, and limited his charge to those services, there would have been no complaint. If the Judge's opinion had been contained in the same number of the same paper, or had ever appeared in a previous number of that paper, there might be some color for the excuse. But it had never appeared in that paper at all; in all probability had never been seen nor read by a subscriber to that paper; the apology, therefore, must be deemed inadmissible, and the misrepresentation inexcusable.

But there is something still more serious in this misrepresentation. It is in proof that there were in Missouri many other grants depending on the same principles with Soulard's: that is, grants by the Lieutenant Governor, in reward of services. At the time of the decision in Soulard's case, it was the universal impression that we were not in possession of all the orders, decrees, and commissions, from Spain, which bore on the land titles in that State; and hopes were entertained by every liberal man, that although as yet nothing had come to light in support of those claims, discoveries might thereafter be made which would support them. The idea that any known order contained a *positive prohibition* on those grants, never had been suggested, nor entered any mind. Yet this first charge presents Judge Peck to the whole body of those claimants, as the extinguisher of their last hope, by representing him as having assumed that the order of 1754 did contain a *prohibition* on all those *grants for services*. Had

the author even qualified this unjust and incorrect charge, by stating the fact that Judge Peck had also held that the ordinance was not in force in Louisiana, he would have relieved, in some degree, the pressure of this charge. But this opinion of the Judge he keeps out of view; thus leaving the public, whom he professed it to be his intention to inform, under the impression that the order was in force in Louisiana, and that it contained a *prohibition*, which abolished these claims.

To make the misrepresentation still more injurious to the court, the order of 1754 was then public, and any man who could read was able to see that it contained no such *prohibition*, and consequently, that the Judge who, according to the author, had assumed that it did, must be either a dolt or a knave: for no man whom "A Citizen" should lead to the perusal of that order, would look for more than the author's charge had put him to inquire into, to wit, whether it contained the *prohibition* in question; and, finding no such *prohibition* there, he would be very ready, (more especially if he were one of the numerous holders of concessions for services) to unite in the cry of impeachment against Judge Peck.

The next assumption imputed to the Judge by the article is, "2. That a sub-delegate in Louisiana was not a sub-delegate as contemplated by the above ordinance."

Judge Peck requests the House to consider for a moment, how a reader of this article, who had never seen the opinion of Judge Peck, and who knew no more of the case than "A Citizen" had chosen to communicate, would probably understand this charge? How else could such an one understand it, but that a sub-delegate was not a sub-delegate; since the additional words "as contemplated by that ordinance," being unintelligible to a reader no otherwise informed than by that article, could have conveyed no explanatory or qualifying idea. Even to a more acute and reflecting reader, who had only that article before him, the charge could convey no other meaning. For the previous charge was calculated to leave the erroneous impression, that the Judge had admitted the ordinance of 1754 to be in force in Louisiana; and it would appear by that article that the power of a sub-delegate under that order, then in force in Louisiana, was in question. Combining the two charges, therefore, the impression to such a reader, not otherwise informed, must have been, that, although that order was in force in Louisiana, and the order thus in force recognized the powers of the officer called a sub-delegate, yet that such a sub-delegate, although he might be a sub-delegate anywhere else in the Spanish dominions, *was not a sub-delegate in Louisiana*.

Now, let this charge be compared even with the *single sentence*, which the accuser (according to his habit) has quoted from the opinion in support of it. That sentence is: "*According to this evidence, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the intention of the ordinance.*" The House cannot but perceive that the sense is entirely varied. But when you go from this single detached sentence, to the entire context with which the position is found connected, you will find that it is not possible to controvert the truth of the proposition, and that it is equally impossible to believe that any man who had intended to represent the opinion of the court with candor, could have so perverted his sense, or made an error out of his position.

The decision of the Judge on this subject will be found in pages 9, 10, and 11, of the report of the committee. By a reference to these pages it will be seen, that the question under discussion, was the great question whether the order of 1754 was in force in Louisiana.

Among other arguments to prove that it was not in force in that province, the Judge relies on the different organizations and powers of the officers employed in grants of the royal domain.

It is in this connexion, and with reference to this question, that he is inquiring into the different modes of appointing sub-delegates under the order of 1754,

and the Lieutenant Governor of Upper Louisiana, who acted as sub-delegate under the arrangements which prevailed in this province.

He quotes the first section of the ordinance of 1754, to show that, from the date of that order, the power of appointing sub-delegate Judges to sell and compromise for the lands, belonged exclusively to the Viceroy and Presidents of the royal Audiencias, who were required to send them their appointment or commission, with an authentic copy of the regulation.

He also notices the provision of that ordinance, that the Viceroy and Presidents should be obliged to give immediate notice to the Secretary of State and universal despatch of the Indies for their approbation, and that the sub-delegates so appointed, might sub-delegate their commissions to others. He then proceeds thus :

“This section prescribes the authority by which alone a sub-delegate can be appointed. It gives to the Viceroy and Presidents of the Audiencias the *exclusive power* of making those appointments ; makes them the exclusive judges of the places and districts where such appointments may be necessary, and vests the sub-delegates with power to sub-delegate their commissions to others for the distant provinces and places of their stations.

“Had the Lieutenant Governor of Upper Louisiana his appointment, as sub-delegate from the Viceroy or Presidents of the Audiencias ? or had he a sub-delegation from one so appointed ? It has been proved, on behalf of the petitioners, that he had not. The evidence of the late Lieutenant Governor of Upper Louisiana to this point, is, that he and his predecessors acted as sub-delegates, without any commission as such ; that he and they performed the functions of that office in virtue of their commission as Lieutenant Governor, which issued from the Governor General of Louisiana ; that the practice in other parts of the province, in this respect, was the same as in Upper Louisiana ; in all, the Lieutenant Governors were *ex officio*, sub-delegates. An appointment from the Viceroy or Presidents of the Audiencias of the Lieutenant Governors to be sub-delegates, is not permitted to be inferred from the performance of the duties of that office ; the absence of such appointment, as well as the authority in virtue of which the duties of the office were assumed, having been proved.”

According to this evidence, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the intention of the ordinance. Nothing can be more clear, than that a concession of lands by a Lieutenant Governor, who had not been appointed a sub-delegate by the authority prescribed in the recited section of the ordinance, can be allowed to possess any validity, *if that ordinance be considered as having been in force.*

The House will perceive that the proposition which the Judge was maintaining, was, that the royal order of 1754 was not in force in Louisiana. This first argument is, that the great and almost sole purpose of that order was to make *sales* of lands for revenue, and not *gifts*. Whereas, in Louisiana, lands were *given to encourage settlement and cultivation.*

The second argument is, that, if that order had been there in force, the sub-delegate must have been appointed in conformity with it, that is, by the Viceroy and Presidents of Audiencias, and with the other solemn sanctions thrown around that appointment by that order ; and that the sub-delegate, so appointed, would also have had the important power communicated by that order, of sub-delegating his powers to others : whereas, it appeared by the evidence in the case of Soulard, that the Lieutenant Governor was not appointed by those authorities ; that his appointment was accompanied by no such sanctions ; and that he had no power of sub-delegation. The conclusion of the Judge, therefore, was, that the Lieutenant Governor was not a sub-delegate, *deriving his powers from the order of 1754*, and that the powers of a sub-delegate could not be asserted for him, *under the authority of that order.*

It is submitted to the House, that this train of reasoning is entirely fair, and the conclusion safely and candidly drawn, and that nothing can be more unlike

than the impression which would have been made by a fair representation of the Judge's opinion, and that which must have been made by the second charge in the article of "A Citizen," who gives a result in his own language, in which he presents an absurdity to the mind of a reader, not otherwise informed, and which absurdity he imputes as an *assumption*, to the Judge.

The third assumption imputed to the Judge, is, "that O'Reilly's regulations, made in *February*, 1770, can be considered as demonstrative of the extent of the granting power of either the Governor General, or the sub-delegates under the Royal order of *August*, 1770.

The House will be pleased to observe, that, in the "Missouri Advocate and St Louis Enquirer," in which this article first appeared, the dates of *February* and *August* were printed in italics, though this is not noticed in the printing of the report of the committee. The fact is important, because it shows the manifest design of the writer to call the attention of the reader to the absurdity imputed to the Judge, of considering the *previous* regulations of O'Reilly as demonstrative of the extent of the *subsequent* order of the king.

Now, although the recent production of the order of August, 1770, has rendered it manifest that this order has made no addition to the regulations of O'Reilly, and that, in point of fact, there would have been no mistake even if the Judge had taken the ground imputed to him: yet, as the extent of the order of August, 1770, was not known at the time of the decision, the *assumption* imputed to the Judge would have been an *absurdity*, and was *obviously intended by the publication to be held up to the community as an absurdity*. But the imputation is unjust; the ground taken by the Judge, and the reasoning in support of it, are to be found in pages 12 and 13 of the report of the committee.

The effect of that reasoning is this: that, although it was unknown what power or discretion that order vested in the Governor General, yet, as grants continued to be made in conformity with the regulations of O'Reilly, the fair inference was, that those regulations were not in conflict with the subsequent order. The language of the Judge on this subject, in page 13, is this: "that the regulations of O'Reilly are of a date anterior to the order of the king, of 1770, does not appear to affect their authority. There would not, necessarily, be such a repugnancy between this order and those regulations, as to annul the latter. The subsequent sanction of these, and the presumption of their being authorized, thence arising, must be considered sufficient to give them the authority of law, whether the power to make them was comprised in the general and extraordinary powers given to the Governor General O'Reilly, previous to the order of 1770, or not."

This consonance between the regulations of O'Reilly of February, and the royal order of August following, which was, at the time, a mere inference of the Judge, by reasoning, has since proved, by the production of the order, to have been the fact. But, apart from this consideration, the Judge submits it to the candor of the House, whether his reasoning upon the subject, as found in his opinion, is fairly and respectfully, or even decently, presented by the third charge in the article of "A Citizen."

The next *assumption* imputed to the Judge, is in these words: 4th. "That the royal order of August, 1770, (as recited or referred to in the preamble to the regulations of *Morales*, of July, 1799,) related exclusively to the Governor General."

The court did *not* assume or decide, that the order of 1770 related *exclusively to the Governor General*; nor did it exclude the idea that the order might have related to others.

The words of the opinion, are: "We have the testimony of *Morales*, the intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military government, after the order of the 24th of August, 1770. The powers of the civil and military government both centered in

the Governor General. To him belonged the power to divide and grant lands in virtue of this order."

It is submitted, that, to this extent, the inference is fairly drawn from the preamble of *Morales*. Had the Judge carried his inference to the extent imputed by the charge, it would have been absurd; and it does not mitigate the contempt intended by the charge, that the order, since received, would have justified the inference to its whole extent; because, at the time of the decision, the precise character of this order was unknown, and was generally believed to have been more comprehensive than it has since been found to be.

The next assumption imputed to the Judge, is in these words: 5th. "That the word '*mercedes*,' in the ordinance of 1754, which, in the Spanish language, means '*gifts*,' can be narrowed by anything in that ordinance or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money."

The court made no such assumption. This misrepresentation was manifestly intended to mislead; and the terms in which it was expressed, can leave no doubt of the contempt intended to be thrown upon the court by the charge.

The only light in which this charge could have struck the mind of the reader of the article, is this: *Mercedes*, in the Spanish language, means *gifts*, and nothing more; and the ordinance authorizes the officer to make *gifts* without any reservation; and yet this sapient Judge has decided that this unlimited power to make *gifts*, authorizes and means only *gifts to Indians* or *rewards to informers*; and moreover, that *gifts* means a *sale for money*. That such must have been the understanding, and was intended by the writer to be the understanding of every reader of his article, must be obvious to every candid mind; and yet there is not one word of the charge thus imputed to the Judge, which is founded in truth.

To enable the House to appreciate justly the character of this misrepresentation, it is proper to remark, that the word *mercedes* occurs in the preamble to the royal regulation of 1754, of which there is a translation in the appendix to the land laws, compiled under the resolution of this House, page 973, and where it will be observed that this word *mercedes* is translated, not *gifts*, but *grants*. It is the closing sentence of the preamble, and is in these words: "I have therefore resolved, that in the (*mercedes*) *grants*, sales and compromises of royal cultivated and uncultivated lands, now made, or which shall hereafter be made, the provisions of the regulation (*this regulation*) shall be faithfully observed and executed." This translation was made by a person chosen by the government, who, of course, had no interest in perverting the sense.

In Col. White's collection, the word *mercedes* is rendered by the same English word *grants*. In the government translation before the court at the time of the decision in Soulard's case, it was rendered *grants*. The sense of the word, it is to be presumed, like that of all other words which have more than one meaning, depends on the subject to which it is applied, and the connexion in which it is found. In the present case, we see that the translator of the government considered it, when applied to the disposition of the royal lands, to mean *grants*; and his view of the subject is strongly countenanced by the general character of the ordinance, and especially by the first sentence of the section which immediately follows the sentence just quoted, where, in the general definition of the powers of the sub-delegate, the word *mercedes* is dropped. The sentence is this: "That, from the date of this, my royal order, the power of appointing sub-delegates Judges to *sell* and *compromise* for the lands," &c. The Judge has not the command of any *law dictionary* of the Spanish language, to ascertain the technical sense of that word.

In the general dictionaries the sense is various. Baretti, (octavo edition, London, 1809,) defines *merced* to mean *courtesy*, *favor*, *kindness*, *reward*; and in the phrase annexed to his definition, as explanatory of the last sense, he has this: "*Servira un senor a merced*, to serve a great man without any salary, and

to be rewarded at his pleasure." Cubi, (Baltimore, 1823, duodecimo,) defines *merced* to mean *wages, gift, pleasure*. Gallet, in his Spanish, French, and Latin Dictionary, (Lyons, 1790, quarto,) defines it first *salair, prix, du travail*. Latin *merces*; i. e. *salary, price of labor, wages*, and next *Grace, bienfait accorda par le roi*. Latin *Gratia*, i. e. *favor, benefit accorded by the king—kindness*.

Now it is of a word whose significations are thus various, and which, in the very instance before the court, had been rendered, by the translator of the government, *grants*, that the author informs his readers the meaning is *gifts*; thus presenting the idea that this was the *only* and *undisputed* meaning of the word: and this unwarrantable assumption he makes for the purpose of caricaturing the opinion of the court into a revolting absurdity.

It will be found, on reference to the opinion itself, that the argument of the Judge is this: The royal order of 1754, was, according to my judgment, not in force in Louisiana, but if you insist that it was, and that it must govern this case, you must bring the case within the ordinance. Your argument is, that the word *mercedes*, in the preamble, brings the case within it. To which I answer. 1st. That the *preamble*, in which this word is found, neither *gives* nor *grants* anything, itself, nor directs any to be *given* or *granted* by others; it is mere *recital*, leading to the regulations which follow: 2d. That the word *mercedes* does not inevitably mean *gifts*; it has been translated by the officers of the government, *grants*; it is capable, also, of being translated *rewards*. It is a word, therefore, at best, of equivocal import. But whether it mean *grants, rewards, or gifts*, the preamble declares, that all such as shall thereafter be made, shall be made in conformity with that ordinance; but in looking through the ordinance, you show the court no article which authorizes *such a gift as this*.

There is enough in the ordinance to satisfy the word *mercedes* in either of the significations which has been given of it: if it mean *grants*, it is satisfied by those articles which regulate the grant of lands on sale and composition: if it mean *rewards*, it is satisfied by those rewards presented by the 7th and 8th articles, which offer rewards to those who give information of intruders on the public lands: if it mean *gifts*, it is satisfied by the second section of the ordinance and the laws 14 and 15 cited therein, which authorize *gifts to the inhabitants of towns for pasturage and commons, according to their wants*, and to the Indians; but in neither sense do you show any part of the ordinance which authorizes a *gift like that which you claimed for Soulard*. Reference is made to pages 11 and 12 of the report, for the opinion of the court on this subject; and it is worthy of observation, that the author has entirely omitted in this charge, "*the gifts to inhabitants of towns for pasturage and commons, according to their wants*," which the court admitted might be made under the ordinance. Why it was omitted, is obvious enough; the insertion of such an exception might have put the reader on further inquiry, and would, moreover, have destroyed the piquancy of the ridicule which arises from grouping together, in one short pithy sentence, *Indians and informers* as the favored objects selected by the court for the display of the royal bounty of Spain.

The court is next charged with erroneously making the assumptions—

6. "That O'Reilly's regulations were in their terms applicable, or ever were, in fact, applied to or published in Upper Louisiana."

7. "That the regulations of O'Reilly, have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them."

8. "That the limitation to a square league of grants to new settlers in Opelousas, Attacapas, and Natchitoches, (in the 8th art. of O'Reilly's regulations,) prohibits a larger grant in Upper Louisiana."

In the argument of the cause, *no question was raised, relating to the publication of O'Reilly's regulations in Upper Louisiana; nor does the opinion contain anything relating thereto; nor does it convey an idea that Soulard's grant was contemplated by these regulations*. Before reference is had to that part of the opinion to which these statements relate, it should be observed, that the object

of the reasoning of the court was to remove all presumption of the legality of the concession, then in question, by showing that an authority to make such a concession, *either in the form of law, or otherwise, was necessary* to its validity : and that the provisions of the regulations of O'Reilly, and also *the general policy* of the Spanish Government, as evinced by those regulations, and the regulations of *Gayoso* and *Morales*, collectively, did not permit a belief in the existence of any such authority. That, admitting that the concession then before the court, *considered alone*, would raise a presumption of its own legality ; yet such a presumption would continue only so long as it should be unopposed by a presumption of a higher nature ; and that the regulations mentioned, being the acts of the supreme authority in the province, the presumption arising in favor of *their* legality, was a presumption paramount to that arising in favor of the legality of the single act of the Lieutenant Governor, in making the concession : that two incompatible presumptions could not both be true : that the weaker could not prevail against the stronger ; and that the stronger must prevail against the weaker.

It was in the application of this course of reasoning that the court, in its opinion, adverted to several of the provisions contained in the regulations of O'Reilly, of *Gayoso*, and *Morales*, to show that those provisions evinced a policy and intention on the part of the Spanish Government, in relation to the disposition of the soil in Louisiana, not to be reconciled with the idea that any law existed, authorizing the grant or confirmation of the claim, then under consideration, even though O'Reilly's regulations were not intended to apply to Upper Louisiana, then known by the name of Illinois. But certainly it is not insinuated in the opinion, that a limitation of a grant to a league square in Opelousas, &c. prohibits a large grant in Upper Louisiana. The doctrine of the opinion is, that a *prohibition* was not necessary to prevent such larger grant, but that a positive authority to make it must be shown. Whereas, the charge of error implies the admission of the court, that the *right would exist, but for the prohibition*. If, indeed, the power had primarily existed, or been previously conferred, a prohibition might have been necessary to prevent its exercise, but that it had not been conferred was an inference which the court could not resist ; and that it did not primarily exist, was an assumption of the court, not controverted at the bar. With regard to the 8th charge, the court did not assume that the limitation of grants to a square league to new settlers in Opelousas, Attacapas, and Natchitoches, (in the 8th article of O'Reilly's regulations) *prohibits* a larger grant in Upper Louisiana. The question was not at all what those regulations *prohibited*, but what they *authorized*. The court held the position that O'Reilly's regulations, by their terms, extended to the whole of Louisiana : that the powers of the inferior officers were to be sought for in those regulations, and that when a power was claimed for them beyond those regulations, (which covered the period of the alleged grant to Soulard) that power must be shown in the form of law or otherwise. On the hypothesis that O'Reilly's regulations constituted the only law on the subject at that period, the court held that they did not contain the power in question ; nor was it pretended that they did.

In reasoning on the probable existence of a tacit power to make the large grant in question of 10,000 arpens, the court say, (pages 13, 14; of the report) "upon what reason is it to be believed that the Governor General intended to authorize grants of land in Upper Louisiana, upon principles different from those upon which grants were to be made in every other part of the province ? Upon what reason were grants of land to be limited in quantity, in Natchitoches, Attacapas, and Opelousas, and unlimited in Upper Louisiana ? And what policy dictated the limitation of grants in the latter place, to 800 arpents, which we find in the 9th and 10th sections of *Gayoso's* regulations, and the first section of the regulations of *Morales*, if, before these regulations, there was no reason for a limitation ? Was not the extension of settlement and the cultivation of the soil, as much to be encouraged by the distribution of land in Upper Louisiana,

as elsewhere in the province? Why, in Upper Louisiana, should grants have been made without regard to the means of the cultivator, when those particulars were to be attended to with strictness in every other part of the province? The regulations of O'Reilly were made for every part of the province, &c.

This is the passage cited to support the 8th charge. Is there any error in the reasoning? But, above all, is there anything to countenance the assumption imputed to the Judge that the limitation to a league square in one part of the province *prohibited* a larger grant in another?

The whole of the opinion to which these three charges are supposed to allude, is to be found in the pages referred to, and further comment is unnecessary to show how grossly they misrepresent the opinion of the Judge.

The next assumption imputed is this:

9. That the regulations of the Governor General, Gayoso, dated the 9th September, 1797, entitled "Instructions to be observed for the Admission of New Settlers," prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

This again must be met by a flat denial—neither of these assumptions is contained in the opinion. With regard to the first branch of the charge, the author, in order to keep up the color of absurdity which he is seeking to fasten on the Judge, continues to confound the *absence of authority* with *positive prohibition*. Thus, in every instance in which the Judge has said that these regulations contain *no authority* to make the grant in question, the author has made him say that they *positively prohibit* it; to prove the falsity of which, and thus to convict the Judge of error, the reader of "A Citizen" had only to inspect the regulations themselves. The author's position seems to be, that the authority to make these large grants is to be presumed, without proof, and must be presumed to continue until positively prohibited. The Judge, on the contrary, held that *the authority must be proved*, and wherever he has stated that the laws placed before him do not prove the authority, the author represents him as saying that these laws *prohibit it*. But the prohibition does not arise from those regulations, and is not to be sought for on their face, where the author represents the Judge as saying it was to be found. The prohibition arises from considerations extrinsic to the regulations, and antecedent to them. The king of Spain being the owner of those lands, no one could grant them except that sovereign, or some one authorized by him. The question was, who was authorized? The court said, that the only laws which had been brought to its view, did not show the authority; and hereupon the author represents the court as saying, that *those laws show a prohibition*. Is this a true statement of the court's position? Let candor, or even charity, answer the question with reference to such a *statement made by a counsel in the cause*.

The second branch of the charge is still more gross: The court is represented as assuming, that the regulations of Gayoso, in 1797, annulled the prior grant to Soulard, which was made in 1796. The court made no such assumption. While the author was using the liberty of the press to parody, according to his own taste, not only the language, but the meaning of the court, he would have made a much nearer approach to the truth of the case, by representing the court as assuming that Soulard had voluntarily abandoned his claim by failing to comply with one of the regulations of Gayoso's, as well as Morales' regulations.

To expose the misrepresentations of the charge, it is proper to observe, that the king of Spain, by one of the laws in the *Recopilacion*, (law 11, page 969, Land Laws,) required all persons to whom lands had been distributed, to take possession within three months, on pain of forfeiture. Gayoso and Morales, pursuing the example of their Sovereign, made successively similar regulations in Louisiana. The 14th of Gayoso required all to whom lands had been granted, to take possession within one year, and to make a specified progress in cultivation in three years.

The 4th of Morales is of the same character. Soulard had disobeyed this command. Morales, also, pursuing the policy of his master in another respect, (see law 14, p 969-70, Land Laws,) had required all holders of incomplete titles to come in and complete them within six months, under pain of forfeiture. Soulard also disobeyed this call, and the reasoning and conclusion of the court on this subject was, that, if he had ever had title, he had forfeited it by his refusal to obey those calls. The House must perceive that, under this explanation, the position of the court, if not impregnable, is not, at least, *absurd upon its face*. But, "A Citizen" gave no such explanation to his readers; on the contrary, the result, as he presents it, places the court in the predicament of giving a retro-active effect to a regulation which was, in truth, prospective, and which the court admitted to be prospective, and exhibits the court as directing the annulling power of the regulation backwards in direct action on the grant, instead of forwards on the omission to obey the command of the regulation.

That passage on the court's opinion to which this objection of the "Citizen" points, is found in pages 18, 19, of the report of the committee, and Judge Peck invites a comparison of the whole passage with this charge, that the House may test the ingenuousness of the representation.

The next assumption imputed to the Judge, is this: "10. That the complete titles made by Gayoso, are not to be referred to as affording the construction made by Gayoso himself, of his own regulations."

13. "That the complete titles (produced to the court,) made by the Governor General or the Intendant General, though based on *incomplete titles*, not conformable to the regulations of O'Reilly, Gayoso, or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees"

14. "That the language of Morales himself, in the complete titles issued by him, on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations."

15. "That the uniform practice of the sub-delegates or Lieutenant Governor of Upper Louisiana, from the first establishment of that province, to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom, therein."

These charges are all presented together, because they are of kindred character, involve the same principle, and require the same answer. They are not true. So far from it, they are diametrically opposed, in point both of *fact* and *doctrine*, to the grounds really assumed and maintained by the court. The representation becomes the more extraordinary, because it is a fact which must have been known to the author, that the evidence to which he alludes, in the 15th charge, was objected to by the District Attorney of the United States, as inadmissible; that the court did admit it *on the very ground that it raised a presumption in favor of the power of the Lieutenant Governor to make the grant in question*; that the District Attorney excepted to the opinion of the court, and that the bill of exceptions now constitutes a part of the record in the case of Soulard, before the Supreme Court.

The court not only admitted all the evidence alluded to in these several charges, but also admitted, in the most distinct terms, that they did afford an inference; that they did raise a presumption; and were to be regarded as proof of the existence of a power, in the Lieutenant Governor, to make the concession on which Soulard relied: and yet precisely the reverse of this is that which is imputed to the Judge in these charges, for which there is not the slightest color in the opinion. The Judge admitted this evidence in the only light, and to the fullest extent, to which it was offered: for it was offered, and could be offered, only as presumptive proof, and in that character it was admitted.

Having received it as presumptive proof—having admitted that it did raise

the presumption that was claimed for it—it became the duty of the Judge to weigh this presumption against the other evidence in the cause. That process was performed ; and the conclusion of the Judge was, that the presumption admitted to have been raised by this evidence, was overborne by the opposing proof : and because the Judge was constrained, in the conscientious discharge of his duty, to come to this conclusion, he is accused, by this author, of having assumed that the testimony in question *afforded no inference, raised no presumption*, in favor of the power claimed for the Lieutenant Governor.

There is a statement in the close of the 13th charge, which demands a separate answer. That charge, it will be observed, after accusing the Judge of having assumed that the complete titles made by the Governor or Intendant General, though based on incomplete titles not conformable to the regulations of O'Reilly, Gayoso, or Morales, *afford no inference* in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated, adds, “and must be considered as anomalous exercises of power in favor of the individual grantees.” This feature, thrown into the charge by way of aggravating the absurdity of the Judge, required only the exercise of a little candor in explanation, to have proved, that, if not impregably correct, the conclusion was, at least, not marked with the absurdity which the author would inculcate on the reader.

The question was, whether the confirmation by the Governor or Intendant General of these inchoate titles, afforded *satisfactory* proof of the powers of those inferior officers to originate those titles. It was admitted by the court, as already stated, that, instead of affording *no inference*, they *did* afford an *inference* of such power ; and the whole question was, whether the subsequent confirmation was *satisfactory* proof of such power ? As the regulations of O'Reilly, Gayoso, and Morales, which had marked out the whole power of the inferior officers, gave no authority to originate such titles, the court conceived that, although the act of confirmation might prove the *power of the confirming officer*, it did not prove the power of the *officer* who had *originated* the claim ; because the *confirming officer* might have the power to establish *any* claim, however irregular in its inception. An instance of this kind is presented in the 15th law of the Recopilacion : (Appendix to Land Laws, 970) the concluding sentence of which is this, “And because some lands have been granted by *public officers* who had *not the power thereto*, and which have been confirmed by us, in our Council, we, therefore, order, that all those to whom warrants of confirmation have been issued, may be at liberty to retain them, and shall be maintained in the possession of what land may be specified therein ; and they shall be admitted, in regard to the excess, to the benefit of this law.” That which had happened in this case might have happened in the case at bar ; for usurpations by inferior officers, far removed from the control of their superiors, are not uncommon occurrences ; and the power of the inferior officer, from the very few confirmations of his acts brought to the notice of the court in Soulard's case, afforded *no stronger inference of the power of the originating officer*, than the *sweeping confirmation* made by the king, of grants which, *he avows at the same time*, have proceeded from *officers who had no power to make them*. In the case at bar, the presumption of power in subordinate officers was confronted by the published regulations of their superiors, which professed to chalk out the whole of their powers, and yet had not given the power in question. The court, therefore, thought it more rational to refer the confirmation to the sovereign power of the confirming officers, than to infer from that act a power in the inferior, not found in the charters from which all his powers appeared to have been derived. Such was the ground taken by the Judge, in which he conceives, that, if there was inaccuracy there was no absurdity ; and that it presents a very different case from the absurd anomaly exhibited by the charge.

The entire reasoning of the Judge upon this subject, is to be found in pages 13, 14, 15, 16, 17, 18, 19, and 20, of the report of the committee. And Judge

Peck desires nothing more than a comparison of this opinion with these charges, to establish that the positions of the assumption here imputed to him are precisely the reverse of the doctrines which he maintains.

The 11th assumption imputed to him is in these words : " 11. That although the regulations of Morales were not promulgated as law in Upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed " from the official station which he held, " to have had notice of their terms."

This is another entire misrepresentation. The error charged to the Judge is based on the assumption, that the regulations of Morales *had not been promulgated as law in Upper Louisiana*; and yet, says the author, the grantee, Soulard, (who resided in Upper Louisiana) was held to be bound by them, inasmuch as he had notice, or must have presumed, " from the official station which he held," to have had notice of their terms; whereas the fact is, that these regulations *had been* promulgated as law in that part of the province, and, by the complete titles which the claimant himself produced, it appeared that Soulard, who was the Surveyor, referred, in his official reports, to those very regulations; and, therefore, *was proved to have had notice*. The truth is, that the publication of these regulations in Upper Louisiana was not questioned at the bar, at the trial, but was tacitly conceded, and it was only denied that the promulgation had been *sufficient*; but, independent of the presumption of their regular publication throughout the province, after they had been so long in operation, it was expressly proved by the late Lieutenant Governor himself, that he, as Lieutenant Governor, had officially received several copies, not less than six, at the port of St. Louis; and it was further proved that his private secretary had another fair copy, *which he posted up in front of the government house*. The court *did not*, therefore, in the opinion, *consider the question* which this statement represents it to *have decided*, which is, Whether, in case of *proof*, that the regulations *had not been promulgated*, the claimant, Soulard, would have been presumed, *from his official station*, to have had notice of their terms. That was not the case in proof; and, therefore, did not call for consideration. The opinion of the court took the ground that there had, in fact, been a sufficient promulgation. The opinion is found in page 21 of the report, and shows that this statement of the author is a misrepresentation of the opinion.

The 12th assumption of the Judge, is in these words : " 12. That the regulations of Morales exclude all belief that any law existed under which a confirmation of the title in question could have been claimed."

It is only by the unfair process of taking a single detached sentence from the opinion, that the author can gain a color for this charge. Standing alone, as it does, and unexplained, it presents the Judge in the light of having affirmed, that the regulations of Morales, unconnected with its preamble, exclude the possible existence of any law under which a confirmation of the title in question could have been claimed from the Government of Spain.

The House will observe, that the question in Soulard's case, was, whether there might not have been some law or ordinance of intermediate date, between those of O'Reilly's regulations in 1770, and Soulard's grant in 1796, by which the Lieutenant Governor was authorized to make the latter grant. It was alleged by the counsel for the claimant, that there was such an intermediate law. In that part of the opinion to which this charge points, the court was considering the probability of the existence of any such intermediate law, and the language of the opinion in page 19 of the report, is this : " The regulations which we have, do not permit us to believe that there existed others. Morales, in the preamble to those made by him, mentions those of O'Reilly and of Gayoso, in a manner which implies that these were all of which he had any knowledge, and shows that he was making regulations which were to offer the *only means by which lands were to be obtained*. His language is : " That all persons who wish to obtain lands, may know in what manner they ought to ask for them,

and on what conditions lands can be granted or sold ; that those who are in possession, without the necessary titles, may know the steps they ought to take, to come to an adjustment ; that the commandants, as sub-delegates of the intendancy, may be informed of what they ought to observe," &c. This preamble excludes the presumption that other laws existed, by which titles could be obtained ; and the regulations themselves exclude all belief that any law existed, under which a confirmation of the title in question could have been claimed.

The House will perceive that, if the whole passage, or even its substance, had been stated by the author, it would have been impossible for him to have made anything of it, which his readers could have been induced to believe was error. It is only by separating the last sentence from its context, that a case can be presented which any man could be persuaded to regard as error.

The Judge is next accused of having decided, 16. "That the historical fact, that *nineteen-twentieths* of the titles to lands in Upper Louisiana, were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles."

The House will look in vain, throughout the opinion, for any such assumption as this : for it contains no such assumption. The fact itself was not in proof, and even if it were true, the court could not have noticed it without such proof. Had it been proved, the evidence would, unquestionably, have appeared in the record which was sent up to the Supreme Court on appeal. But it was not there. Judge Peck has procured a printed brief of that record, which was used at the argument of the case of Soulard, at the last term of the Supreme Court, and which he understands was admitted by the counsel of the claimant to have given a full and fair view of the evidence in that case. The fact, if historically true, was not a fact about which any written history would have been received in evidence, because it is too recent, and because the archives of the province were at hand to make good the fact, if true, and afforded the best, and, therefore, the only evidence of which a court could judicially take notice. A judge could not receive the assertion of counsel, or that of a written book, in proof of a fact like this ; and to accuse a court of disregarding evidence, which was not before it, and which, therefore, it could not notice, is a misrepresentation calculated to bring a court into unmerited contempt.

The next assumption charged upon the Judge, is this : 17. "That the fact that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana, as property saleable, transferable, and the subject of inheritance and distribution, *ab intestato*, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations."

There is nothing in the opinion which can afford the slightest color for this statement. The facts mentioned in it were never offered in evidence, and, therefore, the court neither did, nor could, decide anything relating to them. Nothing in relation to these facts is to be found either in the opinion, or in the record of the case which contains the evidence. Had those facts been in proof, they would have afforded an inference in favor of the claim, and the presumption arising from them would have been fairly weighed with the other evidence in the cause, and settled according to the best judgment of the court.

The last assumption enumerated in the article, is as follows : 18. "That the laws of Congress heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed." There is nothing like this decided in the opinion. All that is said by the court, to which this statement can be supposed to relate, is in these words : "That part of the act which requires the court to determine the question of the validity of the title, according to the several acts of Congress, &c." has been adverted to on behalf of the claimants, but not seriously relied upon, as furnishing the ground of a claim to confirmation in the

present case. Upon this point, it is only necessary to remark, that there is certainly no act of Congress which would authorize the confirmation of the present claim, or any part thereof. Now, the statement presents the case, as if the acts of Congress had been shown to the court, confirming incomplete claims of precisely a similar character, and that the court, with these laws before their eyes, assumed that they furnished no argument or protecting principle in favor of the claim at bar : whereas, in truth, no such law was shown, nor, as the Judge believes, can be shown. But how does this statement agree with Mr. Lawless' evidence, "that he considered the case of the heirs of Soulard as peculiar and original in its leading characteristics?"

The author, not satisfied with this catalogue of misrepresentations, proceeds, in his concluding paragraph, in these words : "In addition to the above, a number of other errors, consequential upon those indicated, might be stated." This is true : for as the author was not governed by the opinion of the court in the enumeration of his charges, their number depended entirely on the fertility of his own invention. He proceeds : "The Judge's doctrine as to the forfeiture, which, he contends, was inflicted by Morales' regulations, seems to me to be particularly pregnant with grievous consequences."

To whom was this sentence addressed ? To the public of Missouri ! What rights were menaced by those disastrous consequences ? The rights of those land claimants whose suits were yet depending in court, and rested upon the same principles with those which had decided the case of Soulard. It was not the case of Soulard which was to be benefited by this publication, for that was gone, having been sent, for correction of errors, to the Supreme Court. And what were the benefits which were to be derived from the publication, with regard to the claims still remaining in court ? To array against the Judge, a power which might overawe and control him, in the decision of the pending cases ; or, to render him, in his character of a court, an object of contempt and indignation, if he should dare to follow up, in future cases, the principles which he had laid down in Soulard's ; or, to render the decisions of the court so despicable in the public estimation, as to destroy all the weight and authority of the court, by holding up to the public, the Judge who composed it, as among the most stupid and absurd, or unprincipled of mankind ; to beget, in the public mind, a sympathy and respect for these claims, which would unfit that public to perform the office of jurors in the trial of those issues of fact which the court was authorized to direct with regard to these claims, and if a jury should be drawn from the public for this purpose, to bring them to the jury-box with such a load of pre-conceived prejudice against the court, as to indispose them to receive, with respect, any instruction, even on a point of law, which might be given from the bench : in short, to erect a trophy for these land claimants, and their claims, on the ruins of the court itself.

The petitioner says, that his whole object in this publication, was to save his clients from speculation, under the despondency which the decision of Soulard's case had inspired. He does not say this in the article signed "A Citizen ;" nor did he say it when he was brought before the court to answer for this contempt. It seems to be an after thought ; but does it furnish any justification of his conduct ? The purpose was commendable, but were the means employed to effect it equally so ? There are those, who hold that the end justifies the means, and assassination has been defended on this ground : but this is not the doctrine of courts. If the author's object had really been that which he avows, to wit : to restore the confidence of his clients against the despondency which the decision of the Judge had inspired, and thus to protect them against the rapacity of speculators, there was no occasion for him to have gone into the public prints to produce this effect. His personal assurance that the decision was erroneous, and would be certainly reversed by the Supreme Court, would have been far more likely to have produced this effect on clients who knew him, and confided in him, than an anonymous article in a public newspaper. The publication,

therefore, must have looked beyond his clients ; it must have looked to the whole public, to whom he addressed himself : and what effect could it have been his purpose to produce upon them ? In law, as well as in common sense, every man is supposed to intend the natural consequences of his own actions ; and what were the natural consequences which must have been expected to follow the imputation of such a catalogue of errors and absurdities, to the opinion of the court ? To bring the court into public contempt, and, with the public contempt, to arouse the public indignation against the court ; to restrain the Judge from the free exercise of his opinion, by the fear of the public resentment ; and, by these means, to operate, indirectly, on the causes which yet remained for decision.

Was not this publication a libel on the court ? “ A libel,” says Blackstone, “ is a writing of an illegal tendency, as a malicious defamation of any person, and especially a magistrate, when it tends to provoke him to wrath, or expose him to public hatred, contempt, or ridicule. The falsehood of a libel aggravates it, and enhances its punishment.” 4 Bl. Com. 150.

Chitty says, “ To constitute a libel, it is not necessary that anything criminal should be imputed to the party injured. It is sufficient if the writer has exhibited him in a ludicrous point of view, has pointed him out as an object of ridicule or disgust ; has, in short, done that which has a natural tendency to excite him to revenge. And, therefore, words, in themselves not scandalous, become criminal if put in writing, so that they tend, in any degree, to a man’s discredit. This applies still more strongly to persons in public capacities, so that, to publish anything which tends, in any degree, to the discredit of public functionaries, whether true or false, is libellous : and this seems to be the true boundary of the freedom of discussion.” 3 Chitty, Cr. Law, 636. [368.]

Be it granted, that, in the United States, and especially under the Constitution of Missouri, a different boundary is contemplated, to wit : that boundary which shall discriminate between truth and falsehood. Still this boundary will not protect this publication against the imputation of being a libel, since it has been shown to be destitute of truth, from the beginning to the end.

Was it not also a contempt of court, punishable by attachment ? Was it necessary, to make it such a contempt, that it should have been committed in the face of the court ?

Blackstone says, that “ Contempts which are thus punished, are either direct or consequential—direct, as open insults : consequential, which plainly tend to create an universal disregard of the court’s authority.” 4 Bl. Com. 283, 284.

Again he says, in page 285, “ Some of these contempts may arise in the face of the court, as by rule and contumelious behaviour, by obstinacy, perverseness, or prevarication ; by breach of the peace, or any wilful disturbance whatever ; others in the absence of the party, as by disobeying or treating with disrespect the king’s writ, or the rules or process of the court ; by perverting such writ or process to the purposes of private malice, extortion, or injustice ; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity ; by printing false accounts (or even true ones, without proper permission,) of causes then depending in judgment ; and by anything, in short, that demonstrates a gross want of that regard and respect, which, when our courts of justice are deprived of their authority, (so necessary for the good order of the kingdom) is entirely lost among the people.” Hawkins says, “ that, for contemptuous words or writings concerning the court, the party is punishable by attachment for contempt.” And with regard to the last class of contempts, he adds, “ it seems needless to put instances of this kind, so generally obvious to common understanding.”

It would be easy to multiply cases, decided both in England and in this country, in which contempts by publications reflecting on the proceedings of a court, have been held punishable by the summary process of attachment. Judge Peck begs leave to refer the House to the following :—2d Atkins, 469. Proceedings against the printers of the Champion, and the St. James’ Evening Post. 13th

Vessey, Jun. ex parte Jones. The King against Almons. Opinions and judgment of Lord Chief Justice Wilmot, page 243.

1st. New York Term Reports, 485. The people against Freer ; and the same case, 518. The people against Fcu. 2d Johnson's Rep. 290. Oswald's case, 1st Dallas, 319.

The case of P. H. Darby, in Tennessee. [Knoxville Register, 27th August, 1824, in the Department of State.]

The petitioner alleges, that at the time of his publication, the case to which it related had been finally decided by the court, and seems to infer, from this circumstance, that it was not a contempt of the court in the sense of the law, and that he was, therefore, not within the power of the court.

The first answer to be given to this remark, is, that the petitioner confounds by it, contempts of a distinct character. In 2d Atkins, 471, Lord Hardwicke says, "There are *three sorts of contempts*. One kind of contempt is *scandalizing the court itself*. There may be, likewise, a contempt of this court, in abusing parties who are concerned in causes here. *There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.*"

There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves and their characters.

Now each of these contempts is separately punishable, and the publication in question is punishable as a contempt of the first description mentioned by Lord Hardwicke, because it tended to the scandal of the court itself, by misrepresenting its proceedings. The reason for punishing this contempt, is entirely different from that which furnishes a contempt with regard to a pending cause. With relation to the first, it is because the publication degrades and vilifies the tribunal, and tends to destroy its authority and utility, as a public tribunal ; while, with regard to the second, the reason for punishing the contempt, is, because it tends to obstruct the course of justice in the particular case, by prejudicing the minds of the court or the public with regard to the parties or their cause. Hence, it is manifest, that, to constitute the first kind of contempt, it is not at all necessary that the proceeding with regard to which the court is defamed, is still pending before the tribunal.

The case of the King against Almon, which has been cited from Wilmot, page 243, is a case of the first description.

It was an application for an attachment against Mr. Almon for a publication containing many libellous passages upon the Court of King's Bench, and *upon the Chief Justice of that court, for his conduct both in court and out of it*; and it charges the court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus act. The charge against the Chief Justice was, that he had amended, at his chambers, an information against Mr. Wilkes. He was charged with this act *as the Chief Justice of the court, and not as the court itself*; the act charged was *one done by Lord Mansfield, at his chambers, and consummated there*; and yet, Lord Chief Justice Wilmot held it to be a contempt of court.

It does not appear that the cause was pending in court ; no notice whatever is taken of this circumstance in the opinion of Lord Chief Justice Wilmot ; and in an opinion so minute and dilated, had that circumstance been considered as essential to the offence, it would not have escaped the notice of the Judge. In the same case, the court had been reflected upon for rules which they had established in relation to the proceeding by Habeas Corpus, and also for the delay to afford a remedy upon the writ of Habeas Corpus in a particular case. Justice Wilmot decides the reflections upon the court, in relation to each of these subjects, to be a contempt. It is certain, therefore, that, with respect to either of these, there was no cause depending, and that reflections upon the court to constitute a contempt, need not relate to a cause depending, much less the misrepresentations of the decision of the court in relation to a cause which, in fact, supposes its determination.

The opinion, in this case, is replete with all the learning upon the subject, and meets every objection which has been urged against the proceeding by Judge Peck.

The case of P. H. Darby, in Tennessee, was a case in which, at the time of the publication, punished as a contempt, the particular cause had been decided by the Supreme Court, against which the contempt was committed, and had been sent back to the Inferior Court, for further proceedings.

The person who had been guilty of the contempt was an attorney, who had been engaged in the cause ; his offence was that of a publication tending to excite the public indignation against the Judges of the Supreme Court, for having given that opinion, and to bring the same into contempt ; and for this offence, he was struck from the roll of attorneys in that court. The cause, it is true, was pending in another tribunal, and might, perhaps, be again brought up before the Supreme Court ; and so the case of Soulard was depending before another court, and might, perhaps, be remanded to the court of Missouri for further proceedings. In both cases, therefore, the particular cause had, at the time of the contempt, been finally decided by the court, and had passed out of that tribunal into another ; and in both, there was a possibility that it might come back again for further proceedings before the libelled tribunal. Yet, in Darby's case, the fact that the cause had, at the time of publication, passed away from the tribunal whose opinion was defamed by him, did not protect him from punishment for the contempt.

A copy of the opinion of the court of Tennessee in Darby's case, is herewith respectfully represented to the House, and is marked D.

But again : If it were essential to the power of the court to punish for a contempt, that the publication should relate to a cause still pending before the court, the evidence in this cause has proved that the publication in question is of this description. The accuser has admitted that, although Soulard's case was his text, his publication was intended to have a bearing on claims of a similar character, and depending on the same principles, which were still before the court, and upon a multitude of cases, which, in presumption of law, were to be brought before it. It was, then, by his own admission, a publication with relation, not to one cause, but to many, which were still depending before the court and was intended to produce an effect on the public mind, with relation to the merits of those cases, and, as he himself states, did produce such effect. It meets, therefore, the third description of contempt, given by Lord Hardwicke, as well as the first, inasmuch as it was a publication tending and intended to prejudice mankind with regard to those causes, before they had been heard by the court.

It has been intimated that this publication was made in the recess of the court, and that, to constitute it a contempt, it is necessary that it should have appeared in term time. There is nothing in the authorities which countenances this suggestion ; and it seems to proceed again, from losing sight of the distinction between the several classes of contempts. With regard to a contempt in open court, it is necessary that the court should be in session : but, with regard to a publication, tending to bring the tribunal into contempt, or tending to bias and prejudice the public mind with regard to causes depending before that tribunal, there is no such necessity : for, whether in session or not, the tribunal is still, in legal contemplation, in constant existence, and the causes which have been there instituted, are as much pending causes in the recess as in the session of the court ; and the mischief is precisely of the same character, in both instances, whether the court be in session or not. It does not appear, in the cases cited, that the court was in session when the publication took place ; and had this been an essential ingredient in the composition of the offence, it would certainly have been noticed. But no definition and no decided case adverts to it as entering at all into the offence of contempt by publication ; and, in reason, it is precisely the same whether the offence be committed in the recess or in the session of the court ; because the offence consists in *producing, or seeking to*

produce, the effect of drawing contempt on the tribunal, or exciting prejudice for or against one side of a pending cause. And it is manifest that the effect is just as certainly produced, and as pernicious, and the mischief just the same, whether done during the session of the court, or after its adjournment; the tribunal being still in existence, and the cause yet pending; and the maxim is, that, *where the reason is the same, the law is the same*. To support the objection, some authority must be produced, directed to these two kinds of contempt, and this, it is confidently believed, cannot be done: the authorities, on the contrary, are the other way.

Was it any excuse for the complainant, that his publication spoke of Judge Peck as Judge Peck, and not as the court? The very same thing occurred, and the same excuse was made, in Almon's case: for there, too, the publication spoke of the Lord Chief Justice, by his title of Lord Chief Justice; and the defamation was with regard to an act done by him singly, and out of court. Yet, says Lord Chief Justice Wilmut, this is no excuse; because the act was done by him in his judicial character; and the contempt, therefore, was offered to him in his judicial character, and as a member of the court.

In the case before the House, Judge Peck, alone, composed the Court of Missouri; and the act, with regard to which he is defamed, was an act done by him in his character of a court.

It is said, that, if this publication was a libel, the author was subject to punishment by an indictment; and it seems to be supposed, that, because he was so punishable, he was not subject to punishment by an attachment for a contempt of the court. But the same objection was urged in the case of Almon, in the same form, and was supported by the same popular topics—that the party had a right to a trial by a jury of his peers; and that in the form of the proceeding adopted by the court, they were making themselves at once parties and judges in their own causes. But the objection was open to these obvious answers, and received them, to wit, that the offence was double. First, it was a libel, (and was, moreover, *scandalum magnatum*,) because it tended to a breach of the peace, and, in this form, was punishable by indictment. Secondly, That it was a contempt of the court, in which aspect it was not punishable by an indictment, and could be punished only by the summary process of an attachment for contempt. That the latter power belonged to all courts from time immemorial, and was indispensable to their existence as courts. It is, indeed, a strange defence for a party to make against a punishment for one offence, to allege, that, by the same act, he has also made himself liable to punishment for another. According to this mode of reasoning, the more a party multiplies and complicates his offences, the more he increases the probability of his escape from punishment for either.

In the case Yates against Lansing, (9 Johnston's Rep. 416,) Platt, Senator, says, "contempt is an offence *against the court* as an organ of public justice, and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment or not. To challenge a senator or a judge, may, under circumstances, be a contempt, but is certainly indictable: a conviction on indictment will not purge the contempt; nor will a conviction for a contempt be a bar to an indictment. The offence may be *double*, and so are the remedy and the punishment. For instance, assaults in the presence of the court, *rescues*, extortion, libels upon the court or its suitors, relating to suits pending, forging a writ, &c. are *indictable* offences, and certainly they are also contempts." Such, also, is the principle maintained by the Court of Tennessee, in the case of P. H. Darby.

The passage in the latter opinion is so peculiarly apposite to the case under consideration, that Judge Peck begs leave to make it more accessible to the House, by a quotation: "The power to punish for a contempt is no part of the criminal law; if it were, courts which had no criminal jurisdiction could not punish for contempt, as the Houses of the Legislature, the Court of Chance-

ry, and this court. Where the contempt amounts to an indictable offence, as well as contempt of the court, punishment inflicted by the latter is no bar to a prosecution for the former, and *vice versa*. And neither the contemned court, nor the court of criminal jurisdiction, is obliged to suspend proceedings till the other has acted—9 Johns. 413, 417. Cowp. 829. This power itself, from its very nature, must, necessarily, be independent of all other tribunals: for, if it depends upon another, whether a punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted Judge must go to law before some other tribunal, with every one whom his decision offends. He must quit his business in court, and leave the bench, and travel to inferior courts, and give his attendance upon them, neglecting, in the mean time, the official duties which belong to his office.

The inferior judge may not be disposed to discourage the contempt; the proceedings may not be regular, or legal; they may be, in the end, set aside and quashed, by arresting or reversing the judgment, and must be commenced again, and the same difficulties again encountered. No one would be afraid to offend; the delay of punishment, and the numerous chances of escaping it, would disarm the expected punishment of all its terrors; nor would the insulted court ever think of the attempt to cause the infliction of punishment under so many discouragements. No sooner does he get through one set of controversies than some other dissatisfied suitor assails him with equal outrage, and involves him in others.

He must go again, and forever, through the same routine of vexation and trouble. With such embarrassments to contend with, will he remain upon the bench? He must either quit it, or submit to be directed by men who resort to such means for the attainment of their ends, and become an instrument in their hands for the sake of rest, abandoning his duties, and resigning the rights of the people, without power to repress the efforts of designing men that shall be directed against him, because of an unyielding temper. How will the Judge be able to uphold his integrity, when interests of the highest magnitude are to be settled by his decisions?

When it shall be observed that the most submissive pass unmolested, will not submission at least plead in recommendation of itself? Will it not set before him the perpetual conflicts which he has to maintain in vindication of opinions in which he has no individual interests, and the unceasing calumnies to which he is exposed for the protection of others, who hardly know the cause why he is so worried? If, in so many difficulties, the Judge is not furnished with the means of immediate defence and repression, his authority must fall, and the rights of the people with it. For what rights have they but those which the law gives, by means of the courts it has instituted? and if these cannot support them, "the rights themselves are nominal."

It is said, that, in punishing this publication as a contempt, "the Judge has invaded the liberty of the press." What is the "liberty of the press?" and in what does it consist? Does it consist in a right to vilify the tribunals of the country, and to bring them into contempt, by gross and wanton misrepresentations of their proceedings? Does it consist in a right to obstruct and corrupt the streams of justice, by poisoning the public mind with regard to causes in these tribunals, before they are heard? Is this a correct idea of "the liberty of the press?" If so, the defamer has a charter as free as the winds, provided he resort to *the press* for the propagation of his slander; and, under the prostituted sanction of "the liberty of the press," hoary age and virgin innocence lie at his mercy. This is not the idea of "the liberty of the press" which prevails in courts of justice, or which exists in any sober and well regulated mind. The "liberty of the press" is among the greatest of blessings, civil and political, so long as it is directed to its proper object—that of disseminating correct and useful information among the people. But this greatest of blessings may become the greatest of curses, if it shall be permitted to burst its proper barriers.

The river Mississippi is a blessing to the country through which it flows, so long as it keeps within its banks ; but it becomes a scourge and a destroyer when it breaks them.

What earthly blessing is so great as civil liberty ? What curse so terrible as licentiousness and anarchy ?

It is to check the last that laws are made ; and it would be just as rational to complain of all laws as a restraint on *natural liberty*, as to complain of that portion of them which restrains the *licentiousness of the press*.

The liberty of the press has always been the favorite watchword of those who live by its *licentiousness*. It has been from time immemorial, is still, and ever will be, the perpetual *decanatum* on the lips of all libellers. Oswald attempted to screen himself under its *ægis*, in the case which has been cited from the first Dallas. But the attempt was in vain. The court taught him the difference between the liberty of the press and the licentiousness of the press ; and, in his further attempt to raise an impeachment against the Judges for that sentence, the House of Delegates confirmed the wholesome lesson.

[Judge Peck prays a reference to the note in the case of Oswald.]

If, indeed, the liberty of the press was a panoply broad enough to cover everything that is done in its name, nothing in the form of a publication could ever have been punished as a contempt of court : for the House will observe, that, in all the reported cases in which these publishers have been called to answer for a contempt, whenever the defence has appeared in the report, it is the liberty of the press which is the perpetual theme. It is uniformly claimed to be the right of the citizen to question the acts of all public men, and the changes are continually rung on that great palladium of human rights and human happiness—the liberty of the press ; as if human rights and human happiness could be promoted by the prostration and destruction of courts of justice, or by poisoning their streams in the fountain head.

It is unnecessary to pursue this subject. The Judge has never pretended that his opinions are not to be questioned : he insists, however, that they are to be questioned only according to the laws of the land. One mode of questioning them under these laws, is by appeal to a superior court ; and, after the *subject-matter* shall have been *finally* decided, another mode of questioning them is by respectful discussion, either in the public prints or elsewhere. In the present case, the first mode of questioning the opinion, that by appeal, had been resorted to : for the second mode, that of respectful discussion, the case was not ready, because the subject-matter had not been disposed of finally ; and, even if it had been, it has been shown that there was no semblance of investigation in this article—no pretence of discussion of any kind. It was sheer misrepresentation ; and it does not follow, that, because an opinion of a court may be respectfully discussed, it may, therefore, be misrepresented : much less that it may be so misrepresented as not only to impair the confidence of the public in the dignity, intelligence, and purity, of the tribunal, but to render both the Judge and the court objects of universal contempt, scorn, and ridicule ; and least of all, that, in doing this, a strong prejudice shall also be infused into the public mind with regard to causes still pending in the court.

The Judge has shown, that, in proceeding against this contempt by an attachment, he was justified by the example not only of the courts of England, from time immemorial, but the example also of other courts in the different States of the Union, where the liberty of the press and the trial by jury are as highly prized and as strongly guaranteed by their constitutions as they are in the State of Missouri ; and he will now add, that, even in Missouri, the courts had led the way by the exercise of the same power in cases of contempt by publication.

One of these cases occurred a very short time before the State Government went into operation. The proceeding was against the editor of the "Missouri Gazette," for a publication, giving an account of an assault and battery which had been committed on him by another editor, after the latter had been recognized to answer for the offence.

The rule for the attachment was made absolute, and although there were mitigating circumstances in this case, the party was both fined and imprisoned.

The other case occurred in the Supreme Court of the State, only two or three years before that under consideration, and it is the case alluded to in the evidence before the committee. In the suit of *Bellisime vs. M'Coy*, Mr. Lawless had prosecuted a writ of error in that court, and the court had decided against his client. A petition for a re-hearing was filed, and a re-hearing was granted. After the re-hearing had been granted, a publication appeared containing *strictures* on the opinion which had been pronounced by the court: the court, considering it to be *a misrepresentation of their opinion*, made a rule on the printer to show cause why he should not be attached for a contempt. Mr. Lawless showed cause against the rule, which being deemed insufficient by the court, it was made absolute. The name of the author was then given up, and that author was the same *Luke E. Lawless*.

A rule was then made on *him*. Mr. Lawless appeared, and attempted to show cause; but the court held it insufficient, made the rule absolute, and ordered interrogatories to be filed. They were filed, and Mr. Lawless answered and purged himself of the contempt. An honorable member of this House, who was an eye witness of the case, can correct any error in this report.

In that case, the exercise of the power was as much an invasion of the freedom of the press and the right of trial by jury, as the proceeding before Judge Peck. It is true that the cause was still pending in court; but it has already been shown that this makes no difference in the law of the case, when the scandal is directly on the court; and it has been also shown, that, in this instance also, there were cases pending, on which the publication was admitted to have been intended to bear.

And, with these remarks, the Judge dismisses this branch of the subject.

It is next said, the Judge's manner and language, in pronouncing sentence on the attachment, were rude and harsh towards Mr. Lawless.

On this subject the Judge understands the resolution of the House to confine him to the evidence reported by the Judiciary Committee; and he will, therefore, make no statement of the case as it occurred, and as he believes it to have been capable of proof, if the opportunity had been afforded. But he presumes that he may call the attention of the House to the admissions made by the two principal witnesses, themselves, of the relation, in point of feeling, which they hold towards Mr. Lawless and the Judge, and to ask that their statements may be received with a reasonable allowance. But, let it be conceded that their statements are strictly correct, to what do they amount? The House will remark, that Judge Peck was delivering an opinion in a case of contempt, arising from a publication which had misrepresented an opinion of the court; the tendency of which was, to destroy all the respectability of the court, and to render it universally ridiculous and contemptible, as well as to destroy the equipoise of the public mind with regard to all the land claims depending before the court. The court was delivering an opinion, too, in reply to an argument which had continued for several days, in which the most inflammatory appeals had been made to the passions of a crowded audience, representing the proceeding as being an invasion of the rights of the free citizens of the State, and more especially an invasion of the sacred right of trial by jury, and of the liberty of the press, which were protected by the most solemn guaranties of the constitution: for such is, in effect, the evidence before the Judiciary Committee, and such were the facts. Against all these topics and arguments, the Judge was replying at considerable length, vindicating a proceeding which he held vital to the existence of the court, and marking his conception of the character of the contempt.

And it is said that the Judge, in the course of delivering this opinion, appeared *at times* to be *a good deal excited*.

Was it strange that a Judge thus circumstanced should have been excited? Or was it even improper, or indecent, or inconsistent with the character of a

Judge, to express with warmth his sense of the indignity which had been offered to the court, and, through the court, to the United States, which that court represented?

With regard to the language of the court, Mr. Lawless says that he considered it *contumacious towards him*; but both he and the other witnesses agree in the specification of the words imputed to the Judge. What were those words? In speaking of that publication, the Judge pronounced it to be *false*: has he not proved it to be so? He pronounced it to be *calumnious*: has he not proved it to be so? He pronounced it *malignant*: has he not proved it to be so? Has it not been shown to have been done *malo animo*, towards the court, and towards the causes still remaining in court? And in having been done *malo animo*, was it not *malicious*? In what other terms was the court to speak of such a publication than those which the law itself has annexed to it? Is not every libel pronounced, both in the books and by the courts, to be *false, scandalous, malicious, and defamatory*? Is a man to reconcile it to himself to do an improper act, and yet take fire at the terms which describe it? Was the court to qualify and mince the common language of the law in cases of this sort, through respect to the feelings of a man, who, so far from showing respect to that tribunal, stood before it charged and convicted of a flagrant contempt?

But it is said that the court, *intra alia*, in the course of its opinion, referred to a practice, in China, of painting the houses of calumniators black; and, as the witnesses inferred, the court seemed to think Mr. Lawless a proper subject for such treatment. The last was an inference of the witnesses: for none of them say that the court *expressed* what they *inferred*, and none of them recollect the connexion in which the court referred to this Chinese custom. It was natural that they should have been struck with what was *new* to them, and not surprising that they should not have observed, or should have forgotten, the precise connexion in which it was introduced; nor is it very surprising, that, as the conduct of Mr. Lawless was in question, they should have looked to see how he would take the allusion. That the Judge, in the course of his opinion, made an allusion to this custom, is the only fact which is clearly in proof. And what impropriety was there in his doing so? Was it improper, on such an occasion, and before such an audience, to show the light in which all civilized nations regarded a calumniator? Did it not fairly and properly belong to the discussion? Was it not proper in a moral point of view? Was it not calculated to have a salutary effect, both upon the bar and the bystanders, to show, that, throughout the world, wherever civilization has dawned, there was but one feeling and one voice with regard to an offence of this sort, and that a voice of unmingled reprobation? With regard to the case itself, and the party concerned in it, what was there that called upon the court to *measure its terms* with regard to such an *unmeasured contempt*? The witnesses themselves prove that warmth and excitement are not the habits of the Judge. But there are occasions in which warmth and emotion become a Judge, and in which coldness and indifference would be unseemly even on the bench. Whenever vice is to be repressed, or the dignity and authority of the court are to be vindicated against aspersion and contempt, the Judge must be either less or more than human who could uniformly play the stoic. But he is unwilling that it should be believed either that his manner or phrase was exceptionable, as he conscientiously believes neither to have been so; and to establish the manner and the phrase in its connexion, was one among his strongest reasons for desiring that his witnesses should be heard by the House. Believing it probable that a member of the House, who witnessed the proceeding, has it in his power to do justice to the Judge in this respect, he hopes he may be permitted to claim that justice from him.

There is one point of view in which this case still remains to be considered. Hitherto it has been treated as if the offender had been a stranger to the court. But Mr. Lawless was attorney and counsel at its bar, and was, therefore, under

an increased obligation to treat it with respect, and also under an increased responsibility to the court. *He* seems to suppose that this relation implies no responsibility on him, except while he was in court, or engaged in some professional duty in relation to a cause in court. But he is mistaken. The relation between the court and the attorneys who stand upon its roll, is a permanent and continuing one, so long as the name is permitted there to stand; and courts have a supervising power over the conduct of attorneys *out of court*, and may *attach them for acts having no connexion whatever with any cause in court*.

Thus the court will order an attorney to pay over money received by him as *steward of a manor*. *Ex parte Corp. Christ. College, 2 Petersdorff, 615, case 13.*

So they will compel him to pay over money received by him *as a collector*. *Id. 614, case 12.*

So when he had received money as a *Bill Broker, unconnected with his professional character*. *Id. 616, case 18, Ex parte Hall.*

For extortion, the king will order him to be struck off the rolls, &c. *Id. 605.*

So for assigning for error that which he knows to be false. *Id. 609, case 6.*

For gross misbehavior, the court will do it. *Id. ib. case 8.*

It is needless to multiply citations to this effect. They will be found collected by this author under the head of "Attorneys."

The court considers its character so far associated and implicated with that of the attorneys who stand upon its rolls, that they will suffer no man to stand there who has disgraced himself by his misconduct, although that misconduct have no connexion with the court. *Cowper, 329, Ex parte Brownsall.*

Attorneys, as officers of the court, are also under its protection; and from this relation, it is their natural duty to set the example of respect to the rest of the community, and to discourage and repress disrespect in others, instead of exciting that disrespect by their own conduct, speeches, and publications.

By the 35th section of the judiciary act, the courts of the United States are authorized to *prescribe the rules* by which they will permit attorneys to be admitted, to practice at their bar; and, with relation to contempts committed by such attorneys, the Supreme Court of the United States has decided, with obvious propriety, that the court towards which the contempt has been committed, must, *of necessity*, be the best judge of the character of the contempt: *they* doubt their own power to revise such a sentence, and say that the case must be a *flagrant one*, indeed, in which they would interfere with such a sentence. *Ex parte Burr. 9 Wheaton, 529.*

If the step taken by the court in this case would have been right towards a stranger, it was, therefore, *a fortiori*, right with regard to an attorney so intimately connected with it, and owing it habitual respect.

Let us now see the conduct of this attorney, when brought before the court to answer for the contempt.

He is told that the court has decided the publication to be a contempt. It was his privilege to purge himself of this contempt, as he had done in the case just mentioned before the State Court. The opportunity of doing so is afforded him. He is asked whether he wishes to have interrogatories propounded to him, or whether he will answer them if propounded by the court? He answers, that he does not wish them, and that, if propounded, *he will not answer them*. This declaration that he would not answer interrogatories if they should be propounded, was not only an aggravation of the first contempt, but was a new and substantive contempt, which would, of itself, have justified the sentence that was passed, and in this light it is considered by the books.

4 Black. Com. 287.

1 Dall. 329.

2 Hawk. P. C. 231, B. 2. C. 22, Sec. 43.

Do. 219, do. note to sec. 10.

Strange's Rep. 1197, 1 Wils. 30.

2 Bar. K. B. 219.

4 Burr, 2105, Rex vs. Edwards.

5 T. R. 362, King vs. Horsley.

In Mr. Lawless' memorial, he states, that, in reply to the question of the court, "1st. That he did not require interrogatories to be filed ;

"2d. That if interrogatories were filed, he would not answer them ;

"3d. That, as he had committed no contempt, he would purge himself of none."

"That the said Judge thereupon declared, that the refusal to answer any interrogatories that might be filed, was a great aggravation of the contempt already committed by your petitioner, and deserved a severer punishment than that which he would possibly have otherwise inflicted."

But there was not a mere refusal to answer interrogatories. A paper was read by Mr. Lawless, or, as the evidence states, by Mr. Lawless or his counsel, in which the truth of the article signed "A Citizen," is, in a spirit of contradiction, re-asserted in the face of the decision of the court then made. [See report of committee, pp. 46 and 47.]

Why, if no disrespect, no contempt, was intended, did not Mr. Lawless avail himself of the opportunity to declare this in the form which the law prescribes ?

The opportunity was fairly opened to him by the tender of interrogatories, but his refusal to answer them was *flat and peremptory*.

Among the questions propounded to Mr. Lawless, while before the committee, there is the following one : "Were you required by the court to make any apology or other atonement for the publication of the article signed 'A Citizen,' before the order was made for your imprisonment, and for suspending you from the bar ?"

Judge Peck has met with no elementary book, nor any adjudged case, which prescribes it to the court as a duty, to make any such overture to a party standing before it convicted of a contempt.

The only course prescribed by them was that which the court did pursue, of tendering interrogatories : and after Mr. Lawless had answered, in reply to this overture, that he did not wish to have them exhibited, and added, indignantly, that he *would not answer if they were exhibited*, and read a written paper re-asserting the truth of the "Citizen," and denying the jurisdiction of the court, any further overture, like that proposed in the question, would have been far more likely to produce a new insult to the court than to propitiate the offender.

Had the contempt consisted of a hasty or unguarded expression, a recantation, in the presence of the court, might have been received as an atonement with propriety. But where the contempt consisted in the misrepresentation of the decisions of the court through the medium of the public prints, with intent to bring the court into contempt ; and consisted, also, in an attempt to influence the public in relation to causes depending before the court, and to excite indignation against the court, it was due to the administration of justice that there should be an example made.

It would have been indefensible on the part of the court, if it had viewed the offence merely in the light of a personal affair, and capable of being atoned for by an acknowledgement of error without the solemnity of an oath.

With respect to the imprisonment of Mr. Lawless in the criminal's apartment of the gaol, the sentence of the court was general, that he should be imprisoned for the particular period. It did not occur to the court that there were different apartments in the gaol, nor was there any suggestion made in relation to that subject.

The sentence would have been complied with by putting him in the debtors' apartment. Had he requested to be put there, there is no question but that his request would have been complied with. He shows that, at his request, he was immediately taken into another room.

In page 35 of the report, it is said, in the testimony of Mr. Lawless, "that, when he presented himself to the court, at the expiration of the term of his suspension, the Judge inquired *particularly of the clerk*, if the time had expired ?"

The House will see how improbable this evidence is, when they reflect that the order of suspense was in the Special Court, held at *St. Louis*, under the act of 26th May, 1824, for the trial of land causes; the records of which court would remain at *St. Louis*, and had no connexion with the records of the District Court held at *Jefferson City*. Yet, in page 36 of the report, Mr. Lawless states, that, after his suspension, he first re-appeared in court at *Jefferson City*. This is adverted to, because it appeared to be the object of the testimony to show a disposition on the part of the court to enforce, rigorously, against Mr. Lawless, its sentence.

Upon the whole, Judge Peck declares that, in this proceeding, he was actuated by a sense of official duty. He considered it his duty to sustain the dignity and authority of the court over which he had been appointed to preside; he considered it due to the government which he represented—due to the tribunal, and due to the suitors whose rights were committed to its protection, to punish this contempt as he did punish it. He did consider himself, and does still consider himself, as sustained, at every step, by the highest authority. He believed it, conscientiously, to be his solemn and imperious duty to make the example which he did make, more especially in relation to the country in which he holds his courts, and the nature of the claims which he was called upon to adjudicate, and which had produced this agitation. If, in so doing, he has erred, he has erred in company with judicial characters with whom any judge may be proud to associate; and he has yet to learn that *such an error* would be a *high misdemeanor* in the sense of the Constitution of the United States.

Judge Peck is perfectly aware of the purposes to be answered by his removal, and is, therefore, not at all surprised at the pertinacity with which it has been sought for the last four years.

Whether these purposes are such as the interests of the United States call upon them to countenance by ordering further proceedings in this case, is a question for others, not for Judge Peck. Confident he is, that, if he had been made of more pliant materials, and could have reconciled it to himself to consult his repose rather than his sense of duty, the House would not have been troubled with this inquiry.

JAMES H. PECK.

Washington, April 13, 1830.

The case having thus been fully brought before the House of Representatives, that body, on the 21st of April, went into a Committee of the whole House on the State of the Union, Mr. Martin of South Carolina in the chair, and took up the memorial of Mr. Lawless, the report of the Judiciary Committee, and the foregoing explanation by the Judge. An animated debate arose. Mr. Buchanan, chairman of the Committee on the Judiciary, addressed the committee for more than an hour, in explanation and support of the committee's report. Mr. Clay of Alabama spoke in reply, strenuously opposing the resolution to impeach, and defending the conduct of the Judge. Mr. Spencer of New York rejoined, and advocated the propriety of an impeachment. The committee then rose; the debate was resumed on the following day; when a motion to postpone all the other orders of the day, in order to give an opportunity for the discussion, occasioned a warm contest, in which Messrs. Whittlesey, Burges, Wickliffe, Spencer, Wayne, Storrs and Ellsworth took part. The motion prevailed; the orders were postponed: and the House again went into Committee of the Whole, Mr. Wilde of Georgia in the chair.

Mr. Pettis of Missouri now took the floor, and continued to occupy it in a speech of more than three hours, warmly defending the conduct of Judge Peck, and earnestly opposing the proposal to impeach him.

Mr. Everett of Massachusetts, though not holding the Judge altogether unworthy of censure, was unwilling to proceed so far as to impeach, and he concluded a short speech in remonstrance, by offering a resolution, declaring, that the House

disapproved the conduct of Judge Peck, but that there was not sufficient evidence before it to justify his impeachment for a high misdemeanor in office.

Mr. Storrs of New York opposed the adoption of the resolution, because it went to recommend a final action by the House upon the subject ; when, in his opinion, it ought to be fully investigated before the competent tribunal. He was replied to by Mr. Burges of Rhode Island, who proposed a modification of Mr. Everett's resolution, which somewhat softened its terms ; declaring, that "although the House might not, if called upon, altogether approve the conduct of Judge Peck, yet, that perceiving no evidence of ill intent on his part, it would not sanction the impeachment." He afterwards, however, withdrew this, and Mr. Everett slightly changed the form of his resolution, so as to suit it more nearly to his views.

Mr. Ellsworth of Connecticut then addressed the committee at length in support of the resolution for impeachment reported by the Judiciary Committee (of which he was a member) ; and was followed by his colleague, Mr. Huntington of Connecticut, who spoke with warmth on the opposite side of the question. The debate was continued till seven o'clock in the evening, when a motion to rise was carried by a majority of two votes only.

On the following day, Mr. Burges spoke at length, in defence of the Judge, and against the motion to impeach. Having concluded an animated speech of more than two hours, he was replied to by Mr. Wickliffe, another member of the Judicial Committee ; whereupon the question was put on Mr. Everett's amendment, which was rejected, and the resolution for the impeachment was carried, ayes 113.

The Committee having risen, and reported the resolution to the House, in the words following,

"Resolved, that James H. Peck, Judge of the District Court of the United States for the District of Missouri, be impeached of high misdemeanors in office,"

The resolution was read at the clerk's table, when Mr. Buchanan demanded that the question be taken by yeas and nays. The demand was supported by the House, and it was ordered accordingly.

Mr. Pettis moved that there be a call of the House : but the motion was negatived.

The question on impeachment was then decided by yeas and nays as follows :

Those who voted in the affirmative were, Messrs. Mark Alexander, Robert Allen, Willis Alston, John Anderson, William S. Archer, William Armstrong, Robert W. Barnwell, Daniel L. Barringer, Thomas Beekman, James Blair, Abraham Bockee, Ratliff Boon, Peter J. Borst, Thomas T. Bouldin, John Bradhead, Elias Brown, James Buchanan, William Cahoon, C. C. Cambreleng, John Campbell, Samuel P. Carson, Thomas Chandler, Thomas Chilton, Nathaniel H. Claiborne, Richard Coke, Jun., Nicholas D. Coleman, Henry W. Conner, James L. Hodges, Benjamin C. Howard, Henry Hubbard, Peter Ihrie, Jun., Jacob C. Isacks, Jonathan Jennings, Richard W. Johnson, Cave Johnson, Joseph G. Kendall, John Kincaid, Perkins King, Henry G. Lamar, Pryor Lea, Joseph Lecompte, Robert P. Letcher, George Loyall, Dixon H. Lewis, Chittenden Lyon, John Magee, Thomas Maxwell, Lewis Maxwell, William McCreery, George McDuffie, Rufus McIntyre, George E. Mitchell, Robert Monell, H. A. Muhlenberg, William T. Nuckolls, Henry B. Cowles, Hector Craig, Robert Craig, Thomas H. Crawford, Jacob Crocheron, Henry Daniel, Thomas Davenport, Warren R. Davis, Edmund Deberry, Harmur Denny, Robert Desha, Charles G. Dewitt, Philip Doddridge, William Drayton, Edward B. Dudley, Jonas Earll, Jun., William W. Ellsworth, George Evans, Joshua Evans, James Findlay, Isaac Finch, Chauncey Forward, Thomas F. Foster, Joseph Fry, Nathan Gaither, John Gilmore, William F. Gordon, Thomas H. Hall, Jehiel H. Halsey, Joseph Hammons, Jonathan Harvey, Charles E. Haynes, Thomas Hinds, Walter H. Overton, James K. Polk, Robert Potter, Gershom Powers, William Ramsey, Joseph Richardson, John

Roane, William Russell, John Scott, A. H. Shepherd, James Shields, Benedict I. Semmes, Samuel A. Smith, Jesse Speight, Ambrose Spencer, Richard Spencer, Michael C. Sprigs, John B. Stengere, Henry R. Storrs, Benjamin Swift, John Taliaferro, John Test, Wiley Thompson, John Thomson, James Trezvant, Harling Tucker, G. C. Verplanck, Geo. C. Washington, John W. Weeks, Campbell P. White, Edward D. White, Charles A. Wickliffe, Richard H. Wilde, Joseph F. Wingate, and Joel Yancey. 123.

Those who voted in the negative were, Messrs. William G. Angel, Benedict Arnold, John Bailey, Noyes Barber, Mordecai Bartley, Isaac C. Bates, John Bell, John Blair, Tristram Burges, Samuel Butman, Clement C. Clay, James Clark, Lewis Condict, Richard M. Cooper, Joseph H. Crane, William Creighton, Jun., B. W. Crowninshield, John Davis, Henry W. Dwight, Edward Everett, Horace Everett, Benjamin Gorham, George Grenell, Jun., Joseph Hawkins, Thomas H. Hughes, Jonathan Hunt, J. W. Huntington, William Kennon, Henry C. Martindale, William McCoy, Daniel H. Miller, Dutee J. Pearce, Spencer Pettis, Isaac Pierson, John Reed, Robert S. Rose, Thomas H. Sill, William Stanberry, James Standefer, Philander Stephens, William L. Storrs, Joel B. Sutherland, Samuel Swann, John W. Taylor, Joseph Vance, Samuel F. Vinton, Elisha Whittlesey, Lewis Williams, and Ebenezer Young. 49.

So the House resolved that the Impeachment should be preferred.

Ordered, that Mr. Buchanan and Mr. Storrs of New York be a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach JAMES H. PECK, Judge of the District Court of the United States for the District of Missouri, of high misdemeanors in office; and acquaint the Senate, that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

Ordered, that the committee do demand that the Senate take order for the appearance of the said James H. Peck, to answer to said impeachment.

On motion of Mr. Storrs, a committee was appointed to prepare and report articles of impeachment. It consisted of Mr. Buchanan, Mr. Storrs, Mr. McDuffie, Mr. Spencer of New York, and Mr. Wickliffe.

On the 26th of April, Mr. Buchanan and Mr. Storrs appeared at the bar of the Senate, and complied with the order of their appointment, when, on motion of Mr. Tazewell, their message was referred to a committee of three members of the Senate: Messrs. Tazewell, Webster and Bell were appointed the committee: but before the ballot for their appointment was taken, Mr. Benton of Missouri was, at his own request, excused from voting.

On the 27th, Mr. Tazewell, from the select committee, made the following report:

Whereas, the House of Representatives, on the 26th of the present month, by two of their members, Messrs. Buchanan and Storrs of New York, at the bar of the Senate impeached James H. Peck, Judge of the District Court of the United States for the District of Missouri, of high misdemeanors in office; and acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said James H. Peck to answer the said impeachment; therefore,

Resolved, that the Senate will take proper order thereon; of which due notice shall be given to the House of Representatives.

And the committee further recommend to the Senate that the secretary of the Senate be directed to notify the House of Representatives of the foregoing resolution.

The Senate concurred, and the notice was given accordingly.

On the day following, the Vice President communicated to the Senate two letters from Judge Peck, notifying that body of his intention of going to Baltimore, where he should remain some days: and requesting that, in the arrange-

ment of the Senate Chamber preparatory to his impeachment, a seat might be assigned him by which he might avoid facing the windows, on account of the weak state of his eyes. The letters were read, and laid on the table.

On the 29th, Mr. Buchanan reported the form of the article of impeachment : which was considered on the 1st of May in Committee of the Whole, and reported with amendments, which were agreed to by the House, and the article in its amended form was then adopted. See it hereafter.

On motion of Mr. Buchanan, it was

Resolved, that five managers be appointed by ballot, to conduct the impeachment on the part of the House.

The House accordingly proceeded to ballot, when the following gentlemen were chosen, viz : JAMES BUCHANAN, of Pennsylvania ; HENRY R. STORRS, of New York ; GEORGE McDUFFIE, of S. Carolina ; AMBROSE SPENCER, of New York ; and, at a subsequent ballot, CHARLES A. WICKLIFFE, of Kentucky.

It was further resolved, that the article of impeachment be carried to the Senate by the managers : and that a message be sent to the Senate informing them that managers had been appointed and directed to carry the article of impeachment to the Senate.

The message having been delivered in that body by the clerk of the House,

On motion of Mr Tazewell, it was

Resolved, that, at twelve o'clock tomorrow, the Senate will resolve itself into a court of impeachment : at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and by him to each member of the Senate, viz :

“ I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of James H. Peck, Judge of the District Court of the United States for the District of Missouri, I will do impartial justice according to law.”

Which Court of Impeachment being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment in the name of themselves and of all the people of the United States against James H. Peck, Judge of the District Court of the United States for the District of Missouri, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the purpose aforesaid.

Ordered, that the secretary lay this resolution before the House of Representatives.

On motion of Mr. Tazewell,

Resolved, that after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against James H. Peck, the President of the Senate shall direct the serjeant at arms to make proclamation ; who shall, after making proclamation, repeat the following words : “ All persons are commanded to keep silence, on pain of imprisonment, while the Grand Inquest of the nation is exhibiting to the Senate of the United States Articles of Impeachment against James H. Peck, Judge of the District Court of the United States for the District of Missouri :” after which the articles shall be exhibited ; and then the President of the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES *vs* JAMES H. PECK.

Tuesday, May 4, 1830.

On motion of Mr Tazewell,

The Senate resolved itself into a High Court of Impeachment : and the Secretary administered the oath prescribed by the resolution of yesterday to the Vice President ; who then administered the same oath to the follow-

ing Senators, viz. Messrs. Adams, Barnard, Barton, Bell, Bibb, Brown, Burnet, Chase, Clayton, Dickerson, Dudley, Ellis, Foot, Forsyth, Frelinghuysen, Grundy, Hayne, Hendricks, Holmes, Iredell, Johnston, Kane, King, Knight, Livingston, McKinley, McLean, Marks, Naudain, Noble, Robbins, Rowan, Ruggles, Sanford, Seymour, Silsbee, Smith of S. C., Sprague, Tazewell, Troup, Tyler, Webster, White, Willey, Woodbury.

The managers on the part of the House of Representatives, viz. Messrs. Buchanan, Storrs of New York, McDuffie, Spencer and Wickliffe, appeared and were admitted : and Mr Buchanan their chairman having announced that they were the managers instructed by the House of Representatives to exhibit a certain article of impeachment against James H. Peck, Judge of the District Court of the United States for the District of Missouri,

They were requested by the Vice President to take seats assigned them within the bar ; and the serjeant at arms was directed to make proclamation, which he did in the words heretofore prescribed.

After which the managers rose, and Mr. Buchanan, their chairman, read the article of impeachment, as follows :

ARTICLE

Exhibited by the House of Representatives of the United States, in the name of themselves, and of all the People of the United States, against James H. Peck, Judge of the District Court of the United States for the District of Missouri, in maintenance and support of their impeachment against him for high misdemeanors in office.

ARTICLE.

That the said James H. Peck, Judge of the District Court of the United States for the District of Missouri, at a term of the said court, holden at St. Louis, in the State of Missouri, on the fourth Monday in December, one thousand eight hundred and twentyfive, did, under and by virtue of the power and authority vested in the said court, by the act of the Congress of the United States, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," approved on the twenty-sixth day of May, one thousand eight hundred and twentyfour, render a final decree of the said court in favor of the United States, and against the validity of the claim of the petitioners, in a certain matter or cause depending in the said court, under the said act, and before that time prosecuted in the said court, before the said Judge, by Julie Soulard, widow of Antoine Soulard, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs at law of the said Antoine Soulard, petitioners, against the United States, praying for the confirmation of their claim, under the said act, to certain lands situated in the said State of Missouri ; and the said court did thereafter, on the thirtieth day of December, in the said year, adjourn to sit again on the third Monday in April, one thousand eight hundred and twenty-six.

And the said petitioners did, at the same December term of the said court, holden by and before the said James H. Peck, Judge as aforesaid, in due form of law, under the said act, appeal against the United States, from the judgment and decree so made and entered in the said matter, to the Supreme Court of the United States ; of which appeal so made and taken in the said District Court, the said James H. Peck, Judge of the said court, had then and there full notice. And the said James H. Peck, after the said matter or cause had so been duly appealed to the Supreme Court of the United States, and on or about the thirtieth day of March, one thousand eight hundred and twenty-six, did cause to be published in a certain public newspaper, printed at the city of St. Louis, called "The Missouri Republican," a certain communication prepared by the said James H. Peck, purporting to be the opinion of the said James H.

Peck, as Judge of the said court, in the matter or cause aforesaid, and purporting to set forth the reasons of the said James H. Peck, as such judge, for the said decree; and that Luke Edward Lawless, a citizen of the United States, and an attorney and counsellor at law in the said District Court, and who had been of counsel for the petitioners in the said court in the matter aforesaid, did, thereafter, and on or about the eighth day of April, one thousand eight hundred and twenty-six, cause to be published in a certain other newspaper, printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," and purporting to contain an exposition of certain errors of doctrine and fact alleged to be contained in the opinion of the said James H. Peck, as before that time so published; which publication by the said Luke Edward Lawless, was to the effect following, viz:

"To the Editor:

Sir: I have read, with the attention which the subject deserves, the opinion of Judge Peck on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe that, although the Judge has thought proper to decide against the claim, he leaves the ground of his decree open for further discussion.

Availing myself, therefore, of this permission, and considering the opinion so published, to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by its operation, I beg leave to point the attention of the public to some of the principal errors, which I think that I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and besides, is not (as regards most of the points) absolutely necessary.

Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

1st. That by the ordinance 1754, a sub-delegate was prohibited from making a grant in consideration of services rendered or to be rendered.

2d. That a sub-delegate in Louisiana was not a sub-delegate as contemplated by the above ordinance.

3d. That O'Reilly's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the Governor General or the sub-delegates under the royal order of August, 1770.

4th. That the royal order of August, 1770, (as recited or referred to in the preamble to the regulations of Morales, of July, 1799,) related exclusively to the Governor General.

5th. That the word 'mercedes,' in the ordinance of 1754, which in the Spanish language means 'gifts,' can be narrowed by anything in that ordinance or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money.

6th. That O'Reilly's regulations were in their terms applicable, or ever were, in fact, applied to, or published in, Upper Louisiana.

7th. That the regulations of O'Reilly have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

8th. That the limitation, to a square league of grants to new settlers in Opelousas, Attakapas and Natchitoches, (in 8th article of O'Reilly's regulations) prohibits a larger grant in Upper Louisiana.

9th. That the regulations of the Governor General, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

10th. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself of his own regulations.

11th. That, although the regulations of Morales were not promulgated as law in Upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, 'from the official station which he held,' to have had notice, of their terms.

12th. That the regulations of Morales 'exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.'

13th. That the complete titles, (produced to the court) made by the Governor General or the Intendant General, though based on *incomplete titles* not conformable to the regulations of O'Reilly, Gayoso, or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

14th. That the language of Morales himself, in the complete titles issued by him, on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

15th. That the uniform practice of the sub-delegates or Lieutenant Governor of Upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom, therein.

16th. That the historical fact, that *nineteen twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

17th. That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession or of the law of nations.

18th. That the laws of Congress heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles of a precisely similar character which remain unconfirmed.

In addition to the above, a number of other errors, consequential on those indicated, might be stated. The Judge's doctrine as to the forfeiture, which he contends is inflicted by Morales' regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him, only to observe, by way of conclusion, that the Judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel, I beg to observe, that all that I have now submitted to the public, has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

A CITIZEN."

And the said James H. Peck, Judge as aforesaid, unmindful of the solemn duties of his station, and that he held the same, by the Constitution of the United States, during good behavior only, with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under color of law, did, thereafter, at a term of the said District Court of the United States for the District of Missouri, begun and held at the city of St. Louis, in the State of Missouri, on the third Monday in April, one thousand eight hundred and twenty-six, arbitrarily, oppressively, and unjustly, and under color and pretence that the said Luke Edward Lawless was answerable to the said court for the said publication, signed "A Citizen," as for a contempt there-

of, institute, in the said court, before him, the said James H. Peck, Judge as aforesaid, certain proceedings against the said Luke Edward Lawless, in a summary way, by attachment, issued for that purpose by the order of the said James H. Peck, as such judge, against the person of the said Luke Edward Lawless, touching the said pretended contempt, under and by virtue of which said attachment the said Luke Edward Lawless was, on the twentyfirst day of April, one thousand eight hundred and twentysix, arrested, imprisoned, and brought into the said court, before the said Judge, in the custody of the marshal of the said State ; and the said James H. Peck, Judge, as aforesaid, did afterwards, on the same day, under the color and pretences aforesaid, and with the intent aforesaid, in the said court, then and there unjustly, oppressively, and arbitrarily, order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twentyfour hours, and that he should be suspended from practising as an attorney or counsellor at law in the said District Court for the period of eighteen calendar months from that day ; and did then and there further cause the said unjust and oppressive sentence to be carried into execution ; and the said Luke Edward Lawless was, and by the order of the said James H. Peck, Judge as aforesaid, thereupon suspended from practising as such attorney or counsellor in the said court, for the period aforesaid, and immediately committed to the common prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment, against the said James H. Peck, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other articles, accusation, or impeachment, which shall be exhibited by them as the case shall require, do demand that the said James H. Peck may be put to answer the high misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as may be agreeable to law and justice.

A. STEVENSON,

Speaker of the House of Representatives.

Attest, M. ST. CLAIR CLARKE,
Clerk House of Reps. U. S.

The Vice President then informed the managers that the Senate would take proper order on the subject of the impeachment ; of which due notice should be given to the House of Representatives.

The managers by their chairman delivered the article of impeachment to the table of the Secretary, and they withdrew.

On motion of Mr. Tazewell, and by unanimous consent, Resolved, that the Secretary be directed to issue a summons, in the usual form, to James H. Peck, Judge, &c., to answer a certain article of impeachment exhibited against him by the House of Representatives on this day ; and that the said summons be returnable here on Tuesday next, the 11th instant, and be served by the serjeant at arms, or some person to be deputed by him, at least three days before the return day thereof.

Ordered, that the secretary lay this resolution before the House of Representatives.

On motion of Mr. Tazewell, the court then adjourned to 12 o'clock on Tuesday next.

justified by the highest authority, and did not act unjustly, arbitrarily and oppressively toward the party who stood convicted of the publication, but was influenced solely by a conscientious sense of public duty, will be the object and business of the answer. In desiring to present the whole case fully and intelligibly to this honorable Court, in the form of an answer, instead of resting on the general plea of Not Guilty, I am sustained by the precedent set by this honorable Court on a former occasion. Indeed, it seems due to this honorable Court, and to the honorable House of Representatives, as well as to myself, that the facts and principles which constitute my defence should be fully, clearly and distinctly set forth in my answer, in order that both my accusers and judges may be in full possession of the grounds on which I respectfully but confidently believe that my conduct will find its entire vindication.

I ask only time to prepare this answer with that care and consideration which are due to this high and honorable Court, to the solemnity of the occasion, and to the deep interest, in point of reputation rather than of office, which I have in the result. In preparing this answer, it will be indispensably necessary, that I should be present with the counsel who will be employed in drawing it, with a view to the correct exhibition of the facts which are to enter into that answer; and I submit it with great respect to this honorable Court, that to the accurate and just accomplishment of an object, on which I have so much at stake, I ask nothing unreasonable, when I request that I may be allowed until the 25th day of the present month for the purpose of filing my answer and plea.

It is equally indispensable to my defence that I should have witnesses from the State of Missouri, which was the scene of the transaction in question, and that I should have certified copies of records from the courts for the trial of land claims in that State. Some of these witnesses are named in the affidavit, hereto annexed: but I confidently believe that there are others in that State who will be found equally material, if an opportunity shall be allowed me to go out and collect them. This honorable Court will be pleased to observe that the transaction which is the subject of complaint, occurred four years ago. The efforts which had been made from the year 1826, down to the present time, to raise an impeachment on that ground, were known to have failed; and not expecting that the effort could ever succeed, I have not been careful to inquire or to reflect who might or might not be important to me as witnesses, in the apparently improbable event of an impeachment. I therefore deem it indispensable to the justice of the case, that after I shall have filed my answer and plea, an opportunity should be allowed me to go to Missouri, and collect my witnesses, and to select from the records of land claims in that State, the cases which bear immediately upon the question before this honorable Court, with the view of obtaining authenticated transcripts to be exhibited on the trial. I am aware that some time will be required to accomplish these objects; but justice requires that they should be accomplished. I ask only a fair trial and that I may not be condemned unheard; but I should be condemned unheard, if the hearing should be forced, and a condemnation should follow, before a reasonable opportunity shall be allowed me to collect the proofs essential to my defence.

I have no desire to delay or to avoid this trial. On the contrary, since it has assumed so serious a form, my sincere desire is to meet it with as little delay as possible. The distance from this place to Missouri, and the time which will probably be necessary to collect the proofs which have been indicated and to bring them to this city, can be as well estimated by the honorable Court as by myself. I will barely observe that the marshal of the State to whom it is understood that *subpoenas* for the witnesses are to be addressed, is believed to reside at the distance of seventy miles from St. Louis; that there is not an entire certainty of finding all the witnesses at home; that if found, they will probably require some days to arrange their business and domestic concerns, before they can safely set out on so distant a journey, which may detain them for six or eight weeks from home; that they are liable to detention by casualties

on the way ; and that some time will be necessary to procure the transcripts of records which will be essential to my defence. It is believed that between fifty and sixty days, from the dates of the subpoenas, were found, in practice, to be necessary to convene before the Judiciary Committee of the honorable House of Representatives, witnesses from the same State in support of the charge which forms the ground of the impeachment. With these *data* before the honorable Court, it is submitted that from fifty to sixty days from the time of filing my answer and plea, and the award of process which I am to carry and cause to be served in Missouri, will not be an unreasonable allowance of time to place me in a condition to meet a full and fair trial of the impeachment on its merits. I ask only the time which this honorable Court shall deem reasonable for the accomplishment of these purposes ; and that the time which shall be fixed may be such as to afford a fair probability, a reasonable certainty of commanding at this city, the use of that testimony which the purposes of justice require ; and that I may be saved from the humiliation of moving a farther continuance on the ground of the unavoidable absence of material testimony.

The motions which I respectfully submit are,

First, That a reasonable time may be allowed me to prepare my answer and plea ; and for this purpose I ask until the 25th day of the present month.

Second, That after my answer and plea shall be filed, process for witnesses may be awarded to me, and a reasonable time may be allowed to collect my witnesses and proofs from the State of Missouri.

In support of these motions, I beg leave to submit to this honorable Court the accompanying affidavit.

JAMES H. PECK.

CITY OF WASHINGTON, TO WIT :

James H. Peck made oath on the holy Evangelists of Almighty God, that among others, John B. C. Lucas, Robert Wash, Edward Bates, and Josiah Spalding, of the State of Missouri, are material witnesses for him on the trial of the impeachment preferred against him by the honorable the House of Representatives of the United States, and that he cannot safely go to trial without the benefit of their testimony : that he verily believes there are other witnesses in Missouri, who may be equally material to him on the said trial, and whom he would have it in his power to collect, if process shall be awarded and an opportunity allowed to him to do so : that it will also be material for him to procure from the Court for the trial of land claims in Missouri, authentic transcripts of records of several cases which are essential to his defence, and without which he cannot safely go to trial : that it will be necessary for him to be present with his counsel who shall be engaged in drawing his answer and plea to the article of impeachment ; and that in order to perform this duty with accuracy and propriety, the indulgence which he has asked till the 25th of the present month is not more than reasonable ; that after this answer and plea shall be filed, the purposes of justice require that he should be furnished with process and permitted to proceed to Missouri to collect his witnesses and select from the land records the transcripts which will be necessary for his defence ; and that he does not think it will be in his power to collect the necessary witnesses and documents at the city of Washington, with reasonable certainty, in a shorter space of time than from fifty to sixty days from the time that he shall set out with process ; and farther, that his application to this honorable Court for time to prepare his answer and plea, and for time to procure the attendance of necessary witnesses, and the transcript of records from the State of Missouri, is not made for the purpose of delay, but only for the purpose of obtaining a full and fair hearing of the impeachment against him on its real merits.

JAMES H. PECK.

Subscribed and sworn to before me the subscriber, a Justice of the Peace in and for the County of Washington, in the District of Columbia, this tenth day of May, 1830.

D. A. HALL, J. P.

Mr. Webster thereupon submitted the following motion, which was considered.

Ordered, that James H. Peck file his answer and plea with the Secretary of the Senate to the article of impeachment exhibited against him by the House of Representatives on or before the second Monday of the next session of Congress.

On motion of Mr. Bibb,

The said motion was amended, and then agreed to, as follows :

Ordered, that James H. Peck file his answer and plea with the Secretary of the Senate to the article, &c. on or before the twentyfifth day of the present month.

Ordered, that the Secretary notify the House of Representatives and James H. Peck accordingly.

On motion of Mr. Chambers, the court adjourned to Tuesday 25th inst. at 12 o'clock.

IN SENATE.—*May 12, 1830.*

Ordered, that the Secretary of the Senate direct copies of the rules of proceedings prescribed in cases of impeachment to be printed for the use of the members, and laid on their tables, on the first day of the next session of the court ; and also; that copies be furnished to the managers of the impeachment in the case of James H. Peck, and to the accused and his counsel.

Which rules are in the following form :

1. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed, on their part, to conduct an impeachment against any person, and are directed to carry such articles to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to the said notice.

2. When the managers of an impeachment shall be introduced to the bar of the Senate, and shall signify that they are ready to exhibit articles of impeachment against any person, the President of the Senate shall direct the sergeant at arms to make proclamation, who shall, after making proclamation, repeat the following words : " All persons are commanded to keep silence, on pain of imprisonment, while the Grand Inquest of the Nation is exhibiting to the Senate of the United States articles of impeachment against ——— ;" after which the articles shall be exhibited, and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3. A summons shall issue, directed to the person impeached, in the form following :

" THE UNITED STATES OF AMERICA, ss.

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

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

[*Here insert the articles.*]

And did demand that you, the said ———, should be put to answer the accusations as set forth in said articles ; and that such proceedings, examinations, trials, and judgments, might be thereupon had as are agreeable to law and justice : You, the said ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform, such orders and judgments as the Senate of the United States shall make in the premises, according to the constitution and laws of the United States.

Hereof you are not to fail.

Witness, ———, Vice President of the United States of America, and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.”

Which summons shall be signed by the Secretary of the Senate, and sealed with their seal, and served by the sergeant at arms to the Senate, or by such other person as the Senate shall specially appoint for that purpose, who shall serve the same pursuant to the directions given in the form next following :

4. A precept shall be endorsed on said writ of summons, in the form following, viz :

“ UNITED STATES OF AMERICA, ss.

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

You are hereby commanded to deliver to, and leave with ———, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both : or in case he cannot with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence ; and in whichever way you perform the service, let it be done at least ——— days before the appearance day mentioned in said writ of summons. Fail not ; and make return of this writ of summons and precept, with your proceedings thereon endorsed, on or before the appearance day mentioned in the said writ of summons.

Witness, ———, Vice President of the United States of America, and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.”

Which precept shall be signed by the Secretary of the Senate, and sealed with their seal.

5. Subpœnas shall be issued by the Secretary of the Senate upon the application of the managers of the impeachment, or of the party impeached, or of his counsel, in the following form, viz :

“ *To ———, greeting :*

You and each of you are hereby commanded to appear before the Senate of the United States, on the ——— day of ———, at the Senate chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ———.

Fail not.

Witness, ———, Vice President of the United States of America, and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.”

Which shall be signed by the Secretary of the Senate, and sealed with their seal. Which subpœnas shall be directed, in every case, to the marshal of the District where such witnesses respectively reside, to serve and return.

6. The form of direction to the marshal for service of a subpœna shall be as follows :

“THE SENATE OF THE UNITED STATES OF AMERICA,

To the Marshal of the District of ———.

You are hereby commanded to serve and return the within subpœna, according to law.

Dated at Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.
 ———, *Secretary of the Senate.*”

7. The President of the Senate shall direct all necessary preparations in the Senate chamber, and all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial, not otherwise specially provided for by the Senate.

8. He shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial, to discharge such duties as may be prescribed by him.

9. At 12 o'clock of the day appointed for the return of the summons against the person impeached, the Legislative and Executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz :

“I, ———, do solemnly swear, that the return made and subscribed by me, upon the process issued on the ——— day of ———, by the Senate of the United States, against ———, is truly made, and that I have performed said services as therein described. So help me God.” Which oath shall be entered at large on the records.

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

11. At 12 o'clock of the day appointed for the trial of an impeachment, the Legislative and Executive business of the Senate shall be postponed. The Secretary shall then administer the following oath or affirmation to the President :

“You solemnly swear or affirm, that, in all things appertaining to the trial of the impeachment of ———, you will do impartial justice, according to the constitution and laws of the United States.”

12. And the President shall administer the said oath or affirmation to each Senator present.

The Secretary shall then give notice to the House of Representatives, that the Senate is ready to proceed upon the impeachment of ———, in the Senate chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

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

14. All motions made by the parties, or their counsel, shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing, and read at the Secretary's table ; and all decisions shall be had by ayes and noes, and without debate, which shall be entered on the records.

15. Witnesses shall be sworn in the following form, to wit : “You, ———, do swear or affirm, [as the case may be] that the evidence you shall give in the case now depending between the United States and ——— shall be the truth, the whole truth, and nothing but the truth. So help you God.” Which oath shall be administered by the Secretary.

16. Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

17. If a Senator is called as a witness, he shall be sworn, and give his testimony, standing in his place.

18. If a Senator wishes a question to be put to a witness, it shall be reduced to writing, and put by the President.

19. At all times, while the Senate is sitting upon the trial of an impeachment, the doors of the Senate chamber shall be kept open.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Tuesday, May 25, 1830.

The court having been opened by proclamation, on motion of Mr. Webster, Ordered, that the Secretary give notice to the House of Representatives that the Senate are now in their chamber, and are ready to proceed on the trial of the impeachment of James H. Peck, Judge, &c. ; and that seats are provided for the accommodation of the members of the House of Representatives.

The message being sent to the House, that body resolved itself into a Committee of the whole House, Mr. Martin in the chair, and proceeded to the Senate chamber, where they occupied the seats which had been prepared for them. The managers of the impeachment having taken the places assigned them,

James H. Peck, being called to make answer to the article of impeachment exhibited against him by the House of Representatives, appeared, being attended by William Wirt, and Jonathan Meredith, as his counsel; and having been asked by the Vice President whether he was prepared to answer the said article? he replied in the affirmative, and requested that his answer might be read by his counsel. The Vice President then asked him whether the answer he desired to be read by his counsel was his final answer on which he intended to rely? He replied in the affirmative.

The Vice President then directed the counsel to read the answer, and it was accordingly read by Mr. Meredith, in the words following:

THE ANSWER OF JAMES H. PECK

To the Article of Impeachment exhibited against him by the Honorable House of Representatives of the United States.

The said James H. Peck, saving to himself all exceptions whatsoever to the said article, and the charges therein contained, answers and says :

That it is true that this respondent did, in his character of Judge of the District Court of the United States for the District of Missouri, at the December term of 1825, render a final decree in favor of the United States against the claim of the representatives of Antoine Soulard, for 10,000 arpents of land.

It is true, also, that an appeal was then and there taken, by the petitioners, from that decree, to the Supreme Court of the United States.

This respondent further states, that the decree rested on the ground that the inchoate title on which the petitioners relied had not proceeded from an officer who was authorized to originate the same, *so as to bind the Spanish Government to confirmation*; and hence, that whatever the United States, *in their sovereign capacity*, might be authorized to do with such a claim, it was not such a one as a *mere judiciary*, acting on the principles of *established law*, was authorized to confirm, under the act of Congress which had given the court jurisdiction over the subject.

The reasons for the opinion had been assigned *in extenso* at the time of its delivery, though they were not then reduced to writing.

But, as the case of Soulard was the first argued and decided of a long list of Spanish claims which were intended to be brought before the court, the bar was naturally desirous of being put in possession of the grounds of the opinion in a form more precise and permanent than their recollection of it as it had been delivered, *ore tenus*, from the bench; and, with this view, several of them requested

that it might be published at length. And it is true, that, after the appeal had been taken, and after the adjournment of the court at which the final decree had been rendered, to wit, on or about the 30th day of March, 1826, the respondent, in compliance with that request, did cause his opinion to be published in a certain public newspaper, printed at the city of St. Louis, called the *Missouri Republican*; the opinion so published being in substance and effect the same which had been delivered on the bench.

The respondent had observed that such publications had been usual in the United States as well as in England; and he saw no impropriety in yielding to the request of the bar. On the contrary, there seemed to be a peculiar propriety in this case in yielding to it—

1. Because, as the opinion had proceeded exclusively on grounds which had not been fully argued at the bar, and as the branch of law on which these claims necessarily rested was new both to the bench and the bar, the court was disposed to permit those grounds to be re-argued in the next case which might be presented for decision, and which rested on the same grounds; and, with this view, it was proper that these grounds should be opened to the deliberate consideration of the counsel who might be disposed to re-argue them.

2. If the counsel and their clients should become convinced, by the reasoning of the court, that the grounds of the decision could not be shaken, it might save to the parties, as well as to their counsel, much expense and trouble in the presentation of other claims, resting solely on those grounds; and, with this view, also, the respondent deemed it right that this reasoning should be submitted to the deliberate consideration both of the claimants and their counsel.

3. It might happen that there might be other cases, with relation to which facts might exist, that would enable the parties to take them out of the operation of these principles; and the publication of the opinion would apprize them of the necessity of that measure, and give them the opportunity of so shaping their cases as to avoid the operation of those principles.

4. The respondent was justly desirous that the claimants themselves, as well as their counsel, should see and know that these principles, which were understood to involve the fate of many other claims, had not been hastily and inconsiderately assumed by the court; but that they had been carefully and laboriously examined, weighed, and considered, and that the court had been constrained to come to its conclusion, by the force of evidence and of arguments which it could not conscientiously resist.

While all these considerations conspired so strongly to recommend the publication of the opinion, and the measure was justified by the practice of all courts, both in this country and in England, the court perceived no inconvenience which could possibly flow from it.

No damage to the land claimants could result from the publication of the opinion, which might not result in an equal, and, perhaps, superior degree, from the publication of the mere fact that the court had decided against the claim. On the contrary, the statement in the papers, of the general fact that the court had decided against the claim, was susceptible of being misconstrued as a decision against the whole mass of the Spanish claims at large; whereas the published opinion would show that the decision affected no other claims than those which rested on the precise and single ground on which Soulard's claim had been decided. With regard to prejudicing the public mind against the claims by the publication of the opinion, it would be a new thing to apply this principle to the publication of a judicial decision; and, again, what greater prejudice could be thus excited than by the publication of the single fact, that the court had decided against Soulard's claim?

It cannot be supposed that the decision of the Supreme Court on the appeal could be affected by the publication of the Judge's reasoning, except so far as that reasoning was solid, and thus far it would be a proper effect; and there

could be no doubt that the Attorney General of the United States would urge in support of a judgment of affirmance in that case, all the topics, and probably more and stronger ones, than those which had been urged by the Judge of the District Court.

This respondent has been thus particular in setting forth the reasons by which he was induced to yield to the request to publish his opinion; because the article of impeachment exhibited against him seems to imply that the honorable House of Representatives deemed that publication unlawful or improper; or that it considered that publication as inviting or justifying the publication signed "A Citizen," which is set forth in the article of impeachment.

It is true also that, after the opinion of the court had, for these reasons, been published in the "Missouri Republican," to wit: on or about the eighth day of April, 1826, the said Luke E. Lawless did cause to be published, in a certain other public newspaper printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," which is set forth at large in the article of impeachment.

It is true, also, that this respondent, considering this last publication as a contempt of the court, did, in his judicial character, in the honest and conscientious discharge of what he deemed his official duty, proceed to punish it as such in the manner which will be hereafter set forth.

He did consider that publication as a contempt, for the following reasons:

1. Because it misrepresented the opinion of the court which it professed to censure, in a manner calculated to destroy the public confidence in the integrity or intelligence of the tribunal, and to bring the court into disrepute, hatred, contempt, and ridicule; and, having been made by a person who was attorney and counsel in the cause, and who must therefore be presumed to have known and understood the opinion of the court, the respondent did believe, and was justified in believing, that those misrepresentations were wilfully, wantonly, and maliciously made.

2. Because, before, and at the time of the said publication, there were other claims for lands still pending and undecided, in which the said Luke E. Lawless, and others, were of counsel for the petitioners, which other claims were of the same character, and rested for their decision on the same general principles on which the case of Antoine Soulard's representatives had been decided by the court; and the immediate tendency and object of the publication were to prejudice the public mind with regard to these claims; to excite the resentment and hostility of the numerous and influential body of land claimants in Missouri, and their connexions, against the Judge, who alone composed the court; to destroy the public confidence in the integrity and judgment of the tribunal; to influence and restrain the court in the free and independent exercise of its judgment, with regard to these remaining claims, and thus to disturb and interrupt the due and regular administration of justice.

For these reasons, the respondent did consider and adjudge the said publication to be a contempt of the court; and did believe, and does still believe, that he was justified by the constitution and the laws of the land in so considering and adjudging it, and in punishing it as a contempt by the summary process of attachment, in the manner in which it was punished.

In addition to which, it may be observed that the suit to which the publication related was still pending on appeal to the Supreme Court of the United States, and was liable to be remanded again to the District Court for farther proceedings.

The respondent respectfully presumes that the questions presented by the impeachment for the consideration and decision of this honorable Court, are these:

- I. Was the publication, signed "A Citizen," a contempt of the court?
- II. If it was a contempt, was it punishable by the summary process of attachment in the manner in which it was punished?

III. If the court erred in adjudging and punishing it as a contempt, was it an innocent error of judgment on the part of the court, or was it a high misdemeanor, because wilfully and knowingly done in violation of law, and with the intention imputed by the article of impeachment, to wit: wrongfully, arbitrarily, and unjustly, to oppress, imprison, and otherwise injure, the said Luke E. Lawless, under color of law?

This respondent presumes that it is only by making good the affirmative of the last proposition, that the impeachment against him can be sustained. He humbly, but confidently trusts that, at the proper time, he will be able to satisfy the honorable Court not only that this affirmative is untrue, but that all and singular the things which he has judicially done in the premises were dictated by the purest sense of official duty; were warranted and justified by the constitution and known laws of the land; and were free from all feelings, designs, and intention, on his part, wrongfully, arbitrarily, and unjustly, to oppress, imprison, or otherwise to injure the said Luke E. Lawless, under color of law.

In the proper order of this answer, the first and great inquiry is, whether the publication signed "A Citizen," was a contempt of court?

The grounds on which the court held it a contempt, have been already distinctly stated: and the principal purpose of this answer is to show that these grounds have been correctly taken, in point of fact.

The publication was a misrepresentation of the opinion of the court, tending to destroy the respect and confidence of the community in the tribunal and to bring that tribunal into open and public contempt and scandal.

The only difficulty which this respondent experiences in establishing the truth of this proposition, arises from the novel character of the controversy in which the opinion was pronounced. It will be impossible to decide whether the publication misrepresented the opinion, until the opinion itself shall be thoroughly understood; and the opinion cannot be so understood without a familiar acquaintance with the peculiar character of the controversy out of which it grew. In the country in which the publication took place, and in which it was intended to operate, the controversy was understood; and therefore the absurdities which that publication imputed to the court were immediately perceived and felt, and produced their intended effect on all who took their impressions only from that article. To enable the honorable Court to estimate the effects of the publication on the people of Missouri to whom it was addressed, it is necessary that they should possess the same familiarity with the nature of the controversy, the questions involved in it, and the peculiar character of the laws by which it was to be decided. For this respondent is convinced, that, without this familiar acquaintance with the subject, no person who now, for the first time, reads the opinion hastily and superficially, and as hastily and superficially compares it with the publication, will be struck with the misrepresentation; but that such a reader will, on the contrary, be apt to suppose that there is resemblance enough between the argumentative conclusions drawn by the Judge in his opinion, and the *assumptions* imputed to him by the publication, to authorize the belief that the Judge must have acted vindictively in treating it as a misrepresentation and punishing it as a contempt. It is in this that the art and mischief of the publication consist. This honorable Court must have observed, in the course of their experience, that the soundest conclusion which a logician can draw, may be rendered ridiculous by suppressing the reasoning which led to it, and under the pretence of giving the result, by giving it in terms which distort it, without entirely extinguishing the resemblance. It is this species of caricature which pervades the whole of the article signed "A Citizen," and it was from this character that its mischievous tendency and operation arose. But to render this truth palpable to this honorable Court, it is indispensably necessary that they should be able to institute the comparison between the opinion and the publication under those strong lights which can be

furnished only by a familiar acquaintance with the subject-matter of the controversy. This will give trouble. But this honorable Court is sitting in the last resort on a case most deeply affecting this respondent; and he feels the cheering confidence that the cause will now be mastered before it shall be decided.

To produce this effect, this respondent finds it necessary to begin by apprising this honorable Court that Soulard's case was one of those which grew out of the cession of Louisiana to the United States, in 1803. By the third article of the treaty of cession, the United States stipulated that the inhabitants of the ceded territory should be protected in their property. Louisiana belonged originally to France, had been ceded to Spain in 1762, though possession was not taken by this latter power until 1769. In 1800 it had been re-ceded to France, though the possession was retained by Spain until, and even after the cession of France to the United States, in 1803. From these circumstances it was known at the time of the last cession, that there existed various private claims to land in that province, both by French and Spanish subjects, and that these claims were of various characters. Some of them were mere rights by settlement and occupancy without any title whatever derived from either of the preceding governments; others, mere permissions to settle, which had never been surveyed; others, floating concessions for a given quantity of arpents, without any description of place, which had also never been surveyed; some of them were concessions by officers who had no right to make them; others, concessions surveyed, but which had not been carried into grant; and others complete and final grants. It became important to ascertain what portion of these claims were valid, and what spurious. This was necessary as well to enable the United States to keep its faith in protecting the inhabitants of the ceded territory in their property, as to ascertain what portion of the domain still belonged to the United States, and was subject to survey and sale by its authority.

To accomplish these purposes, special officers were first appointed, and then Boards of Commissioners were organized to receive, adjudicate, and report upon these claims to Congress. The claimants were required to present their claims to these tribunals within a limited time, under pain of having them forever barred. The Commissioners were clothed with the most liberal powers of confirmation with regard to all fair claims of given descriptions; but among these provisions there is one to which this respondent deems it important to call the attention of this honorable Court, as marking the sense of Congress with regard to the class of characters by whom it was anticipated that those claims might be presented. The Commissioners were required to note specially, and to report to Congress, *all forged and antedated claims*.

Through indulgence to the land claimants, the time limited by the original law for the presentation of their claims was opened again and again. The Boards of Commissioners were kept in operation for many years; but when at last they were finally closed, it was still found that there were many outstanding claims, which were now pressed on the consideration of Congress with great importunity.

Under this pressure, Congress passed the act of the 26th May, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims."

To two of the provisions of this act, it is important to invite the attention of this honorable Court. By the first section of the law, the persons authorized to appeal to the jurisdiction of the court were the holders of grants, &c. *legally made*, before the 10th March, 1804, *by the proper authorities*. By the second section, the court were required, *in all cases to refer, in their decree, to the treaty, law, or ordinance, under which the claim was confirmed or decreed against*.

These provisions clearly indicated an apprehension on the part of Congress,

that claims might be presented on titles *not legally made by the proper authorities*; and that their confirmation might be urged on grounds other than those solid grounds of treaty, law, or ordinance, which alone Congress meant to *authorize the courts to regard as grounds of confirmation*.

The judges of these courts were thus required, by this act of Congress, to inform themselves of the several and respective powers of the officers employed by the preceding governments in granting the royal domain in Louisiana, and of the various treaties, laws, and ordinances, under which confirmation could be demanded of the courts as matter of right: for the respondent did not consider himself as authorized by the act of Congress to administer any portion of the power of the United States, *in their sovereign capacity*, and, therefore, to confirm every claim which that sovereign, *in the exercise of their free grace*, might confirm. He considered such a power as not being communicable to the *judiciary* under the constitution of the United States; this instrument limiting the judiciary to the exercise of *judicial power* merely. From the constitution of the court, therefore, as well as from the terms of the act of Congress, he considered himself required in every case to call upon the claimant to show the authority of the officer from whom he had derived his title, and to show also the specific treaty, law, or ordinance, by which the court was authorized, *as a matter of right*, to confirm the claim.

The case of Soulard was this: Antoine Soulard claimed 10,000 arpents of land, under a concession alleged to have been made to him in 1796, by Don Zenon Trudeau, the Lieutenant Governor of Upper Louisiana, then called Illinois, and now Missouri. The concession was alleged to have been made for public services. The concession itself, and the petition on which it was founded, were not produced, they being stated by Soulard to have been destroyed through mistake. The court was therefore left to collect from the evidence the particular character of the *public services*, in consideration of which the alleged concession was made; and by this evidence, which was quite vague, it appeared that they were *services in the various characters of Surveyor of Upper Louisiana*, for which it was said he had theretofore received only the usual fees of office; of *Deputy Adjutant of that part of the province for a time*, and of *Informal Adviser or Assistant*, or, as one of the witnesses termed it, the *right arm of the Lieutenant Governor*.

The questions pressed upon the consideration of the court in this case, by the act of Congress, were;

1. Whether Don Zenon Trudeau, the Lieutenant Governor of Upper Louisiana, was authorized by the laws of Spain to make a concession of 10,000 arpents of land, for such services as these?

2. Whether there was any *treaty, law, or ordinance*, to which the court could refer in its decree, for a confirmation of the claim?

With regard to the laws of Spain, all that was known at the time of the decision, was this:

1. That, from the epoch of the discovery by Columbus, the several kings of Spain, in succession, had, from time to time, made orders and decrees relative to granting out the royal domain in the newly discovered countries, which, long before the acquisition of Louisiana by Spain, had been collected and published in a general code, under the name of "*Laws of the Indies*:" to this collection belonged the royal order of 1754, with which it is unavoidably necessary that this honorable Court should become better acquainted in the course of this answer.

2. That when, in 1769, Spain for the first time took possession of Louisiana, under Count O'Reilly, that officer, who had been appointed by special commission Governor and Captain General of the province, had, on the 18th February, 1770, published at New Orleans a set of rules for the express purpose of directing the mode of granting out the lands in Louisiana; at the close of which reg-

ulations he "ordered and commanded the Governor, Judges, Cabildo, and all the inhabitants of the province, to perform punctually all that was required by these regulations."

That, on the 9th September, 1797, the Spanish Governor, Gayoso, had also published at New Orleans additional regulations, addressed to the same specific purpose of granting out the royal domain in that province.

And, finally, that, on the 17th July, 1799, the Intendant, Morales, to whom, in lieu of the Governor, the power of granting lands had been recently transferred, had published at New Orleans another set of regulations, directed to the same purpose, the granting of the royal lands, in which he recited those of O'Reilly and Gayoso as having furnished the basis of his own.

So that here were two codes of Spanish law presented for the consideration of the court.

1. The code called "the Laws of the Indies," made for the government of the Spanish possessions prior to the acquisition of Louisiana.

2. The code composed of the regulations of O'Reilly, Gayoso, and Morales, made and published for the express purpose of regulating the grants of the royal lands in Louisiana.

These two codes were fundamentally different in their policy. The Laws of the Indies looked to the raising of a revenue by a sale of the lands. The code of the Spanish Governors, on the contrary, looked to a gift of the lands for the encouragement of population and agriculture, and the raising of stock; and under the latter code the quantity of lands given was always proportioned by a fixed standard to the means of the settler; that is, to the number of his laborers or the quantity of his stock.

The two codes were entirely different, also, in the organization of the officers employed in originating and completing the titles

Under the former, by virtue more particularly of the royal order of 1754, the officer who originated the title was a *sub-delegate Judge*, appointed by the *Vice Roys and Presidents of the Royal Audiencias*, whose appointment was expressly required to be notified to the *Secretary of State and universal despatch of the Indies*; and the *sub-delegate*, so appointed, had also express power to *sub-delegate his commission to others*.

But, in Louisiana, there were neither *Vice Roys, Royal Audiencias, nor sub-delegate Judges*, so appointed, and armed with such power of sub-delegation.

Under the royal order of 1754, the officers authorized to confirm an incipient title were the *Royal Audiencias*.

Under the code of regulations in Louisiana, the whole arrangement was radically different, and is thus briefly delineated in the 12th regulation of O'Reilly; which was the regulation in force at the date of the alleged concession to Soulard by Trudeau, to wit, in 1796:

"12. All grants shall be made in the name of the king, by the *Governor General of the Province*; who will, at the same time, appoint a *Surveyor to fix the bounds thereof, both in front and depth, in presence of the Judge Ordinary of the District, and of two adjoining settlers, who shall be present at the survey. The above mentioned four persons shall sign the verbal process which shall be made thereof, and the Surveyor shall make three copies of the same; one of which shall be deposited in the office of the Scrivener of the Government and Cabildo, another shall be delivered to the Governor General, and the third to the proprietor, to be annexed to the titles of his grant.*"

With two codes thus strikingly different in their policy, arrangements, and details, the question was, to which of them the court was to refer, in order to test the power of *Don Zenon Trudeau*, the Lieutenant Governor of Upper Louisiana, to make to Soulard the concession in question; that is to say, a *concession of 10,000 arpents of land, as a reward for services of the peculiar character of those alleged by Soulard as the basis of his title.*

As preparatory to that exposition of the opinion which relates to this inquiry, and which is indispensably necessary to the understanding of the impeachment, this respondent annexes hereto, as part of his answer, the printed brief prepared for the Supreme Court of the United States on the trial of the appeal in Soulard's case, which he understands and believes was admitted by the counsel for the appellant to give a full view of that case as it stood on the appeal record, to which printed brief is also appended the opinion of this respondent, as it was published in the Missouri Republican. This exhibit is marked A.

This respondent prays the honorable Court to have reference, also, to so much of the two codes, to which he has already referred, as is believed to affect this investigation, to wit :

1. "Spanish Regulations of Grants," extracted from the "Laws of the Indies," of which a translation will be found in the edition of the laws relating to public lands, printed by order of the House of Representatives in 1823—Appendix, pp. 966 to 977, inclusive. This reference includes the royal regulation or order of October 15th, 1754, which has been so often mentioned, and which belongs to the 31st article of the Laws of the Indies.

2. To the regulations of O'Reilly, Gayoso, and Morales, to be found in the same Appendix, from page 978 to 986, inclusive.

On the argument of the cause, the counsel for Soulard's representatives had insisted that the power of the Lieutenant Governor, Trudeau, to make the concession in question, was to be tested by the first mentioned code, and especially by the royal order of 1754, referred to in the 81st article of the *Spanish Recopilacion*. The counsel insisted, that, although these laws had been made prior to the acquisition of Louisiana, yet, that, having been made for the government of the Indies, generally, as soon as Louisiana became incorporated with the Spanish dominions, these laws introduced themselves into the newly acquired territory, *proprio vigore*, and governed the grants of lands therein, as they had before governed those grants in other parts of the Spanish dominions. They insisted farther, that, if the Laws of the Indies (including of course the royal order of 1754) did not introduce themselves, *proprio vigore*, into the newly acquired territory, but required some special act of the King or his representative to introduce them, that act had been furnished by the proclamation of Governor O'Reilly, when he took the possession of Louisiana, by which, it was alleged, he had expressly introduced the Laws of the Indies.

To these propositions the court could not assent, but held and decided—

1. That the Laws of the Indies did not introduce themselves *proprio vigore*, into Louisiana, immediately on the acquisition thereof, but that it rested with the new sovereign to say by what laws the grants of the royal domain there should be regulated.

2. That, although Governor O'Reilly had, by his proclamation, declared the Laws of the Indies to be in force, to *some extent*, yet it could not be believed that he had intended to introduce such parts of that code as regulated the grants of land ; because he had, himself, on the 18th February, 1770, introduced a new code, directed to the express purpose of regulating the grants of land in Louisiana ; which new code was radically and fundamentally different from the "Laws of the Indies," in the very policy on which the two systems were bottomed—the first looking to the raising of a revenue by *the sale*, and the last, to the encouragement of population and settlement by *a gift* of the lands.

3. In the organization of the officers employed in granting or distributing the royal lands ; and,

4. In the details under which titles to lands were, under these different systems, carried into complete grant, from their inception to their consummation.

But admitting, for the sake of the argument, that the 81st article of the "Laws of the Indies," that is, the royal order of 1754, was in force in Louisiana, it remained for the claimants to show that, by force of that order, Trudeau, the Lieutenant Governor of Upper Louisiana, was authorized to make the con-

cession of 10,000 arpents to Soulard, in reward for the peculiar services on which that concession was alleged to have been made.

This the counsel for the claimant attempted to prove by the following propositions :

1. That Trudeau was a sub-delegate Judge in Upper Louisiana.
2. That, as a sub-delegate Judge, he possessed all the power of this officer, under the royal order of 1754.
3. That, by this order, sub-delegate Judges were authorised to make gifts of lands to any extent and for any cause, at pleasure ; and, consequently, that he had the power to make the gift in question as a reward for those services.

To these propositions, also, the court could not assent :

I. Because, if the royal order of 1754 was in force in Louisiana, proceeding as it did from the authority of the King, it could not be changed at the will of a Governor ; and hence, that, to clothe the sub-delegate Judges with the powers conferred by that ordinance, it was essentially necessary, 1. *That they should have been appointed in strict conformity with its provisions ; that is to say, that they should have been appointed, as that order had expressly enjoined, by the Viceroy and Presidents of the Royal Audiencias :* 2. *That the appointment should have been reported to the Secretary of State and universal despatch of the Indies :* and, 3. *That these sub-delegates should have the power of sub-delegating their commissions to others in distant parts and provinces of their stations.*

But it was not pretended, 1. That Don Zenon Trudeau had been thus appointed. It was proved, and admitted, that he held his commission as *Lieutenant Governor merely from the Governor General of the Province.* The form of that commission (to another Lieutenant Governor) was before the court, and composes a part of the printed brief which has been exhibited with this answer, being the document distinguished by the letter R, (page 51 of the brief.) It will be observed that this commission appoints him merely as "*Lieutenant Governor of the establishments of Illinois,*" gives him no power as a sub-delegate Judge, and no authority, in any other character, to meddle with the grants of public lands ; nor does it contain any specification of his powers, even as Lieutenant Governor : 2. *It was not shown, nor alleged, that there had been any report to the Secretary of State and universal despatch of the Indies of the appointment of Trudeau as a sub-delegate Judge, according to the requisition of the royal order of 1754 ; nor,* 3. *was it pretended that he had any power to sub-delegate his commission to others.*

It was not pretended that Trudeau himself had any written commission, as a sub-delegate Judge, even from the Governor General of the province ; the claimant relied on parol proof merely, that the Lieutenant Governor was, *ex officio*, a sub-delegate.

This striking difference in the mode of appointment and of sub-delegation in the power of the sub-delegate Judge, under the order of 1754, and under the practical operation of the land system in Louisiana, was among the auxiliary arguments of the Judge, to show that the order of 1754 was not in force, and was not considered as in force in Louisiana.

But his conclusion was, that, if it was in force, inasmuch as it was the voice of the King, it must be obeyed ; that it was not in the power of the Governor to dispense with any part of its requisitions ; that, under that order, no one could exercise the powers of a sub-delegate but one who had been appointed and commissioned in compliance with those requisitions ; and that, if that order was in force in Louisiana, (which, however, the court had denied,) the Lieutenant Governor of Upper Louisiana was not a sub-delegate, within the intention of that ordinance ; because he had not been appointed in compliance with its requisitions.

But admitting again, for the sake of the argument, that the powers of the Lieutenant Governor were commensurate with those of the sub-delegate Judge, under the royal order of 1754 ; had the latter, under the powers conferred upon him by that order, the power to make such a concession as that on which Soulard relied ; a concession for 10,000 arpents of land, in reward for services of that specific character ?

The counsel for the claimant insisted that he had this power, by force of the Spanish word *mercedes*, which is found in the preamble of the ordinance ; which word, it was alleged, meant *gifts*, and nothing else but *gifts*, and that, *standing as it did, without limit*, it carried with it *the broad power to make gifts at pleasure*, and, consequently, the power to make the gift in question in reward of services.

To render the opinion of the Judge on this point intelligible, it will be important for this honorable Court to observe that the preamble to the royal order of 1754, in which this word *mercedes* is found, is a mere recital of the notices which led the King to make that ordinance. After an enumeration of these motives, the preamble concludes with these words : " I have therefore resolved that, in the (*mercedes*, rendered in the appendix already cited) *grants*, sales, and compromises of royal cultivated and uncultivated lands, now made, or which shall hereafter be made, *the provisions of the regulation*, (that is, *this regulation*,) *shall be faithfully observed and executed.*" The order then proceeds, under fourteen distinct and separate heads or articles, *to detail minutely, all the powers and duties* of the several officers employed in making grants of the royal lands ; and, among others, *all the powers and duties of the sub-delegate Judge*. And it concludes with a solemn warning from the King, that all the provisions of t at regulation should be strictly and punctually observed by his Viceroys, Audiencias, Presidents, and Governors, of all his dominions of the Indies, and by the *sub-delegates*, and other persons whom its observance concerned, and that it be not violated for any cause or pretext.

Hence it was manifestly necessary to look for the powers of the sub-delegate under that ordinance, *not in the general reciting words of the preamble, but in the regulations themselves, in which those powers were specifically detailed and defined*. In examining those regulations, with this view, it will be observed by this honorable Court, that their great and sole business is to regulate *the sale and composition of the royal lands with a view to revenue*. This, indeed, had been announced by the preamble to be the object.

There is only *one* of those regulations in which a *gift of any kind* or for *any cause*, is contemplated ; and that is the *second*, which, in its close, refers, among others, to laws 14 and 15 of the *Recopilacion*, on turning to which, (pp. 969, 970 of the Appendix to the Land Laws,) and reading them in connexion with this second regulation, it will be seen that *gratuitous reservations* are made for *pasturage* and *commons* to the towns, and for *tillage* and *herding* for the aborigines of the country.

And the only regulations of the royal order, which contemplate *rewards* are the seventh and eighth, by which the sub-delegate Judges are authorized to *reward those who shall give information of intruders without title, upon the public lands, with a moderate portion of those lands, with regard to which they shall have given information*.

With these two specific exceptions, there is not a line nor a word of the royal order of 1754, which contemplates a power in the sub-delegate Judges to make either gift or reward.

The conclusions of the court, therefore, on this question, were, that, even if the powers of the Lieutenant Governor of Upper Louisiana were to be measured by those of the sub-delegate Judge, under the royal order of 1754, he possessed no power to make such a concession as this, because the latter officer possessed no such power : that the word *mercedes*, found in the preamble, did not necessarily mean *gifts* ; that it might be translated, as it had been translated, *grants* ; or that it might be rendered *rewards* ; that, whether it meant the one or the other, the extent to which the sub-delegate was authorized to make either *grant, reward, or gift*, was to be sought for, not in the *preamble*, which is mere recital, but in the *regulations themselves* ; that, by the regulations, sufficient effect was given to the word in either of those senses ; if it meant *grant*, it was satisfied by those articles which regulated the grant of lands for sale and composition ; if it meant *rewards*, it was satisfied by the 7th and 8th articles, which

authorize rewards to those who give information of intruders on the public lands ; if it meant *gifts*, it was satisfied by the 2d article in connexion with laws 14 and 15 of the *Recopilacion* therein referred to, which authorize gifts to the inhabitants of towns for pasturage and common, and to the Indians for tillage and herding, according to their wants ; but in neither of its senses was there any article of the ordinance which authorized a sub-delegate to make a *grant, gift, or reward*, like that which was claimed for Soulard, to wit : a concession for 10,000 *arpents of land, as a reward for services rendered as Surveyor, as Adjutant, and as privy Councillor and assistant to the Lieutenant Governor.*

Upon this whole head of argument, therefore, the conclusions of the court were—

1. That the royal ordinance of 1754 was not in force in Louisiana ;
2. That, if it was, the Lieutenant Governor of Upper Louisiana had not the powers of a sub-delegate under that ordinance, because he had not been appointed in conformity with its provisions ;
3. That, if he even had those powers, he had no power to make the concession in question ; because, a sub-delegate under that ordinance could not have made *such a concession in reward for such services.*

Since, then, no authority could be derived to Don Zenon Trudeau from “the Laws of the Indies,” to make the concession in question, the remaining inquiry was, whether such authority was to be found in the only other remaining code of Spanish law which was before the court, the regulations of O’Reilly—and it was admitted on every hand, that these gave no such authority : on the contrary, although they did contemplate a *gift of the lands*, it was a *gift studiously and exclusively directed to the accomplishment of certain political objects, to wit : the speedy settlement of the province, the promotion of its agriculture, and the increase of its herds and stocks.* Hence, it authorizes no gifts or grants, *except with relation to the one or the other of these objects* : if settlement and agriculture were the objects, the quantity of land to be granted was to be regulated by the number of the family and of the working hands of the settler ; and the settlement and culture are required to be made within a given time, as the conditions of the grant : if pasturage and herding were the objects, the quantity granted was to be regulated by the number and quantity of the stock : but, even in the last case, in which the larger range seems to have been taken by the regulations, *the quantity was in no case to exceed a league square, which is 7,056 arpents.*

But in the case before the court, the concession was for 10,000 *arpents*, and *it had no reference to either of the objects which were the exclusive objects of the regulations, settlement, agriculture, or stock ; but was a grant in reward for services ; a species of grant which had no place, nor even shadow of a type in any one of those regulations.*

The counsel for the claimants were so well satisfied that the concession could not be supported on the authority of O’Reilly’s regulations, that their effort was to get rid of them altogether. With this view, they contended that those regulations were not made for Upper Louisiana ; that, so far as they contemplated agriculture, they looked merely to small settlements in the lower districts of the province, fronting on the Mississippi, as was manifest from their language ; and that, so far as they contemplated pasturage and herding, and the raising of stock, they were limited to the grazing districts, which were specifically named in the regulations, to wit : the Opelousas, Attakapas, and Natchitoches.

In answer to this, the court, admitting the force of the argument as far as it went, held the opinion, that, although that part of the province, then known by the name of Illinois, afterwards called Upper Louisiana, and now Missouri, was not expressly named in the regulations, yet these were avowedly made for *the whole province*, and the Governors, Judges, Cabildos, and all the inhabitants of the province of Louisiana were expressly required to conform punctually to those regulations ; which of course included Illinois as a part of the province : and farther, that the *policy* of the regulations manifestly extended equally to every

part of the province ; nor could the court discern, nor was any reason assigned or attempted, why settlement, agriculture, and the raising of stock, should be so studiously contemplated in every other part of the province, and wholly neglected in Illinois ; why actual settlement and culture should be made indispensable conditions of the grants everywhere else, and not be required at all in Illinois ; nor why the *marimum* grant should be limited to a league square in Opelousas, Attakapas, and Natchitoches, and remain unlimited in Illinois. The court found this policy to be not only the predominant and exclusive object of O'Reilly's regulations, which were in force at the date of the alleged concession to Soulard in 1796, but the same policy reigned throughout the regulations of the Spanish Governor, Gayoso, which were passed in the following year, 1797 ; and in which, *Illinois is expressly named*, as well as in those of the Intendant Morales, in the year 1799. Now the concession in question was directly at war with the whole of *this policy* ; and even if those regulations were wholly set aside as inapplicable to Upper Louisiana, it would still have remained for the claimant to show the authority of Trudeau to issue that concession, and to point the court to the law or ordinance by which it could be confirmed.

In the course of this investigation, it became necessary for the court to advert to the royal order of the 24th of August, 1770, to which a reference is made by Morales, in the preamble to his regulations.

This royal order of the 24th August, 1770, was not before the court, nor was anything then known of its character or contents, except what was to be collected from the very slight mention of it which had been made by Morales ; and all that he says of it is in these words : "The King, whom God preserve, having been pleased to declare and order by his decree, given at Sta. Lorenzo, the 22d October, of the last year 1798, that the intendency of these provinces, to the exclusion of all other authority, be put in possession of the privilege to divide and grant all kind of land belonging to his crown ; *which right, after his order of the 24th August, 1770, belonged to the civil and military government,*" &c. Morales then proceeds to say : "After having examined, with the greatest attention, *the regulation made by his Excellency Count O'Reilly, the 18th February, 1770, as well as that circulated by his Excellency the present Governor Don Manuel Gayoso de Lemos, the 1st January, 1798, and with the counsel which he has given me, &c. &c. I have resolved that the following regulations shall be observed.*"

Thus neither the court nor the bar knew anything more of this royal order of the 24th August, 1770, than that, after its date, the power to grant the crown lands in Louisiana, belonged to the civil and military government. But this was precisely the effect of the regulations of O'Reilly ; so that, so far as anything was then known of this royal order, there was no conflict between it and these regulations, and therefore no necessary or implicative repeal of the latter ; on the contrary, they were, so far as they were both known, perfectly concordant ; and as, after the date of that order, lands continued to be granted in conformity with O'Reilly's regulations, the court inferred that there was nothing in that order which had repealed or superseded those regulations.

This respondent will here observe, that, since the decision in Soulard's case, a copy of the royal order of the 24th August, 1770, has been procured, and it is found that the inference drawn by the court from existing appearances was correct ; that order being nothing more nor less than a mere simple ratification by the King, of the antecedent regulations of O'Reilly, of which a copy had been forwarded to Madrid for the royal consideration. Of this order, as well as of the correspondence which produced it, a copy will be herewith exhibited, if it can be procured in time, and marked B.

That which has been stated, was, in effect, all that was said by the court in relation to this *then* unknown order of the 24th August, 1770, to wit : That nothing had been shown which presented that order as necessarily in conflict with O'Reilly's regulations, and thereby producing either a positive or an im-

plied repeal of them ; and that, as lands continued, after the date of the order, to be granted in conformity with O'Reilly's regulations, the court was justified in the conclusion that these regulations remain in force, notwithstanding that order.

But if the counsel could have established the proposition that O'Reilly's regulations had been, by any cause, superseded or annulled, the counsel for the claimant would have been as far as ever from establishing the authority of Trudeau to issue the concession in question ; because it was impossible for the court to adopt the wild conjecture that the unknown order of the 24th August, 1770, contained such authority, and to refer to that in its decree as the basis of a confirmation.

The counsel for the claimant, in farther support of the concession, placed before the court three or four cases of concession, made to others by the Lieutenant Governor of Upper Louisiana, not in conformity with the regulations of O'Reilly, Gayoso, or Morales, but which had nevertheless been confirmed by the Governor, and by the Intendant Morales, and relied upon these acts of confirmation by the Governor and Intendant, as furnishing presumptive proof of the power of the Lieutenant Governor to originate concessions, without regard to the limitation imposed by these regulations.

These concessions now form a part of the exhibit A, annexed to this answer. It will be observed that they are all below the quantity of a league square, the *maximum* fixed by the regulations where pasturage and herding was the object ; but exceeding 800 arpents, the *apparent maximum*, where agriculture was the object. In all other respects they conform to the policy of the regulations, the grants being confirmed expressly on the conditions of settlement and culture, within the time therein limited.

The question before the court was to what extent the irregular concessions, thus confirmed, established a power in the Lieutenant Governor to originate a *binding concession, without regard to the restrictions and limitations imposed by the regulations*. The court admitted that they did raise such a *presumption* ; but that no written law or authority being shown for such concessions, it was *but a presumption*, which was to be weighed against the other evidence in the cause. In performing this duty, the court had before them, on the one hand, the published regulations, proceeding from the highest authority in the province, which gave no power to issue such concessions ; on the other hand, there were three or four such irregular concessions, which had, nevertheless, been confirmed by that highest authority. The question was, whether it was most reasonable to refer those *confirmations* to the power of the *sovereign authority within the province* to dispense with their own regulations in those particular instances, or to refer them to an unlimited power in the Lieutenant Governor to issue concessions to any extent, and for any purpose, which the Governors and Intendants were bound to confirm ? The latter presumption at once abolished the whole of the published regulations, or reduced them to a dead letter : the former left them in full life, but with a dispensing power in the lawgiver to abate their rigor in particular cases. The court, therefore, thought this the most rational conclusion ; and, in illustration as well as in confirmation of it, the honorable Court will observe in the last sentence of the 15th law of the recopilacion (appendix to the land laws, page 970,) a striking instance of the same kind, in which the King of Spain, himself, confirmed concessions, which he declares, at the same time, had been made by public officers who had no authority thereunto.

While, therefore, the court admitted that a *presumption* in favor of the power of the Lieutenant Governor, to a certain extent, did arise from those confirmations, that presumption was believed to be encountered by evidence of a higher nature, which overthrew it, and forbade the conclusion that the Lieutenant Governor possessed the unlimited power to *bind his superiors* to confirmation, which was attempted to be derived from it.

In the course of the argument, it was suggested by the counsel of the claimants, as highly probable that we were not in possession of all the laws and ordinances

which bore on the grant of lands in Louisiana, but that there were possibly others besides those of O'Reilly, Gayoso, and Morales, which, if they could be commanded, would show that the concession in question had been legally issued by the proper authority. To this the court answered, that, if there had been any others, they must be believed to have been known to the Intendant Morales; and that, if they had existed, they would have found a place in the recital of the acts of his predecessors, contained in the preamble to his own regulations. But that, having recited only those of O'Reilly and Gayoso, the presumption was a fair one, that they were all which had existed: in addition to which, no witness had been able to speak of any such regulations.

But again; the court was required by the act of Congress to refer in its decree to the law or ordinance on which it founded its confirmation; and to enable the court to satisfy this requirement of the act, the law or ordinance must be shown and not conjecturally guessed at. If Congress had intended that the acts of the Lieutenant Governor should of themselves be the evidence of his authority, that enlightened body would never have thrown upon the court, in terms so clear, distinct, and repeated, the duty of inquiring whether the concession, &c. was legally made by the proper authority, and have required the court, also, to refer in its decree to the specific law or ordinance under which the confirmation was made.

It was further urged by the same counsel, that, although neither the royal order of 1754, nor the regulations of O'Reilly, Gayoso, or Morales, expressly authorized such a concession; yet, that neither of them prohibited it, and that hence the authority must be believed to have been regularly exercised. To which the court answered, in effect, that the question was not what these laws or ordinances prohibited, but what they authorized. That the claimant coming before the court for confirmation, was bound to show affirmatively, by some law or ordinance, that the concession on which he relied was legally made by a person duly authorized to make it; that he was therefore bound to point the court to the law or ordinance which gave the authority in question; that, to show that these laws did not expressly prohibit it, did not by any means prove that they authorized it; that the opposite argument was founded on the erroneous postulate that all power existed which was not prohibited, whereas, in truth, no power existed but such as could be shown to have been granted.

There was another view of this subject, which this respondent, in the discharge of his official duty, considered himself bound to take. In describing the claims which were to be submitted to the court for its decision, the act of Congress gives, among others, this feature: all such as "might have been perfected into a complete title, under and in conformity to the laws, usages, and customs, of the government under which the same originated."

The concession on which Soulard relied, was alleged to have been made by Trudeau, in April, 1796. From that time until the cession of the province to the United States, he had not taken a single step towards the completion of his title. So far from having settled, planted, or cultivated the lands, he had not even located or surveyed them until February, 1804. In the mean time, the Spanish Governor, Gayoso, by his regulations in 1797, and the Intendant Morales, in 1799, had required all persons to whom lands had been granted, to settle and improve them within a limited time, under pain of forfeiture—Gayoso giving one year for that purpose, and Morales three. This requisition Soulard had wholly neglected. His title, therefore, had been subjected to forfeiture, and was in that condition when the sun of the Spanish power had set in Louisiana. Under these circumstances, it was impossible for the court to affirm that this was a concession which might have been perfected into a complete title according to the laws, usages, and customs of the government under which it originated. It did not at all impugn the soundness of this conclusion, that the laws of Gayoso and Morales, which contained the requisition, were subsequent in point of date to the alleged concession of Trudeau, because they were reg-

ular calls on the holders of complete titles to comply with the conditions which were requisite to their completion, and had a precedent in point in the Laws of the Indies.

To avoid this conclusion, the counsel for the claimant had argued that the regulations of Morales had never been duly promulgated in Upper Louisiana, and consequently, that Soulard could not be supposed to have notice of this requisition.

To which the court answered, that such a publication had been proved as must have brought them to the notice of Soulard, who was the surveyor of the Upper province. The evidence of this promulgation is in the exhibit A, which is annexed to this answer, by which it appears that the Lieutenant Governor had officially received from Morales six copies of these regulations, at the post of St. Louis, his own place of residence and that of Soulard, who was in his intimacy; that the private Secretary of the Governor had also posted up another copy in front of the Government House; and, among the confirmed claims presented by the petitioner himself, as evidence of the Lieutenant Governor's power to issue concessions without limit, there is a recital of the publication of those regulations, as well as an official act of Soulard, bearing date in 1802, in which he makes express reference to the 16th article of the Instructions of the Intendant, thereby fixing the proof of knowledge on himself.

There is only one other point in the opinion, to which this respondent will here slightly call the attention of this honorable Court. The counsel for the claimant adverted, in the course of their argument, to that part of the act of 26th May, 1824, which requires the court to determine the question of title according to the several acts of Congress, &c.; but no act of Congress was pointed out, which seemed to the court to authorize the confirmation of the claim then under consideration; and the court accordingly expressed this opinion.

With this outline of the principles established by the opinion, for the fidelity of which he appeals to the opinion itself, this respondent now begs leave to turn the attention of this honorable Court to the publication of Luke E. Lawless, signed "A Citizen," barely requesting this honorable Court to bear in mind that this latter article appeared in a different newspaper from that in which the opinion had been published—a paper of a different political complexion, supported for the most part by different subscribers, and, consequently, that few if any of the readers of the article signed "A Citizen," could have any knowledge of "the opinion" which it professed to censure, other than that which they derived from the article itself. This honorable Court will also be pleased to observe, that this article does not profess to *reason at all* on the principles maintained by the opinion, but consists entirely of a series of *assumptions* (as the writer styles them) which it imputes to the Judge, and with regard to the most of which (as the writer himself justly observes) reasoning was not *absolutely necessary*: for, in the terms in which they are imputed, they are such revolting absurdities, that it was impossible to read and to believe them, without presuming the Judge to be either deficient in understanding, or destitute of integrity.

The writer begins with a *contemptuous misrepresentation*. At the end of the opinion, this respondent had used the following expression: "The decision of most of the points having proceeded chiefly upon grounds which had been little or not at all examined in the argument, it is deemed proper to remark, that *counsel* will not be excluded from again stirring any of the points which have been decided, *when they may hereafter arise in any other cause.*"

No man, whether lawyer or not, could have sincerely mistaken the meaning of this permission. But the writer of this article affects to understand it thus: "I observe, that, although the Judge *has thought proper* to decide against the claim, he leaves the ground of his decree open for further discussion. *Availing myself, therefore, of this permission,*" &c. thus leaving his readers to believe

the judge was so profoundly ignorant of what belonged not only to the *dignity*, but even to the *decorum*, of the judicial character, as to have invited the general discussion of his opinion in the public newspapers, and that the ridiculous view which the writer was about to give of that opinion, was made by the Judge's own permission. The sneer with which this wilful and wanton perversion is introduced—"Although the Judge has thought proper to decide against the claim"—and the palpable and gross nature of the perversion itself, can leave this honorable Court in no doubt of the spirit and intention with which the publication was made.

"Judge Peck," says the writer, "seems to me to have erred in the following assumptions, as well of fact as of doctrine."

The honorable Court will be pleased to observe, that, in the opinion, this respondent had assumed, as a postulate, no one position, either of fact or doctrine, as the basis of his decision; but that every conclusion on which the opinion rested, was bottomed on evidence, or deduced by argument. Yet, according to the common acceptation of the English language, the readers of this article were informed that the Judge had bottomed his decision on the stupid and ridiculous assumptions which were about to be enumerated.

"1. That, by the ordinance of 1754, a sub-delegate was prohibited from making a grant in consideration of services rendered, or to be rendered."

The Court will be pleased to observe, that the writer here suppresses the important fact that the Judge had decided the ordinance of 1754 not to be in force in Louisiana; and that, consequently, according to his opinion, it was immaterial to the land claimants in that province, what the construction of the ordinance might be. He also suppresses the reasoning by which the Judge had gained his conclusion, and then imputes to him a different conclusion which would have been manifestly false, and which every reader of the ordinance would see at once to be false: for the ordinance contains *no such prohibition*; and the Judge had not assumed that it did. On the contrary, he had admitted that it did authorize the sub-delegate to make grants in reward of services of a certain description. But he said that that ordinance nowhere authorized a sub-delegate to make *such a concession as that which was in question before the court*—a concession for 10,000 arpents of land, and for such services as those which were alleged to have been rendered by Soulard; whereas, the court is here charged with having assumed that the ordinance of 1754 contained a *positive prohibition* on the sub-delegates from making grants in rewards of any kind of services rendered or to be rendered. These last words, so entirely gratuitous, contribute essentially to mark the *quo animo* of this misrepresentation. To manifest its materiality, and the effect which it was calculated to produce, and, as the respondent believes, it was intended to produce, in Missouri, it is proper to state, that, besides Soulard's case, it is well known that there were in Missouri many other unconfirmed concessions by the Lieutenant Governor, in reward of services rendered or to be rendered, which had still to abide the judgment of the court; and although as yet no Spanish law or ordinance had been produced, under which they could be confirmed, there was a common impression throughout the country that there did exist, or had existed, some such law or ordinance, which would yet make its appearance in protection of those claims. The royal order of the 24th August, 1770, had not yet been seen, and sanguine hopes were entertained that, upon its production, it would be found to be broad enough to cover all the claims; and, although the recital of the regulations of O'Reilly and Gayoso, in the preamble to those of Morales, forbade the conclusion that there was anything farther in the form of regulations, from which light could be expected, still it was hoped and believed that, in some hitherto undiscovered commission or letter from the King to his Governors, an authority, or some color of authority, would be found for these concessions, even if the order of the 24th August should fail to shield them. One of the causes which contributed to keep alive the hope, was, that none of the laws or ordinances which had been

produced, contained anything like a direct or positive *prohibition* of these concessions. This, having been strongly pressed in the argument of Soulard's case, had been admitted as strongly as anything can be admitted by implication that there was no such positive prohibition. But here is this writer charging the court with having assumed the direct reverse. If he had informed his readers that the court had declared the ordinance of 1754 not to be in force in Louisiana, this misrepresentation would have been comparatively harmless. This, however, he keeps out of view. He permits them to believe that the court considered that ordinance as in force in that province, and as containing a prohibition fatal to all these claims; thus holding up the Judge to this numerous body of exasperated land claimants as attempting to apply an extinguisher to their last hope, by drawing from the ordinance of 1754 a prohibition which every boy that could read could see was not there.

"2. That a sub-delegate in Louisiana was not a sub-delegate as contemplated by the above ordinance."

To the readers of this article, who had never seen the opinion of the Judge, (which was the case with a great mass of its readers) this charge must have exhibited the Judge in the light of having *assumed* the ridiculous solecism "that a sub-delegate was not a sub-delegate," since to *such a reader* the additional words "as contemplated by that ordinance," could have presented no intelligible qualification of the absurdity. Here again the effect is produced of the suggestion of a falsehood, by the suppression of the truth. For the important truth that the court had held the ordinance of 1754 not to be in force in Louisiana, is suppressed. The important position, that, if that ordinance was then in force, it was necessary that the sub-delegate judge should be appointed in conformity with its provisions, was also suppressed. The admission that the Lieutenant Governor had not been thus appointed a sub-delegate, was also suppressed: and, finally, the conclusion of the Judge, that, *if that ordinance was then in force*, the Lieutenant Governor, *not having been appointed in conformity with its provisions, was not a sub-delegate within its intention*, is distorted into the naked and unexplained absurdity, that a sub-delegate in Louisiana was not a sub-delegate within the contemplation of that ordinance, although (for aught that appears to the contrary in the charge) he might have been appointed in strict conformity with its requisitions.

"3. That O'Reilly's regulations, made in *February*, 1770, can be considered as demonstration of the extent of the granting power, either of the Governor General or the sub-delegates under the royal order of August, 1770."

It will be shown to this honorable Court, on the trial, that, in the original printing of this article, the dates of February and August were *italicised*, for the manifest purpose of directing the attention of the reader more pointedly to the absurdity imputed to the Judge, of *assuming* that O'Reilly's regulations of February, were to be considered as *demonstrative of the extent of the granting power, either of the Governor General or of the sub-delegates, under the subsequent order of the King, of August, 1770.*

This whole charge, as this honorable Court cannot but discern, is a gross and wanton perversion of the court's conclusion, and manifestly intended to bring the court into public contempt and ridicule. The court never did commit nor insinuate the absurdity of referring to the *prior regulations* of O'Reilly, as being, *in themselves, demonstrative of the granting power under the subsequent royal order of August, 1770.* The court did consider *the fact* that, *after the date of the royal order, grants still continued to be made in conformity with the regulations of O'Reilly, as justifying the inference, that the royal order (the extent of which was admitted to be unknown to all) was not in conflict with these regulations, in this particular.* This inference, it must be perceived, was drawn from *matter of fact subsequent to the date of the royal order*, to wit: that the regulations were still permitted to operate *after the date of that order*: whereas the writer, whose obvious and uniform purpose it is to misrepresent and expose the

court to contempt and ridicule, perverts *this fair inference of reason*, into an *absurd assumption*, on the part of the Judge, that the *prior regulations of O'Reilly, of themselves, demonstrated the whole extent of the subsequent unknown order of the King, with regard to the granting power of the Governor General and sub-delegates.*

"4. That the royal order of August, 1770, (as recited or referred to in the preamble to the regulations of Morales of 1799,) related exclusively to the Governor General."

This is another wanton and wilful perversion of the reasoning and conclusion of the court. The court never pretended to indicate the whole extent of the royal order of August, 1770. All that the court said on the subject was a mere paraphrase of what Morales himself had said. The Intendant had declared, in his preamble, that, "after the date of that order, the privilege of dividing and granting all kind of lands, belonging to the crown, belonged to the civil and military government." The language of the court, as found in the opinion, is this: "We have the testimony of Morales, the Intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military government, after the order of the 24th August, 1770: the powers of the civil and military government both centered in the Governor General. To him belonged the power to divide and grant lands in virtue of this order."

Thus Morales had affirmed, *not the whole extent*, but *one feature* of the order of 1770. The court did nothing more than to echo his language, *with regard to this one feature*: and this is perverted by this writer into an assumption, on the part of the court, that the order of 1770 related exclusively to the Governor General.

The mischief of this misrepresentation, in Missouri, cannot be estimated by this honorable Court, without a distinct knowledge of the fact, that, with but one or two exceptions, the unconfirmed claims had originated with the Lieutenant Governor. The charge, therefore, that the court had decided that this order related exclusively to the Governor General, and contained no communication of power to the Lieutenant Governor, from whom the unconfirmed claims emanated, presented to the minds of the numerous body of land claimants a decision which went to the root of all their claims. Ignorant as the court, the bar, and the country, then were of the extent of this order, it would have been most unwarrantable, as well as most offensive, to have *assumed* that it related *exclusively* to the Governor General. It was not necessary to the argument of the court to make this assumption. They did not make it. The counsel, with the opinion before him, must have known that the court did not make it; and yet he charges it to the court in this publication.

"5. That the word '*mercedes*,' in the ordinance of 1754, which, in the Spanish language, means '*gifts*,' can be narrowed by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money."

If this charge had stood alone, it could have left no doubt of the contemptuous and malevolent purpose of the writer; for it imputes to the court such a *congeries* of most ridiculous absurdities, as could not but have awakened the laughter of the light-hearted, the sorrow of the considerate, and the indignation of the land claimants.

Now, if this honorable Court has accompanied this respondent through the foregone delineation of his opinion, they cannot but perceive, that the whole of this sneering sarcasm at the Judge is the pure coinage of the author's own brain. For, in the first place, it is not true that the Judge either *assumed* or *admitted* that the word *mercedes*, in the Spanish language, means *only gifts*; on the contrary, the Judge held that it was capable of being translated *grants*, and had, in fact, been so rendered by the translator of the Government.

Thus, the leading proposition with which this charge sets out, to wit: that

mercedes means *only gifts*, and was so assumed or admitted by the Judge, on the truth of which proposition the whole sarcasm depends, is false in fact.

The farther implication of the charge is, that the ordinance of 1754 conveyed to the sub-delegates an *unlimited power to make gifts of lands, to any extent, or for any cause, at pleasure*; and that the Judge *conceding this*, had, by construction, narrowed down *this unlimited power of making gifts to the idea of a grant to an Indian, or a reward to an informer, and even to a mere sale for money*: in all which this honorable Court cannot but perceive that there is not one word of truth. For, in the first place, the Judge did not concede, nor is it true, in point of fact, that the ordinance does contain any such unlimited power of making gifts; and, consequently, there was no occasion to narrow down this power by construction. In the next place, the Judge never did hold that an unlimited power of making *gifts* could be narrowed down, by any process of reasoning, to the *idea of a grant to an Indian, a reward to an informer, and much less to a mere sale for money*. The Judge made no such absurd and ridiculous transformations of the word *gifts*.

The whole argument of the court on the ordinance of 1754 was perfectly simple and consistent.

The court held, 1. That, for the reasons already stated, that ordinance was not in force in Louisiana. 2. That, if it was in force, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the intentions of that ordinance, because he had not been appointed in conformity with its provisions. 3. That, if the ordinance was in force, and Trudeau was a sub-delegate within its intention, still that, as a sub-delegate under that ordinance, he had no power to make the concession in question, because *the whole powers* of the sub-delegate were minutely and specifically detailed by the several articles of that ordinance, and that, in following out these details, through the entire ordinance, it was seen that the duties of a sub-delegate were, not by *construction, but by express terms* of the ordinance itself, confined to the following heads:

First, and chiefly, to making sales, and compositions of the royal lands, with a view to revenue.

Second. That there was no one article of the ordinance which contemplated a *free gift* in any case whatever, except the second article, which authorized *gifts to the inhabitants of towns for pasturage and commons according to their wants, and gifts to the native Indians which might be necessary for tillage and herding*.

Thirdly. That there were no articles of the ordinance which contemplated grants of land as *rewards for services*, saving the 7th and 8th, which authorized the sub-delegates to *reward those who might give information of intruders on the public lands with a moderate portion of the lands in relation to which such information might be given*. But that there was no article of the ordinance which authorized a sub-delegate to make such a concession as *that on which Soulard relied*.

These powers of the sub-delegate, *thus deduced by the Judge from a careful examination of the several articles themselves*, are alleged by this charge to have been drawn from the word *mercedes*, which is alleged to mean *gifts*; and the court is accused of having arrived at their conclusion, by torturing the word *gifts* from its natural sense, and making a *gift* to mean, first, a *grant to an Indian*; next, a *reward to an informer*; and finally, by way of capping the climax of absurdity, to make *gift* to mean a *mere sale for money*. "The gifts to the inhabitants of towns for pasturage and commons, according to their wants," was struck from the catalogue. Why? Because it would weaken the energy of the period by lengthening it; and destroy the poignancy of the ridicule intended to be thrown upon the court, by the motley group of *Indians and informers*; whom it exhibits as selected by the court as the only proper objects for the exercise of the royal bounty of Spain.

"6th. That O'Reilly's regulations were, in their terms, applicable, or were, in fact, applied to or published in Upper Louisiana."

No one part of this charge is true *in the sense* in which the writer manifestly intended it to be understood by his readers. The court never did assume or contend that these regulations were, by *their terms*, extended specifically to Upper Louisiana. With regard to their having even been *in fact applied to*, or *actually published in Upper Louisiana*, there was not a word of controversy at the bar, nor is there a word said upon either of these propositions by the court. The court did say that O'Reilly himself had declared these regulations to be published for the government of the grants of land in the *Province of Louisiana*; that is to say, in the whole province, because he himself had made no exception of any part of it. And the court did farther say that the *policy* of the regulations applied as well to one part of the province as another. Had these propositions been stated as they were laid down by the court, the writer would have found something more necessary to convict the court of error, besides the mere statement. But having informed his readers that he should confine himself to an *enumeration of the Judge's errors*, "without entering into any *demonstration or developed reasoning on the subject*, which he adds (and truly) was not, as regards most of the points, absolutely necessary, his only study seems to have been, so to shape his charges as that the absurdity imputed to the Judge should be self-evident, without any solicitude for the candor or truth of the imputation.

"7. That the regulations of O'Reilly have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them."

This is another misrepresentation of the same character with the last, intended to mislead the reader to the prejudice of the court. The Judge never did assume that the regulations of O'Reilly had any bearing on *the specific grant to Antoine Soulard*; and so far from saying *that such a grant was contemplated by them*, the court decided the exact reverse, to wit: *that no such grant ever was contemplated by them*.

"8. That the limitation to a square league, of grants to new settlers in Opelousas, Attakapas, and Natchitoches, (in 3th article of O'Reilly's Regulations) *prohibits a larger grant in Upper Louisiana*."

This is another gross perversion of the reasoning and conclusion of the court. The Judge made no such *assumption*, and maintained no such proposition. His reasoning and conclusion were these: O'Reilly himself declares his regulations to have been intended for the province of Louisiana at large. Their *policy* is the encouragement of population, settlement, agriculture, and stock in that province. This policy applies with equal force to the whole province. The court, therefore, can see no reason why grants should be made with a regard to the means of the settler, and on the express conditions of settlement and culture in one part of the province more than in another; nor why grants should be limited to a league square in Opelousas, Attakapas, and Natchitoches, and be unlimited in Upper Louisiana. This conclusion, founded on the general policy of the regulations, as being equally applicable to every part of the province, is here converted into an *isolated assumption* on the part of the Judge, that the limitation to a league square in Opelousas, Attakapas, and Natchitoches did, *per se*, prohibit a larger grant in Upper Louisiana.

"9. That the regulations of the Governor General, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' *prohibit in future a grant for services*, or have the effect of annulling that to Antoine Soulard which was made in 1796, and not located or surveyed, until February, 1804."

The implication here is, that, prior to Gayoso's regulations, there had been a law by which concessions of the character of that of Soulard had been authorized, *that being a grant to an old settler in reward of public services*; and that, with this fact before him, the Judge had assumed that these regulations of Gayoso, entitled "Instructions for the *admission of new settlers*," and consequently *confined merely to the case of the admission of new settlers*, had the effect of pro-

hibiting a grant for services to an old settler. And by way of making the ridicule still more striking, the court is here represented as separating the regulations of Gayoso from its natural relation with those of O'Reilly and Morales, for the purpose of producing this absurd effect.

Now, in answer to this branch of the charge, the Judge is constrained to say that not one word of it is true. There was no such previous law; nor did the Judge attribute any such prohibition to the regulations of Gayoso. All that the court said upon the subject was, that the three sets of regulations, those of O'Reilly, in 1770, of Gayoso, in 1797, and of Morales in 1799, *evinced a settled and continuing policy, which was at war with the belief that any authority existed in the Lieutenant Governor of the province to make such concessions as those of Soulard.*

The second branch of the charge is still more gross. The Judge is represented as *assuming* that the regulations of Gayoso, in 1797, annulled the prior grant to Soulard which was made in 1796. But he made no such assumption. He assigned no *retroactive effect* to those regulations. The character he assigned to them was purely *prospective*.

This honorable Court will be pleased to observe that the King of Spain, by one of the laws in the *Recopilacion*, (Law 11, page 969, Land Laws,) had required all persons to whom land had been distributed, to take possession *within three months, on pain of forfeiture*. Gayoso and Morales, pursuing the example of their sovereign, made similar regulations in Louisiana. The 14th of Gayoso required all to whom lands had been granted, to take possession *within one year, and to make a specified progress in cultivation in three years, on pain of forfeiture*. The 4th of Morales is of the same character. Soulard had disobeyed them both. The conclusion of the court, therefore, was, that his title had been *forfeited by this act of disobedience subsequent to the law*. The court assigned no *retrospection* whatever to these regulations; but considered them as purely *prospective*. Whereas the assumption imputed to the court is, that these regulations struck backwards at the grant, and annulled it in its origin, although, according to the implication, it proceeded originally from a competent authority.

“10. That the complete titles made by Gayoso are not to be referred to, as affording the construction made by Gayoso himself, of his own regulations.”

“13. That the complete titles (produced to the court) made by the Governor General, or the Intendant General, though based on *incomplete titles*, not conformable to the regulations of O'Reilly, Gayoso, or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.”

“14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.”

These charges are all presented together, because they are of kindred character, involve the same principle, and require the same answer. They are not true. So far from it, they are diametrically opposed, in point both of *fact* and *doctrine* to the grounds really assumed and maintained by the court. The representation becomes the more extraordinary, because it is a fact which must have been known to the author, that the evidence to which he alludes, in the 15th charge, was objected to by the District Attorney of the United States as inadmissible; that the court did admit it on the *very ground that it raised a presumption in favor of the power of the Lieutenant Governor to make the grant in question*; that the District Attorney excepted to the opinions of the court; and that the bill of exceptions constitutes a part of the record in the case of Soulard before the Supreme Court, as may be seen by referring to the 47th, 48th, and 49th pages of exhibit A.

The court not only admitted all the evidence alluded to in these several charges, but also admitted, in the most distinct terms, that they did afford an inference, that they did raise a presumption, and were to be regarded as proof of the existence of a power in the Lieutenant Governor to make the concession on which Soulard relied; and yet precisely the reverse of this is that which is imputed to the Judge in these charges, for which there is not the slightest color in the opinion. The Judge admitted this evidence in the only light, and to the fullest extent to which it was offered; for it was offered and could be offered only as presumptive proof, and in that character it was admitted.

Having received it as presumptive proof; having admitted that it did raise the presumption that was claimed for it; it became the duty of the Judge to weigh this presumption against the other evidence in the cause. That process was performed, and the conclusion of the Judge was, that the presumption admitted to have been raised by this evidence, was overborne by the opposing proof; and, because the Judge was constrained, in the conscientious discharge of his duty, to come to this conclusion, he is accused by this author of having assumed, that the testimony in question *afforded no inference, raised no presumption, and was not to be referred to*, in favor of the power claimed for the Lieutenant Governor.

The assumption imputed to the Judge in the close of the 13th charge, that the confirmation of these irregular concessions must be considered as *anomalous exercises* of power in favor of individual grantees, is not correct; for the court considered that confirmation as the *legitimate exercise* of the sovereign power of the Governor General and the Intendant, and as *demonstrative of this power*, not of the originating power of the Lieutenant Governor, which has been already explained in the foregoing delineation of the opinion.

“11. That, although the regulations of Morales were not promulgated as law, in Upper Louisiana, the grantee in the principal case was bound by these, inasmuch as he had notice, or must be presumed, from the official station which he held, to have had notice, of their terms.”

Here is another gross and palpable misrepresentation: Soulard resided at St. Louis, the capital of Upper Louisiana, and was the official Surveyor of that part of the province; and the court is charged with assuming that, *although it was in proof that the regulations of Morales had not been promulgated in Upper Louisiana*, still that Soulard was bound by them, *because he had notice, or must be presumed from his office, to have had notice*. The court made no such assumption. The principal fact on which the charge is founded is false. *The regulations of Morales had been promulgated in Upper Louisiana*. It was not questioned in the argument at the bar that they had been promulgated there. The only question raised, was, whether the promulgation had been sufficient. The court was of opinion that it had been sufficient; because the Governor had received at least six copies of them from Morales himself; and because his Secretary proved *that he had posted up another copy in front of the Government House*; and because Soulard had proved notice on himself, by having referred, *in one of his official returns, in 1802*, to the 16th article of these regulations, which he stated had been complied with in that particular case; and further, because their publication was recited in the grant offered by the petitioner, as before mentioned; and their recognition as law by the Lieutenant Governor in one of his official acts, formed a part of the evidence in the cause, as will be seen by the exhibit already made.

“12. That the regulations of Morales exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.”

This is another instance of the suggestion of a falsehood arising from the suppression of truth. It is only by the unfair process of detaching a single sentence of the opinion from its context, that even a color can be gained, to give countenance to this charge. This honorable Court will observe, that one ques-

tion in Soulard's case was, whether there might not have been some law or ordinance, of intermediate date, between the regulations of O'Reilly in 1770, and Soulard's grant in 1796. On this subject, the language of the court is: "The regulations which we have, do not permit us to believe that there existed others. Morales, in the *preamble* to those made by him, mentions those of O'Reilly and of Gayoso, in a manner which implies that these were all of which he had any knowledge, and shows that he was making regulations, which were to offer the only means by which lands were to be obtained. His language is: 'That all persons who wish to obtain lands, may know in what manner they ought to ask for them, and on what condition lands can be granted or sold; that those who are in possession, without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants, as sub-delegates of the Intendancy, may be informed of what they ought to observe,' &c. This preamble excludes the presumption that other laws existed by which titles could be obtained; and the regulations themselves exclude all belief that any law existed, under which a confirmation of the title in question could have been claimed." This last member of the sentence has immediate reference to the discussion which had just been closed in the preceding part of the opinion; and by which it was shown that Soulard had forfeited his title, by refusing to comply with the condition of settlement and cultivation exacted by Morales and by Gayoso. This illustration is entirely suppressed by the writer. He seizes on the strict terms of the last member of the last sentence, and separating it from its explanatory matter, exhibits the court as assuming that Morales' regulations *per se* (and unconnected with the forfeiture, which Soulard had incurred from a non-compliance with them,) excluded all belief of the existence of any law under which a confirmation of this title could have been claimed from Spain.

"15. That the uniform practice of the sub-delegates or Lieutenant Governors of Upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as a proof of law, usage, or custom therein."

"16. That the historical fact, that *nineteen-twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles."

"17. That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution *ab intestato*, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations."

These three charges are thrown together, because they are of the same character, and must receive the same answer. They are charged *as assumptions made by this respondent in his opinion*. There are no such assumptions there, nor one word in the opinion to countenance either imputation.

The uniform practice alleged in the 15th charge was not in proof, and therefore that proof could not be disregarded.

The historical fact alleged in the 16th charge was not in proof, and therefore the court could not and did not say what inference it would have afforded if it had been in proof.

The fact alleged in the 17th charge was not in proof, and therefore the court did not and could not say what inference it would have afforded if it had been in proof.

The cases severally made by these three charges, as well as the assumptions imputed by them to the court, are from the mint of the writer's own imagination. Yet are they gravely published to the world as facts, and they are manifestly of a character to expose the court, not only to contempt, but to indignation.

Whether the claimant and his counsel had it in their power to have made good these supposititious cases by proof; and what would have been the legal

effect if such proof had been offered to the court, it is needless here to inquire. It is enough to say that no such facts were proved ; for the truth of which assertion, this respondent refers to the exhibit A : and that no such assumptions were made by the Judge ; for the truth of which, he refers to the opinion forming part of the same exhibit.

“18. That the laws of Congress heretofore passed in favor of incomplete titles furnish no argument or protecting principle in favor of those titles of a precisely similar character which remain unconfirmed.”

The Judge made no such assumption. It would have been a gross violation of his duty if he had done so, and would justly have exposed him to the contempt and indignation of his country. He appeals to the opinion itself for a refutation of this charge. All that he says upon the subject is, that there was certainly no act of Congress which would authorize the confirmation of the claim, or of any part of it ; whereas the charge exhibits the Judge as *assuming that, although acts of Congress had been placed before him, which, by their principles, called for a confirmation of the claim ; yet, that he would disregard them, and refuse the confirmation.*

The writer having thus finished his enumeration of what he is pleased to call the *assumptions* of the Judge, proceeds to say : “ In addition to the above, a number of other errors, consequential upon those indicated, might be stated.” This is true ; for, as he had not been at all governed by the opinion of the court in the fabrication of these charges, their number depended entirely on the fertility of his own invention. He proceeds—“ The Judge’s doctrine as to the forfeiture which he contends was inflicted by Morales’ regulations, seems to me to be peculiarly pregnant with grievous consequences.” And yet these grievous consequences were merely the same which had been announced by the King of Spain himself, in the 11th law of the Recopilacion, to which a reference has been already made, and by the parallel regulation of Gayoso, in 1797.

Such is the *farrago* of folly and absurdity which this writer has been able to extract from the case, and which, in his published article, he has imputed to the Judge, as *assumptions made by him in the course of his opinion.* That a man of sufficient discrimination to be placed as leading counsel in the management of cases of so much importance, could have accumulated such a mass of misrepresentation, through innocent mistake, was, and still is, in the opinion of this respondent, utterly incredible. He did, and does still, consider it to have been wanton, wilful, and done *malo animo.* Why was the publication made ? To enlighten the public by a rational discussion of an important subject ? But there is no discussion, nor even the pretence of discussion ; there is nothing but naked, sheer misrepresentation from beginning to end. And although there is no discussion of the grounds of the decision assumed by the court in Soulard’s case, but, on the contrary, a total suppression of those grounds, the publication embodies the evidence and arguments upon which the validity of the claims were mainly to be supported, and represents the court to have disregarded that evidence, and to have overruled those arguments ; thus inculcating the merits of the claims, and leaving the inference necessarily and forcibly to be drawn by the public and the claimants, that those merits would be, as they had been in the case of Soulard, disregarded by the court, should the decision in that case be persevered in. The effect to be expected from such a publication was manifest, and, both in law and morals, every man is presumed to intend the natural consequences of his own actions. It cannot be perceived by this honorable Court, that the direct and inevitable tendency of such a publication was to bring this court into open contempt and scandal, to inflame the resentment of the very numerous and powerful body of land claimants in Missouri, together with that of their adherents and connexions ; and thus to array against the Judge, a power which might overawe and control him in the decision of the pending cases, or render him perfectly odious if he should dare to follow up in these cases the principles which he had laid down in Soulard’s ; to render the de

cisions of the court so despicable among the people, as to destroy all the weight, authority, and even utility of the tribunal ; to beget in the public mind such an undue sympathy and prejudice in favor of these claimants and their claims, as to unfit that public for the performance of the office of jurors in the trial of issues of fact ; and, if a jury should be drawn for this purpose, to bring them into the jury box with such a load of pre-conceived prejudice against the Judge, as to indispose them to receive with respect, any instruction, even on points of law, which might be given from the bench ; in short, to erect a trophy for these land claimants, their counsel, and their claims, on the ruins of the court itself.

And this respondent, farther answering, says, that, considering the said publication to be a contempt of the court, and punishable by the summary process of attachment, it is true, that he did make a rule on the said Luke E. Lawless, who had been proved to be the author, to show cause why an attachment should not be awarded against him, and why he should not be suspended from practice as an attorney and counsellor in that court ? That he did appear on the return of the rule, and did attempt to show cause, by himself and his counsel, insisting that the publication was no contempt, but a correct representation of the opinion of the court ; that, in making that publication, he was exercising the rights of an American citizen ; and that, to punish it by attachment, would be at once an invasion of the liberty of the press, and of the right of trial by jury. The cause thus shown not being satisfactory to the court, but the court on the contrary holding and pronouncing the publication to be a gross misrepresentation and a contempt, and, according to the settled authority of the law, punishable by attachment, the attachment was accordingly issued, and the said Luke E. Lawless was brought before the court thereupon ; that, being thus before the court, the privilege was tendered to him of purging himself of the contempt, if he thought proper to do so ; and with this view he was asked by this respondent whether he chose to have interrogatories exhibited, or whether, if exhibited, he would answer them ? In reply to which he said, that he did not wish interrogatories ; that he would not answer them if they should be filed, and that, as he had committed no contempt, he would purge himself of none. And, further, in open defiance and contempt of the opinion which had been solemnly pronounced by the court, and to the evil example of the bystanders, and of all others who should have business to do in the court, he read in open court a paper in which the *truth* of the publication signed " A Citizen " was re-asserted. And it is true that this respondent, considering this conduct of the said Luke E. Lawless, and his refusal to purge himself of the contempt as a contumacious persistence therein, and an aggravation of the first contempt, did proceed to pass sentence that the said Luke E. Lawless should be imprisoned for twentyfour hours, and that he should be suspended from practising, as an attorney and counsellor in that court for eighteen months.

In all which actions and doings of this respondent in the premises, he avers that he was supported and justified by the constitution and laws of the land, and that he will be prepared to make good this averment at such time as this honorable Court shall appoint.

And, solemnly denying the intention charged to him by the article of impeachment, " wrongfully and unjustly to oppress, imprison, and otherwise injure, the said Luke E. Lawless, under color of law," and asserting, in the presence of the Supreme Searcher of Hearts, that, in all that he did in the premises, he was actuated by the purest sense of what he deemed a high official duty, and was, as he believed, and still confidently believes, well warranted and supported in every step, by the constitution and laws of the land, this respondent, for plea to the said article of impeachment, saith, that he is not guilty of any high misdemeanor, as in and by the said article is alleged, and this he prays may be inquired of by this honorable Court, in such manner as law and justice shall seem to them to require.

JAMES H. PECK.

Mr. Storrs, on behalf of the managers, moved that they have time to consult the House of Representatives on a replication ; and that they be furnished with a copy of the answer of the respondent : which was agreed to.

On motion of Mr. Webster, the court then adjourned, to meet on the second Monday of the next session of Congress, at 12 o'clock, then to proceed with the said impeachment.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES *vs.* JAMES H. PECK.

Monday, December 13, 1830.

The court having been opened by proclamation, the President administered the oath to Mr. Baker and Mr. Poindexter.

On motion of Mr. Woodbury,

Ordered, that the secretary inform the House of Representatives that the Senate are in their public chamber, and are ready to proceed on the trial of the impeachment of James H. Peck, Judge of the District Court of the United States for the District of Missouri ; and that seats are provided for the accommodation of the members.

Notice was received by Mr. Clarke, their clerk, that the House of Representatives have agreed to a replication, on their part, to the answer and plea of James H. Peck, Judge, &c. to the article of impeachment exhibited to the Senate against him by that House, and have directed the managers appointed to conduct the said impeachment to carry the said Replication to the Senate, and to maintain the same at the bar of the Senate, at such time as shall be appointed by the Senate.

Four of the managers, viz. Mr. Buchanan, Mr. McDuffie, Mr. Spencer and Mr. Wickliffe, attended.

James H. Peck, the Respondent, accompanied by his counsel, also attended.

The replication of the House of Representatives was then read by Mr. Buchanan in the following words :

REPLICATION,

By the House of Representatives of the United States, to the answer and plea of James H. Peck, Judge of the District Court of the United States for the district of Missouri, to the article of impeachment exhibited against him by the said House of Representatives.

The House of Representatives of the United States, having considered the answer and plea of James H. Peck, Judge of the District Court of the United States for the district of Missouri, to the article of impeachment against him by them exhibited, in the name of themselves, and of all the people of the United States, reply, that the said James H. Peck is guilty in such manner as he stands impeached ; and that the House of Representatives will be ready to prove their charges against him at such convenient time and place as shall be appointed for that purpose.

The replication was handed to the secretary to be filed.

The President then informed the managers that they were at liberty to proceed in support of the article of impeachment exhibited ; and on request of Mr. Buchanan the witnesses on behalf of the managers were called as follows : viz.

Luke Edward Lawless,
Charles S. Hempstead,
Edward Charles,
Arthur L. Magenis,
Wharton Rector,

Henry S. Geyer,
Rev. Thomas Horrall,
Josiah Spalding,
Marie Philip Leduc,
Hon. Thomas H. Benton.

On request of Mr. Meredith, counsel for the respondent, his witnesses also were called, as follows : viz.

Robert Wash,
John K. Walker,
Hon. Spencer Pettis,
John B. C. Lucas,

William C. Carr,
Jesse G. Lyndell,
Daniel Hough,
George H. C. Melody,
William Davidson King.

Mr. Buchanan, on behalf of the managers, informed the court that in consequence of the unavoidable absence of a material witness, (Charles S. Hempstead, who had been overset on his way and had his collar-bone twice broken, but was likely to recover and to be able to attend the court,) they could not proceed to make good their charge without further time.

Whereupon, on motion of Mr. King,

Ordered, that the secretary inform the House of Representatives that the Senate will, on Monday next, at 12 o'clock, be ready further to proceed on the trial.

The court then adjourned to Monday next, at 12 o'clock.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Monday, Dec. 20.

The court having been opened by proclamation, the managers, accompanied by the House of Representatives attended.

James H. Peck, the respondent, and his counsel, also attended.

At the request of Mr. Meredith, the witnesses on behalf of the respondent were called.

The President informed the managers that they might proceed to substantiate their charge.

Mr. McDUFFIE then rose, and addressed the court as follows :

Mr. McDuffie said, that in discharging the high and responsible trust which had been confided to him by the House of Representatives, he should feel that he was acting with a proper regard to all the considerations of public duty, in reducing to the narrowest limits of practicable brevity, the preliminary exposition which it had devolved on him to make, of the facts and principles upon which he should invoke the judgment of this honorable Court against the respondent at the bar, on the article of impeachment presented by the high inquest of the nation. The great importance of this case, said Mr. McDuffie, both to the respondent himself and to the people of the United States, must be so extremely obvious to every member of the court, as to render it unnecessary for me to solicit their attention by any special invocation. Fully assured of that patient attention which will be indispensable to a proper understanding of the case, I shall at once proceed to lay down and explain the propositions of law and of fact, upon which the managers of this impeachment will rely, for convicting the respondent of the high misdemeanor with which he stands charged.

1. I shall, in the first place, attempt to show, that admitting the publication signed "A Citizen" to have been false and malicious, Mr. Lawless was only liable to be indicted and tried for a libel, and that the respondent was guilty of a dangerous usurpation of power, in proceeding by the summary process of attachment, as for a contempt, to pronounce sentence and inflict punishment.

2. I shall attempt to show, in the second place, that the publication in question was neither false nor malicious, but a true statement of the assumptions made by the respondent in the case of Soulard ; and consequently, that the proceeding against Mr. Lawless was not only illegal, but unjust, tyrannical and oppressive.

In support of my first proposition, I hold it to be incontrovertible, that the common law of England, as such, has no semblance of authority in the courts of the United States ; any more than the civil law of the Roman empire. A greater political solecism cannot be imagined, than that the laws of a foreign country,—or what is even more absurd,—a particular branch of the laws of a foreign country, should be recognized by our courts as the law of the United States, without the sanction of the legislative authority. Were it not that the common law of England has been adopted in most of the States by legislative enactments, and had not most of us been educated in its principles, it never would have occurred to any human being, that it was of force, as a part of the law of the United States, any more than that the United States were still overshadowed by the prerogative of the king and the supremacy of parliament. I grant that many of the acts of Congress, particularly those relating to the organization and powers of the federal tribunals, are to be expounded with reference to the common law of England ; so far as such reference may be necessary to ascertain the meaning of legal terms and technical phrases. But it must be obvious to this enlightened court, that this reference is made to the English common law, upon the same principle that a like reference would be made to an English dictionary, as the mere means of ascertaining the true construction of the acts of Congress, and the actual intentions of the lawgivers.

I will also admit, that all courts, from the bare fact of their creation and organization, must of necessity have the power to make rules to regulate their proceedings ; and that the courts of the United States have very wisely adopted the rules of the common law, in these particulars. But as regards the punishment of criminal offences, I utterly deny that the common law of England can be referred to by the Judges of the federal courts, as a source of authority, whether those offences be tried upon an indictment and by a jury, or in the more summary mode of attachment, and by the arbitrary and sole power of the judge.

I am aware that it may be contended, with some show of plausibility, that to punish a contempt, by the process of attachment, is not the exercise of a criminal power, because it is exercised in England by the Courts of Common Pleas and Chancery, equally with the Court of King's Bench. But I humbly conceive, may it please the court, that such an argument is sacrificing the substance of the thing to the mere form of proceeding. A man is called up before a Judge—a Chancellor, if you please—upon a charge of being guilty of publishing a libel against the court ; and without any of the forms of proceeding intended to secure a fair and impartial trial to every citizen ; without either the advantage of an indictment, to apprise him of the offence alleged against him, or a jury to secure him from the excited vengeance of the offended Chancellor, he is pronounced guilty of a false and malicious libel, and subjected to as high a punishment, nay, to a higher punishment than could be legally inflicted by a court of general criminal jurisdiction, after a solemn trial and conviction by any impartial jury of his peers. And yet according to the argument I am answering, though a citizen is thus pronounced guilty of an infamous offence, and punished with the utmost severity of the law, it is no assumption of criminal power by the court, for the very extraordinary reason, that the sentence has been pronounced, and the punishment inflicted, without the forms of a trial, and by a court, which is not invested with a general jurisdiction to try and punish offences ! Such an argument as this, addressed by a judge, to a citizen who should complain of the exercise of usurped power, would be the most outrageous mockery, by which judicial tyranny could add insult to the injury inflicted.

ed. If a contempt of court, such as we are considering, be not a crime, I should be gratified to be informed by the learned counsel for the respondent, to what legal category it belongs ; and I should also be pleased to know by what human authority a Judge of the United States assumes to punish a citizen by fine, imprisonment and disfranchisement, not only without a trial, but also without a crime ? The power to punish libels, as for contempts, is not only a criminal power, but a criminal power more dangerous to public liberty than any that has ever been exercised by our courts of justice ; and is, therefore, the very last of the criminal powers, which the courts of the United States should assume to exercise on the authority of the common law of England.

But it is very far from my intention to deny to the federal tribunals the protective power of punishing for contempts of their authority. Even if the judiciary act of 1789 had not expressly conferred this power, I readily agree that these courts would have possessed it, as an inherent power, derived, not from the common law of England, but from the great law of self-preservation. It is indispensable to the due exercise of their high and important functions, that they should have the power to protect themselves while engaged in the administration of justice ; to punish all direct outrages upon the court ; to prevent the Judge from being driven from the bench, and the jury from being driven from their box ; and in a word, to punish in the most summary manner everything that actually impedes or obstructs the administration of justice.

It is highly important, however, that we should ascertain the source of this power, with a view to fix its extent and limitations. If it be derived from the common law of England, our courts would of course possess it in all the latitude in which it may have been exercised by English judges ; if it be derived from the act of 1789, its limitations are clearly and distinctly defined in the act itself ; and if it be derived, as an inherent power, from the imperious law of necessity, its limitations are obviously indicated by the very law in which it originates. Necessity, to be sure, is the tyrant's plea ; but it must also be the plea of the federal judges, by which only they can justify the exercise of the power of punishing for contempts, in cases where the acts of Congress do not expressly authorize it. To what extent, then, can this plea avail them, and in what cases ? The answer is a very obvious one. The plea must be pleaded in good faith, and clearly made out. It must be a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed. It will not do to rely upon a mere constructive interference, impeding the course of justice, by some far-fetched implication. I am aware, that certain notions of judicial prerogative, have been imperceptibly introduced into this country, from loose phrases, in the elementary books of English common law, and in the opinions of English judges ; and that our judges and lawyers have, in this manner, become imbued with principles which are utterly incompatible with every just conception of liberty.

The case of the respondent is a striking illustration of the truth of this remark. He was not sitting in court, in the actual administration of justice, when the publication of Mr. Lawless was made. There is not the shadow of a pretence that this publication had the effect of interrupting the administration of justice, either in the case to which it refers or in any other case. The judgment of the court, in the case of Soulard, had been rendered some five or six months previous to the publication. The decree had been actually entered of record, and there was an end of the judicial functions of the Judge as to that case ; when, after the lapse of several months, the respondent, from some consideration, satisfactory, no doubt, to himself, thought proper to come out with an extra-judicial argument in the newspapers, which he calls the opinion of the court. And it was this newspaper opinion, thus promulgated, which he has sought to screen from public scrutiny, by ascribing to his own person, whether on the bench or off of it, that sacred and inviolable sanctity, which the law of England ascribes to the person of the king. By that law, the

king can do no wrong ; and it will be hereafter shown that some of the English judges have attempted to maintain the monstrous doctrine, that a judge, being the representative of the king, and selected to administer his justice, is entitled to the same immunity, and is equally exempt from scrutiny and responsibility. And such, may it please the court, is the extravagant and outrageous pretension by which Judge Peck attempts to justify his high-handed proceeding.

Admitting the publication of Mr. Lawless to have been, what it certainly was not, a false, malicious and atrocious libel, was there anything in the case, which could render it necessary, in any legal sense of the term, to exercise the extraordinary and summary power of committing and suspending the publisher without anything more than the veriest mockery of a trial ? Will it be pretended that the course of justice, in its actual administration, was obstructed ? Was there the slightest semblance of necessity, the only plea that can justify the assumption of this dangerous power ? Was there, indeed, any emergency in the case, which would defeat the purpose of punishment, unless that punishment were inflicted promptly ? Even if we concede to the judicial character, the irresponsible sanctity ascribed to it by Chief Justice Wilmot, and claimed by Judge Peck, on this apochryphal authority ; suppose it to be granted that it was libellous to publish anything, true or false, tending to bring his character into ridicule and contempt ; to what lawful end can punishment be inflicted, in such a case as this ? The only purpose which punishment could answer—except it be to gratify the vengeance of the offended Judge—was to deter this and other offenders from committing similar offences. And this purpose would be as effectually accomplished, without all this “unrighteous speed,” by the ordinary process of indictment and trial by jury, as by the most summary and instantaneous punishment that could be inflicted. Indeed, the greater solemnity and impartiality of the former mode of proceeding, would give much more weight to the judgment and punishment, as a mere matter of example.

I beg the court to attend to the obvious distinction between a contempt, which interrupts the administration of justice—such, for example, as a riot in court, or a glaring insult offered to the judge while actually sitting on the judgment seat ; and a constructive or consequential contempt, consisting of a mere criticism, however unfair and false, upon the opinion of the judge, or of a libel upon his character. In the former case there is an obvious necessity for instantaneous punishment, in order to remove the obstruction that impedes the course of public justice. In the latter case, there is not the slightest necessity for any extraordinary expedition, nor any plausible ground for distinguishing a judge from any other public functionary. We are told of the great importance of preserving the characters of our judges ; but it is certainly not a matter of less importance to preserve the characters of the President and Vice President, the heads of Departments, and the members of Congress. Yet I think the learned counsel for the respondent will hardly contend that the President and all the members of his cabinet united, would dare to punish the author of the most infamous and defamatory libel, by the summary process of attachment. Nor will it be contended, I presume, that either house of Congress would have the power to punish a libel against any or all of its members, published when the house was not in session, in relation to a past transaction. When the judgment of the court has been finally pronounced in a case ; when its judicial functions have entirely ceased as to that case ; when, long after the adjournment of the session at which the case was tried, the opinion is promulgated in the newspapers ; it becomes a mere matter of judicial history, and is as unquestionably the subject of scrutiny and even of censure, as the opinions of judges delivered a half century ago. I will say nothing of the policy of that principle of the common law, which forbids any publication relative to a case pending ; for it certainly can have no bearing on this case.

But I will say, that all the considerations which make it improper to publish anything relative to such a case, operate with double force against such a publication by the judge who is to try that case.

Let us reflect for a moment upon the consequences which would result from conceding to the federal judges the power of punishing in this summary way, any publication censuring or condemning their judicial opinions, after those opinions have become a matter of history. The judges of the Supreme Court, form a very important part of our political system; they have settled, so far as their decision can settle, some of the most doubtful and interesting questions of constitutional power; questions which involve the jurisdiction of conflicting sovereignties. Their decision in the case of *Cohens* brought them into direct conflict with all the departments of sovereign power, in the State of Virginia. Their opinion, in that case, has been published to the world. And will it now be contended that a citizen of Virginia, who believed that opinion dangerous to public liberty, and subversive of the essential rights of the States, would not have the undoubted right to denounce it in the most unmeasured terms of indignant reprobation? Would he not have an unquestionable right to appeal to this decision, as a proof that the judges are the mere instruments of the power whose will they are called upon to expound; and to assert, in the roundest terms, that the judges of the Supreme Court, like the judges of other countries, are the mere ministers of despotism? And, admitting that there was no just foundation for these charges, will any man venture to assert, in the presence of this august tribunal, that the judges of the Supreme Court would have a right to dispatch the Marshal to the extremities of this Union—to South Carolina or Louisiana—with an attachment, to arrest a printer who had published them; and that when the offender should be brought before the offended judges, they would have the right to pronounce him guilty of a false and malicious libel, and punish him accordingly, in utter disregard of all the constitutional guarantees, which secure to every citizen the right “to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed?”

If these things may be, Mr. President, the liberty of the press, the right of public discussion, and the responsibility of public functionaries, are vain delusions,—empty sounds,—that do not “keep the word of promise even to the ear.” But, sir, from my knowledge of the members of that court, and particularly of the Chief Justice, I have not a doubt, that in such a case as I have just supposed, they would unanimously decide that they have no power to try the offender, even in the most solemn form, with the instrumentality of a jury; and much less to punish him without trial, by the summary process of attachment. They would say with one accord, that such a power is not necessary to protect them from interruption in the actual administration of justice; and that so far as the preservation of their characters as judges is a matter of public concernment, that object, important as it undoubtedly is, can never be promoted by the assumption of a power which would overthrow all the safeguards of liberty, and render the court itself a just object of public abhorrence and detestation. In confirmation of the views I have presented, I beg leave to call the attention of the court to the sedition law of former times—a law as notorious in the political history of the country, as it was odious and unpopular in its day. It is very far from my purpose to revive party feelings that have long slumbered, or excite any political prejudices by recurring to this law. My sole object is to deduce some analogies from it, which, in my judgment, have a very decided bearing upon the principal question involved in the present issue. No law of the United States has been more thoroughly investigated, none is better understood than that to which I have referred; and I think I may safely assume it as the almost unanimous opinion of the country—without distinction of party—that it was palpably unconstitutional and extremely dangerous to public liberty. Public opinion has pronounced

an irreversible judgment upon these points, and if that law has any advocates at this day, I am entirely unacquainted with them. And yet, sir, what were its provisions? It greatly mitigated the severity and injustice of the common law of England, then of force in most of the States, by permitting the truth to be given in evidence in cases of libel, and thus exploding the monstrous heresy, that the greater the truth, the greater the libel. It was condemned, not on account of its particular provisions on the subject to which it related, but because it was an unconstitutional assumption, by the federal legislature, of the power to legislate on a subject, which the constitution expressly excluded from its jurisdiction, and thus to transfer from the State, to the federal tribunals, the trial of cases involving "the liberty of speech and of the press." This was the real grievance, which awakened the indignation of the whole country. Congress was expressly prohibited by the constitution, from passing any law "abridging the freedom of speech or of the press." It was only by usurping the power to pass a law directly in the face of this prohibition, that Congress could confer upon the federal courts any authority to assume jurisdiction in cases of libel; inasmuch as those courts could not take jurisdiction of crimes created by the laws of the States, any more than of those created by the English common law.

In pronouncing sentence of condemnation upon this sedition law, the people of the United States have solemnly decided, that the federal legislature has no power to protect the public functionaries from even the most abusive and licentious exercise of the freedom of the press; holding, that the State legislatures and State tribunals are more safe depositories of that power. And such is the plain language of the constitution. But what, may it please the court, has Judge Peck done on this subject? It cannot be disguised, it is too obvious to be doubted, that he has arbitrarily and unconstitutionally assumed and exercised a power, which the whole legislative authority of the country—the President, the Senate and the House of Representatives united—could not confer upon him. His usurpation is so glaring an outrage upon the liberty of the press, as to throw the sedition law quite into the shade. Let us for a moment analyze that law, and see how Judge Peck's usurpation would read as a concluding section.

In the first place, it provides that any person who shall publish a false and malicious libel concerning any of the public functionaries of the United States, shall be arraigned and tried before the federal courts. But it is provided that the accused shall enjoy the great privilege of a trial by jury, and that he shall be permitted to prove against the public functionary the truth of the charge alleged to be false and libellous. Now let us suppose that the law in question had concluded with a section, providing, that any person who should publish a false and malicious libel against a federal judge, touching his judicial conduct, and calculated to diminish the public confidence in his capacity or impartiality, should be liable to be tried by the very judge against whom the libel was published, and punished at his arbitrary discretion, by the summary process of attachment, without even an indictment setting forth the imputed libel, or an impartial jury to pronounce upon its truth or falsehood! In what terms of indignant eloquence would the patriots of 1798 have denounced this most outrageous provision? And yet, Mr. President, a power which even the Congress of that day, amidst all the violence of party excitement, would not have dared to confer even upon the judges of the Supreme Court, is boldly and audaciously usurped, without the authority of Congress, by a petty provincial judge, who comes here to justify the outrage, by claiming for his official character, the same exemption from scrutiny and responsibility, which the policy of other countries concedes to the character of their hereditary monarchs. His person, forsooth, must be held sacred, and his opinions inflexible, or the judiciary will be brought into contempt! And this is the pressing emergency, which requires that punishment should be inflicted without delay, without trial, and

without law ! Such are the miserable pretences to which tyranny has resorted, in all ages, to palliate its usurpation. They most assuredly will not meet with any countenance from this high tribunal.

But the respondent has not only usurped a power which Congress could not confer, but which it has deliberately refused to confer, when legislating on this very subject of contempts. The 17th section of the judiciary act of 1789, provides "that the judges of the said courts of the United States shall have power [among other things] to punish by fine or imprisonment, at the discretion of the said courts, all contempts of authority, *in any case or hearing before the same.*"

It is quite apparent, that it was the design of Congress, to give us power on this subject, beyond the mere self-preserving power of punishing contempts committed during the session of the court, and which might be calculated to obstruct the current of public justice, in its actual administration. And although I will admit that this is an inherent power, which the courts might have exercised without the express authority of Congress ; and though I will not contend for a rigid application of the maxim, that the expression of one thing, in a grant of power, is the denial of all others ; yet it cannot be denied that this act furnishes conclusive evidence of the opinion of Congress, as to the limits, which ought to be prescribed to this power, of punishing for contempts, and as to the cases in which it should be exercised. It would be very extraordinary upon the courts the power of punishing for contempts, in cases of obvious necessity, and yet leave them to assume, by strained and artificial construction, the more dangerous, and less necessary power, of punishing contempts in no way obstructing the administration of justice, and no farther to be regarded as public offences, than as they are calculated to call in question the character of the judges for capacity and integrity. But the act of 1789 not only prescribes the cases in which the courts may punish for a contempt, but the punishment which they may inflict. This is limited to fine and imprisonment. There is no power given, to disfranchise a citizen, by striking him from the roll of attornies, and thus cutting him off from the professional pursuits upon which he depends for the support of himself and his family. This is equivalent to depriving a man of his inheritance ; for a profession without the privilege of pursuing it, is no better than an inheritance without the privilege of enjoying the income. In no civilized country with which I am acquainted, has the power been assumed of striking an attorney from the rolls of the court, for publishing a libel. There is no appropriateness in such a punishment. If a lawyer has been guilty of malversation in his profession, by committing a fraud upon his clients ; or if he has been convicted of an infamous offence—any offence coming within the denomination of *crimen falsi*, he may be justly stricken from the roll. But upon what principle, and to what end is this done ? It is done, sir, upon the ground that the attorney is wholly unworthy of confidence, and to the end that the community may not be imposed upon and defrauded by means of a commission derived from the court. But there is no imputation upon Mr. Lawless of any malversation in office, nor is it pretended that he has been guilty of one of those infamous offences, which would prove him to be unworthy of public confidence. His offence is not against his clients, but against the judge. Too much zeal and fidelity, in the case of those clients, and too little respect for the published opinion of the judge, constitute the sole crime for which he has been made the victim of a punishment, which equally violates his rights and the rights of hundreds of his fellow-citizens who were entitled to his professional services.

It must be apparent by this time, Mr. President, that the constitution and laws of the United States give no countenance to the conduct of the respondent, but stand directly opposed to the exercise of the power he has assumed in the case of Mr. Lawless. Even the common law of England, if that could be referred to as a source of authority, does not authorize this monstrous doc-

trine of the right to punish a contempt against the infallibility of the judge and the sacred majesty of the court. It is true, sir, that in the case of the king against Almon—which by the by was no case at all, but a mere extrajudicial argument of Chief Justice Wilmot, found among his papers after his death—principles of the most unmitigated and unlimited judicial despotism are maintained by a very ingenious tissue of artful reasoning and strained inferences. What is the principle assumed in that argument? Why, sir, that the king, who, by the theory of the English constitution, can do no wrong, is the fountain of justice; that, consequently, the judges “sit in the seat of the king, administering his justice,” and that to accuse these judges, for example, of depriving the subject of the privilege of habeas corpus, was “to accuse the king of violating his coronation oath!!” And it is to this miserable jumble of false assumptions, and sophistical inferences, that a District Judge of the United States has ventured to appeal for a justification of his judicial tyranny! No minion of despotism ever ventured to advance more slavish doctrines, and God forbid that they should produce any other impression upon this court, than to excite a sentiment of unmingled abhorrence. It is distinctly laid down in this argument of Chief Justice Wilmot, that it is not lawful to publish anything, whether true or false, concerning a public functionary, which tends to his disparagement. And it is the private opinion of a judge, who maintains this infamous doctrine, that we are called upon to recognize as a judicial authority, in the highest tribunal known to the constitution and laws of the United States! It is the distinguishing glory of our institutions, that a public functionary can claim no immunity, no exemption from public scrutiny and public censure, that does not equally belong to a private citizen. I go even farther, and contend that many things would be libellous, if alleged against a private citizen, that would not be so, if alleged against a public functionary or a candidate for a public office. In the former case, the follies or the vices of a private man do not concern the public; and there is no motive to justify their obtrusion into the public prints; whereas in the latter case, the public have a deep interest in the free and fearless discussion of the conduct and character of public men. It is a right essential to the enforcement of political responsibility. In this view of the subject, there is hardly any latitude of licentiousness, which it were not better to indulge, in canvassing the conduct of public men, than to run the hazard of restricting the liberty of discussion and the freedom of the press, under the color of restraining its abuse. I will now very briefly call the attention of the court to one or two elementary writers, on the common law of England, from which I think it will be manifest, that Judge Peck can find no warrant for his proceedings, even in that code. I admit that there is some apparent discrepancy between the *dicta* of elementary writers; but I am not aware of any English *adjudication*, that comes in conflict with the principles I am about to lay down on the authority of Hawkins; a writer not certainly remarkable for his leaning against the power of the crown, and in favor of the liberty of the subject. It is true that Judge Blackstone, with whose work we are all familiar, as a text book, and whose principles many of us have unfortunately imbibed, in the course of our professional education, speaks loosely and vaguely of the power of the courts to punish for what he denominates consequential contempts. But this is the mere *dictum* of a writer, notorious for pushing prerogative to its extremest limits, and entirely unsupported by any English decision that comes within my knowledge. But let us return to the authorities in Hawkins.

In the first volume of his *Pleas of the Crown*, ch. 6. sec. 12. it is laid down, “That it was formerly holden that a man might be indicted for a slander of the justice of the nation, by reflecting on a sentence given in any court Ecclesiastical or Temporal.” Chap. 13. “But it seems the better opinion of this day, that a man cannot be indicted for any scandalous or contemptuous words, spoken of or to such officers, not being in the *actual execution of their office*;”

as for saying "that such an order was a numskull order, and that the justice deserves to be hanged who made it." It will not be pretended that there is anything in the publication of Mr. Lawless, that will bear any comparison with the words just quoted, for harshness and severity; words which an English subject might use to the very face of a judge, with perfect impunity, unless they should be addressed to him when in the actual execution of his office.

In Holt upon the law of libels, it is laid down that the opinions of the judges are fairly subject to criticism and even to censure, provided that improper motives be not imputed. Both these writers, however, seem to have regarded it as a matter of course, that libels against judges, like all other libels, were to be punished only by indictment and trial by jury.

Mr. McDuffie having proceeded thus far, the court adjourned to to-morrow at 12 o'clock.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Tuesday, Dec. 21.

The court having been opened by proclamation, the managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel, also attended.

Mr. McDuffie resumed and concluded the opening of the cause on the part of the United States, as follows:—

With a view to demonstrate that the respondent, in the exercise of an usurped power, has committed a wanton and unprovoked outrage upon Mr. Lawless, I will now proceed to exhibit to the court an analytical review of the publication signed "A Citizen;" and if I am not grossly deceived, it will be manifest, that there is not one word in that publication, in the slightest degree disrespectful to the Judge, or which misrepresents his published opinion, in any one material particular. And before I have done, I think this honorable Court will be satisfied, that the conduct of Judge Peck towards Mr. Lawless, and the extraordinary process of hypercritical cavilling by which he has managed to distort a perfectly innocent publication into a false and defamatory libel, exhibit all the characteristic features of judicial tyranny. Surely, Mr. President, nothing but the disordered imagination of a judge, infuriated by his excited passions, could have tortured the plain and inoffensive language of this publication into that monstrous "*congeries* of ridiculous absurdity," which he has drawn from it. And I solemnly declare, that if I did know the very able and respectable counsel who appear for the respondent, and take it for granted that the defence he has made before this court must have received their consent at least, if not their entire approbation,—I should come to the conclusion, from reading that defence, that Judge Peck labored under some unaccountable derangement, in regard to this transaction.

In the conclusion of the opinion which he published in the case of Soulard's heirs, he states, after adverting to the novelty of the questions involved in it, "that counsel would not be excluded from again stirring any of the points which had been therein decided, when they might subsequently arise in any other case." Mr. Lawless, in the commencement of his publication, refers to this concluding remark of the Judge—as I humbly conceive, in a spirit of unbecoming deference and humility, rather than of disrespect and contempt—as a permission from the Judge to examine his Opinion. He says, "I observe that though the Judge has thought proper to decide against the claim, he leaves the ground of his decree open for further discussion." And then proceeds: "Availing myself, therefore, of this permission, and considering the opinion, so published, to be a fair subject of examination by any one who feels himself interested in or aggrieved by its operation, I beg leave to point the attention of the public to some

of the principal errors, which I think that I have discovered in it." Now, would any man of plain common sense, not frenzied by his passions, have discovered matter of mortal offence in this very courteous and respectful introduction to the subject? Yet Judge Peck, with all that suspicious jealousy, which characterizes a tyrant doubting his own pretensions and feeling their insecurity, seizes upon "trifles light as air," to prove the contemptuous design of Mr. Lawless. He discovers a most malicious sneer in the phrase, "although the Judge has thought proper to decide against the claim." How dare Mr. Lawless to say Judge Peck "*thought proper* to decide against the claim!" He also discovers a most wanton and palpable perversion, in stating, that "he had left the ground of his decree open for further discussion," and in adding the words, "availing myself, therefore, of this permission." Who, exclaims the Judge, would not believe from this "that the Judge was so profoundly ignorant of what belonged, not only to the *dignity*, but even to the *decency* of the judicial character, as to have invited a general discussion of his Opinion in the newspapers?" And who—I must be permitted to add,—could be so "profoundly suspicious," as to put any such construction upon the language of Mr. Lawless? After very gravely complaining that he was accused by Mr. Lawless of having erred in certain "*assumptions*, as well of fact, as of doctrine," and formally denying that he "*assumed* any position as a postulate," all being "bottomed on evidence or deduced by argument,"—after this ridiculous and puerile criticism upon the word "*assumption*," the Judge proceeds to the separate examination of each of the specifications in the article signed "A Citizen."

The first of these erroneous assumptions is imputed to the respondent in these words: "That by the ordinance of 1754, a sub-delegate was prohibited from making a grant for services, rendered or to be rendered." Here the respondent says, he is falsely charged with having said that the ordinance of 1754 contained a *positive prohibition* on the sub-delegates from making grants in reward for services. Now, this court will perceive, that no such charge is made against the respondent. It is not stated that the ordinance contained a *positive prohibition*, nor is that inference fairly deducible from the words used by Mr. Lawless. What was the real question at issue, and what did the Judge decide? When we have ascertained these facts, it will be seen that Mr. Lawless represented the Opinion of the court with substantial accuracy. The concession made to Soulard, of the land in dispute, was issued in consideration of public services rendered; and it was contended by the claimant, that it had been the uniform practice of the sub-delegates to make such concessions, and that many such had been confirmed by the Governor General, who thus recognized their validity. Judge Peck decided that by the ordinance of 1754 "no confirmations should be made, except upon sales, or compromises for a consideration in money," and that, consequently, the uniform practice of the sub-delegates could avail nothing against these express provisions and requirements of the ordinance. Now if to direct that "no confirmation should be made, except upon sales or compromises for a consideration in money" but not to "prohibit a sub-delegate from making a grant in consideration of services, rendered or to be rendered," I certainly do not know how to estimate the force of the English language. But it seems that Mr. Lawless suppressed the fact that the Judge decided that the ordinance of 1754 was not in force in Louisiana, and also the reasoning by which the Judge came to his conclusion. Mr. Lawless does not profess to give the reasoning of the Judge, nor to state every position of law or of fact laid down by him. And yet the respondent holds him guilty of a contemptuous suppression of the truth, for omitting, what he was under no sort of obligation to state. If the fact alleged to be suppressed had been inconsistent with the one stated, there would have been some foundation for the charge. But the respondent contends that he did not say that by the ordinance of 1754, a sub-delegate was *prohibited* from making a grant for services; that he only said the ordinance did not *authorize* such a grant.

Now, taking a full view of the ordinance and the Opinion, I will not undertake to say that Mr. Lawless has followed the most approved models of English composition. With due deference, I must say, that I do not think the word "prohibit" is precisely the most appropriate word to communicate the idea he evidently intended to convey; though the words of the Opinion justify the use of it.

But the most cavilling criticism can do nothing more than convict Mr. Lawless of violating the strict rules of grammatical propriety; of committing a blunder which is of very common occurrence in this country, particularly among the Irish and Scotch Irish residents. Where the law regulating the granting of land; for example, authorizes grants with certain limitations and conditions, it would be said, that the law prohibits a grant in any other cause; meaning that the requirements of the law are incompatible with such a grant. In like manner, it is a common mode of expression, with the persons to whom I have alluded, when they mean to assert that they are under no *obligation* to do a certain thing, to say, "they have no *right* to do it." What the sentence pronounced upon Mr. Lawless would have been had he perpetrated this latter violation of the king's English, it is difficult to conjecture. As Judge Peck seems to imagine himself "in the seat of the king, administering his justice," he may also think himself bound to punish any outrage upon his standard English, thus constituting himself a high court of criticism, with power to inflict fine, forfeiture and imprisonment, by the summary process of attachment! I will now proceed to the second specification in the offensive article.

2. It is in these words: "That a sub-delegate in Louisiana, was not a sub-delegate as contemplated by the above ordinance." Here, says the respondent, the Judge is exhibited in the light of assuming the ridiculous solecism, "that a sub-delegate is not a sub-delegate!" One of the plainest sentences in the English language, of which the meaning must be obvious to every reader, at the first glance, is thus tortured by the most downright judicial quibbling, into a palpable contradiction in terms. Judge Peck decided that the Lieutenant Governor, who exercised the functions of sub-delegate in Louisiana, was not appointed in the manner prescribed by the ordinance of 1754; and consequently, that although he did exercise the functions of sub-delegate, in certain cases, he could not be recognized as a sub-delegate under the said ordinance. Surely no one but Judge Peck himself would have thought of drawing any other inference than this from the language of Mr. Lawless.

3. The third specification is as follows: "That O'Reilly's regulations, made in *February*, 1770, can be considered as demonstrative of the extent of the granting power, either of the Governor General or the sub-delegates, under the royal order of *August*, 1770." The respondent first gives a strained and unnatural construction to this specification, and then pronounces it a gross and flagrant misrepresentation, calculated to bring the court into contempt and ridicule. Interpolating words and ideas of his own, he makes Mr. Lawless say, that the regulations of O'Reilly were "in *themselves*, demcnstrative of the *whole* extent of the granting power." This court will clearly perceive that Mr. Lawless neither said nor meant any such thing. The word "demonstrative," is equivalent to the phrase "tending to demonstrate." The error imputed to Judge Peck, therefore, in this specification, was simply that of maintaining that O'Reilly's regulations of *February*, 1770, could be considered as having any tendency at all to indicate the extent of the granting power, under the order of *August*, 1770. It is not for me to say in what attitude of contempt and ridicule the Judge is here presented; but I do maintain that it is the very attitude in which he has placed himself. He does distinctly contend that the previous order of *February*, aids the construction of the subsequent order of *August*, adding these express words: "That the regulations of O'Reilly are of a date *anterior* to the order of the king of 1770, does not appear to affect their authority."

4. The fourth specification : "That the royal order of August, 1770, (as recited or referred to in the preamble of the regulations of Morales of 1799) related exclusively to the Governor General."

Now Judge Peck admits in his defence, what is evident from his Opinion, that he did maintain, that the royal order of 1770, so far as it regarded the authority to grant the royal domain, did relate exclusively to the Governor General ; he being vested by that order with the exclusive power of granting lands. It is equally obvious that Mr. Lawless—having no concern with any other power of the Governor General than that of granting land—meant only to be understood as imputing to the Judge, the opinion that the order of 1770 "related exclusively to the Governor General," so far as it regarded that power. In the case of Soulard, no other power of the Governor General or of the Spanish authorities in Louisiana, was involved; and it is utterly absurd to suppose that Mr. Lawless could have referred to any other. Yet Judge Peck, with the ingenious perversity which pervades his whole defence, pretends to understand Mr. Lawless as ascribing to him the assumption, that the order of 1770 related exclusively to the Governor General, in all its provisions, whether they related to the granting of lands, or the most petty regulations of local police ! If anything can exceed the absurdity of this construction, it is that placed upon the next specification.

5. "That the word '*mercedes*' in the ordinance of 1754, which, in the Spanish language, means '*gifts*,' can be narrowed down by anything in that ordinance, or any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money." In this specification Judge Peck seems to think Mr. Lawless has reached the grand climax of contemptuous misrepresentations and violated majesty ; and I must be permitted to say, that, in his comments upon it, the respondent has reached the very climax of judicial cavilling and absurdity. Mr. Lawless had maintained that the word "*mercedes*," in the preamble of the ordinance of 1754, meant "*gifts*," and that, therefore, the body of the ordinance—the enacting part—should receive such a liberal construction, as to include grants for services, as well as sales or grants for money, or otherwise there would be a discrepancy between the preamble, and the enactments of the ordinance. Judge Peck replied in his Opinion, that the word "*mercedes*" did not necessarily mean "*gifts*," but might as well be construed to mean "*grants* ;" but that even if it did necessarily mean gifts, "effect was sufficiently given to it in this sense," by those provisions of the ordinance which relate to gifts to Indians, grants to towns, and rewards to informers.

Now, Mr. Lawless, in this specification, imputes to the Judge, in very plain language, precisely what he decided. And not only is there no misrepresentation calculated to bring the court into contempt and ridicule, but, in my judgment, it is apparent from the very face of the statement of Mr. Lawless, that the Judge was correct in the assumption which Mr. Lawless imputes to him as an error. But the respondent, in the true spirit of a tyrant, in the very delirium of a jealous and suspicious tyranny, has strained and tortured this charge, by a tissue of absurd inferences, into what he denominates "a congeries of most ridiculous absurdities ;" and then, turning round upon these phantoms of his own disordered fancy, "the mere coinage of his own phrenzied brain," he denounces Mr. Lawless in terms, not very well becoming the "dignity and the decency of the judicial character," for making such monstrous imputations against him.

The first in this congeries of absurdities supposed to be imputed by Mr. Lawless is, that the respondent assumed, that the word "*mercedes*" meant "*gifts*." Now, any man familiar with common English and common sense, will perceive at the first glance, that Mr. Lawless does not impute to Judge Peck anything like the opinion, that *mercedes* means gifts. It is obviously *Mr. Lawless himself*, who expresses this opinion ; and the error he imputes to Judge Peck is, that he narrowed it down, so as to make it mean a grant to an Indian, a reward to an

informer, or a sale for money. The next absurdity imputed by this specification, to the respondent, as he alleges in his answer, is, that he conceded, that the ordinance of 1754 conveyed to the sub-delegates an unlimited power to make gifts of lands to any extent and for any cause, and yet narrowed down this unlimited power to a grant to an Indian, a reward to an informer, or a sale for money! Now all this is the merest fabrication of the respondent, for which there is not a shadow of foundation in the article of Mr. Lawless. There is no such absurd contradiction in that article, as "an unlimited power, limited by construction." Its whole import is that the word "*mercedes*," in the preamble of the ordinance, means gifts; and that Judge Peck narrowed down the meaning of that word, so as to limit the granting power to a certain description of gifts, and to grants for money. And in this imputation, Mr. Lawless is clearly sustained by the Opinion of the Judge.

6. The sixth specification: "That O'Reilly's regulations were, in their terms, applicable, or were in fact applied to or published in Upper Louisiana." Here we have another of the respondent's wretched quibbles, in order to distort the language of Mr. Lawless into a misrepresentation. The argument had been used at the bar, in the case of Soulard, that O'Reilly's regulations were not of force in Upper Louisiana, not being applicable to the peculiar situation of that part of the province. Judge Peck decided, that they "were made for the whole province," and insisted that their policy was as applicable to the upper as the lower divisions of it. Yet he now gravely contends that he did not say the regulations were "in their terms" extended to Upper Louisiana. I beg to know how they were extended there at all, if it were not by their terms? But Mr. Lawless only ascribes to Judge Peck the assumption that these regulations "were in their terms applicable," or "were in fact applied" to Upper Louisiana. He certainly decided one or the other of the alternative propositions.

7. The seventh specification: "That the regulations of O'Reilly have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them." The meaning of Mr. Lawless is here wantonly perverted by the respondent, and he is most absurdly represented, as imputing it as an assumption of the Judge, "that the regulations of O'Reilly *authorized* the grant to Soulard," the very reverse of what is obviously intended. If the grant to Soulard were to be governed by the regulations of O'Reilly, it would be void; and Mr. Lawless had contended that this grant did not come within the purview of those regulations, or in his own words, was not contemplated by them. Judge Peck held the opposite opinion, and Mr. Lawless imputes nothing more to him, in the short sentence under consideration.

8. The eighth specification: "That the limitation to a league square of grants to new settlers in Opelousas, Attakapas, and Natchitoches (in 8th article of O'Reilly's regulations) prohibits a larger grant in Upper Louisiana." Here again, as in the first specification, Mr. Lawless may be liable to be arraigned before a court of competent jurisdiction for violating the rules of grammatical propriety and elegance. Judge Peck decided that as the regulations limited grants of land to a league square in Opelousas, Attakapas, and Natchitoches, he saw no reason why—as "the regulations were intended for the province at large"—grants of land should be unlimited in Upper Louisiana. In a word, he made a constructive limitation of the granting power in Upper Louisiana, which he deduced from the limitations expressly prescribed for other parts of the province.

Now this, to be sure, was not deciding that the 8th article of the regulations *expressly* prohibited grants for more than a league square in Upper Louisiana; but it was undoubtedly asserting a virtual or constructive prohibition; and this is obviously what, by the very terms of the specification, Mr. Lawless intended.

9. The ninth specification : " That the regulations of the Governor General, Gayoso, dated 9th September, 1797, entitled ' instructions to be observed for the admission of new settlers,' prohibit in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until 1804." Now, though the respondent asserts that not one word of this specification is true, this court will perceive, on comparing it with the Opinion, that every word of it is true. It imputes to the Judge precisely what he decided, saving and excepting the Scotch Irish use of the word " prohibit." The Judge decided that " these regulations contain provisions not to be reconciled " with a power in the Lieutenant Governor to make this concession ; and that, therefore, his official act, which, if it had stood alone, would have been regarded as *prima facie* evidence of the existence of the power in question, could not be so regarded, in the face of provisions incompatible with it. The regulations, therefore, in the opinion of Judge Peck, made void a grant which would have been valid had they not been in existence. But he complains of misrepresentation on another point. Mr. Lawless imputes to him the assumption, that these regulations, dated in 1797, have the effect of annulling the grant to Soulard, which was made in 1796. The Judge unquestionably did so decide, with this exception only, that he used the term " forfeit " in place of " annul." And he said expressly, " that the regulations are of a date *subsequent* to the concession, forms no reason why they may not impose duties on the claimant, and prescribe forfeitures for a failure to perform those duties." Now I cannot perceive the difference between annulling a grant and declaring it void by forfeiture. If the great political doctrine of nullification—very much discussed of late—had been at that time agitated, Judge Peck might have had some grounds for supposing that Mr. Lawless designed to impute it to him. In that view only, could the difference be material. As to the distinction which he now makes, between the prospective and retroactive operation of the regulations—between " striking back at the grant," and striking forward at it—between annulling it by a back-handed blow and a straight-forward thrust—however just that distinction may be, it is not to be found either in the opinion of the Judge, or in the article of Mr. Lawless.

10. The tenth specification : " That the complete titles made by Gayoso are not to be referred to, as affording the construction made by Gayoso himself, of his own regulations."

14. The fourteenth specification : " That the language of Morales himself, in the complete titles issued by him, on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to, as furnishing the construction which he, Morales, put upon his own regulations."

Both of these specifications are subject to the very same remarks. Mr. Lawless imputes it to the Judge that he assumed that the language and the acts of these officers were not to be referred to " *as furnishing the construction which they themselves put upon their own regulations ;*" and the respondent, for the purpose of making out a case of misrepresentation, pretends to understand, that he is charged with having decided, that the language and the acts of these officers, were not to be referred to at all for any purpose ! This sort of forced construction, is perfectly in keeping with the spirit and character of his whole defence. It certainly needs no further commentary.

11. The eleventh specification : " That, although the regulations of Morales were not promulgated as law, in Upper Louisiana, the grantee in the principal case was bound by these, inasmuch as he had notice, or must be presumed, from the official station he held, to have had notice, of their terms."

The respondent, with his accustomed unfairness, assumes that he is charged with admitting that the regulations of Morales were not promulgated ; whereas it is apparent that Mr. Lawless states a mere hypothetical case. It is precisely as if he had said " that *'even if'* the regulations of Morales were not pro-

mulgated, the grantee is bound by the *notice* which, from his station, he must be presumed to have received." And this is precisely what Judge Peck did expressly decide. His words are: "In answer to that portion of the argument, which denies the force of law to the regulations, for want of publication, it is only necessary to remark, that such a publication is proved as must have brought them to the *knowledge of the ancestor*." Here Judge Peck evidently assumes the absurd position, that a law, although not promulgated so as to be binding on the whole community, may yet be rendered binding on a single individual, by actual notice!

12. The twelfth specification: "That the regulations of Morales exclude all belief that any law existed, under which the confirmation of the title in question could have been claimed."

Nothing can show more clearly the spirit of Judge Peck's proceedings against Mr. Lawless, than the extraordinary commentary, which he makes upon this specification, in his recorded defence. "This (he says) is another instance of the suggestion of a falsehood, by the suppression of truth." And yet this honorable Court will be surprised to learn, that Mr. Lawless uses the very words contained in the Opinion. In speaking of the regulations in question, Judge Peck says, "This preamble excludes the presumption that other laws existed by which titles could be obtained; and the regulations themselves exclude all belief that any law existed under which a confirmation of the title in question could have been claimed." This is truly characteristic of a judicial tyrant, predetermined to condemn and punish the victim of his vengeance!

The very words he used, in the very sense in which he used them, are imputed to him by Mr. Lawless; and yet he denounces this as a contemptuous misrepresentation. In effect he says to Mr. Lawless, "How dare you, sir, with sacrilegious hands, tear a sentence of my Opinion, from the admirable context; and thereby mar the symmetry of this beautiful monument, which I have erected to perpetuate my fame? You have been guilty of the insolent and outrageous contempt, of stating my conclusion, without stating also the reasoning upon which it was founded; and I therefore commit you to prison, and suspend you from practice!"

13. The thirteenth specification: "That the complete titles (produced to the court) made by the Governor General, or the Intendant General, though based on incomplete titles not conformable to the regulations of O'Reilly, Gayoso or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated, and must be considered anomalous exercises of power in favor of individual grantees." The assumptions here imputed to the Judge, are fairly inferred from the language of his Opinion. He complains, however, in his defence, that he is misrepresented in this: that whereas he admitted that the confirmation of incomplete titles *would have* raised a presumption in favor of the power of the Lieutenant Governor, if the regulations had not contained provisions inconsistent with such a power; Mr. Lawless represents him as deciding that the confirmation of these titles could afford no inference at all, under any circumstances. Now Mr. Lawless imputes to him no such thing. He asserts nothing more than this: "Judge Peck decided that in the *face of the law and the evidence before him*, the confirmation of the incomplete titles produced, afforded no inference in favor of the power claimed for the Lieutenant Governor." And he certainly did so decide; and expressly referred the confirmation of the incomplete titles produced by the Governor General to "a dispensing power, incident to the legislative department of every government."

I will now proceed to consider the fifteenth, sixteenth and seventeenth specifications, together.

15. "That the uniform practice of the sub-delegates or Lieutenant Governors of Upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded, as a proof of law usage or custom therein."

16. "That the historical fact, that nineteen twentieths of the titles to lands, in Upper Louisiana, were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles."

17. "That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and people of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution, *ab intestato*, furnishes no inference in favor of those titles, or of their claim to the protection of the treaty of cession or of the law of nations."

These three specifications are grouped together in the answer of the respondent, as utterly destitute of a shadow of foundation in truth. He says in the first place that the facts they assume were not proved; yet this court will perceive, by a reference to the documents, that they were all proved—or at any rate, evidence offered to establish them. But the Judge contends that the specifications are false, because he said nothing about those facts, whether they were proved or not. This is precisely the ground of the charge made by Mr. Lawless, and furnishes me with a proper occasion for vindicating his use of the term "assumption" at which Judge Peck's hypercritical acuteness has been so deeply offended.

Mr. Lawless established—as he supposed conclusively—the uniform practice mentioned in the fifteenth specification, and the historical facts mentioned in the sixteenth and seventeenth. Yet Judge Peck, without pretending that the evidence was not sufficiently made out, pronounced a decision, which necessarily involved the assumption, that these facts afforded no inference in favor of the legality of the titles in question. This is precisely the case which most strictly authorizes the use of the offensive word "assumption." The Judge does not *say* the facts are irrelative or unimportant, but he decides precisely as if they did not exist, and therefore *assumes* it. To illustrate my view of this matter: a man is charged with the crime of murder; he proves that he killed his adversary in necessary self-defence; the judge, without saying a word about the justifying cause of the homicide, instructs the jury that it is a clear case of murder. I beg Judge Peck or his counsel to inform me, whether such a judge might not be truly told that he had *assumed* that necessary self-defence was no excuse for homicide, though he had *said* nothing about it?

18. I come now to the last specification: "That the laws of Congress heretofore passed, in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles of a precisely similar character which remain unconfirmed."

Here Judge Peck again resorts to the artifice of making Mr. Lawless impute to him an opinion, which Mr. Lawless only asserts himself. *The Judge* had decided that the acts of Congress, theretofore passed, in favor of incomplete titles, afforded no argument or protecting principle in favor of Sould's case, or of any such cases. *Mr. Lawless* had contended that these cases were "of a precisely similar character" with those confirmed under the said acts of Congress. And in this specification, every man of common sense will perceive, that he does not mean to charge Judge Peck with the gross absurdity of deciding that the acts of Congress afforded no protecting principle for these cases at issue, and of admitting at the same time that they were of a precisely similar character with those in favor of which these acts were passed. Yet this is the construction of Judge Peck; being the only one by which he could pervert the statement of Mr. Lawless into a misrepresentation.

Such, then, Mr. President,—to retort his own language—"is the farrago of nonsense and absurdity" which this Judge "has been able to extract" from the publication of Mr. Lawless; a publication perfectly respectful in its terms, and throughout substantially correct in its representations. It was, till recently, the practice in South Carolina, to carry up cases to the Court of Appeals, by a

sort of informal bill of exceptions, which was made out by the attorney, and not examined or signed by the presiding judge, who always sat in the Appeal Court. This bill of exceptions consisted of a statement of the facts of the case and the points decided, and concluded by stating the grounds of appeal, or in other words, the errors imputed to the judge. And I declare, that in the course of my practice, I have seldom seen a statement of this kind, which exhibited the conclusions or assumptions of the court more fairly and correctly than Mr. Lawless has presented the assumptions of Judge Peck in the article signed "A Citizen;" and I am sure I have seen hundreds, where the opinion of the presiding judges were much less fairly stated. It is not to be expected, it is hardly practicable, that a lawyer who believes a judge to have erred, and who sits down for the purpose of pointing out his errors, should exhibit his opinions in the aspect, and with the lights and shades, that would be best calculated to show off those opinions to the best advantage. We must make some allowance for the diversity of the human mind, and for the opposite views in which the subject is contemplated. Even in debate, in this or the other Hall, we every day witness how difficult it is for a debater to state the argument of an opponent with precise accuracy, even where it has been delivered only a few moments before.

Aware of the difficulty of making out a case of actual misrepresentation, Judge Peck takes the ridiculous ground, that Mr. Lawless is responsible for the erroneous impressions his publication may make upon those who are entirely ignorant of the subject, and will not take the trouble to examine it. Now I think it must be apparent from the analysis I have presented, that there is nothing upon the face of that publication, from which a man, unacquainted with the matter, could decide whether Judge Peck or Mr. Lawless was in error: of course, it could not strike such a reader, that Judge Peck is charged with an absurdity. But, surely, Mr. Lawless is not to be responsible for the ignorance of his readers.

Suppose he had been indicted for a libel; how would the truth or falsehood of his publication have been made out before a jury? By keeping them in profound ignorance of the Opinion of the Judge and the evidence in the case? Certainly not. The Opinion and the publication would have been both submitted to the jury, with all the law and evidence; and the fact of truth or falsehood, would have been the result of a careful examination and comparison. No one, after such examination and comparison, could fail to perceive that every specification in the publication of Mr. Lawless is true, in the sense in which he intended to be understood.

And now, that this court may have an entire view of this offensive publication, I beg that it may be read by the Secretary.

[Here the Secretary read the article of Mr. Lawless.]

Such, may it please the court, is the mild and respectful statement in reference to the published Opinion of a Federal Judge, for which a citizen of the United States has been sentenced, without trial, to an ignominious punishment and subjected to a forfeiture of the most grievous character! There is not a single word of censure in the whole article. It professes to point out errors which the writer very modestly says, "he *thinks* he has discovered" in the published Opinion of Judge Peck; and it is confined to a simple narrative of the conclusions of that Opinion.

This court will form its own estimate of the jealous and arbitrary character of a judge, who can discover a hidden sneer or a disguised sarcasm in almost every sentence of this most inoffensive publication; and I confidently appeal to every member of this court to say, whether it does not appear from the very face of the documents that the respondent has been guilty of a wanton, unprovoked and outrageous act of judicial tyranny, which calls aloud for exemplary punishment?

I want no stronger proof of the vindictive spirit by which he has been actuated throughout this proceeding, than that which is furnished by the written de-

fence he has made before this court. Such a defence, I will venture to assert, never before appeared on the records of a High Court of Impeachment. What is it, from the beginning to the end, but one unbroken tissue of misrepresentation and perversion, in regard to the publication of Mr. Lawless, and one uninterrupted stream of denunciation and calumny against the writer, wholly unbefitting either the "dignity or the decency of the judicial character," of which the respondent talks so much and seems to know so little? It would really appear, from reading the defence, that Judge Peck and Mr. Lawless had changed positions; that the former, instead of being upon his trial for a high misdemeanor, was the accuser of Mr. Lawless. Even in this character, what he has here presented as his defence, would be regarded as a harsh and undignified and uncandid opening of a prosecution against Mr. Lawless.

No impartial man can fail to perceive, that Judge Peck has misrepresented the publication of Mr. Lawless, much more than Mr. Lawless misrepresented the opinion of the Judge; and he has seasoned his misrepresentations with every disparaging epithet which his invention could suggest. The same spirit of revenge—proceeding from the wounded vanity of a weak and arrogant pretender—which sentenced Mr. Lawless to an unjust and lawless punishment, appears to be still unappeased.

If Mr. Lawless were the Judge, and Judge Peck the Attorney; if the article signed "A Citizen" were the opinion of the court, and the defence of the respondent the commentary of that attorney, Heaven defend the respondent from the excited wrath of his judge and accuser, if governed by the principles by which he has judged Mr. Lawless.

I now beg leave to present, for the consideration of this High Court of Impeachment, some considerations, tending to show the dangerous and alarming nature of the precedent that would be established by the acquittal of the respondent. He has violated the liberty of the press, in the most pernicious of all the modes in which that sacred and inestimable privilege can be assailed—prostituting the forms of judicial proceeding, and the authority of his official station, to the purpose of inflicting an unlawful, unjust and vindictive punishment, upon Mr. Lawless, for daring to question his judicial infallibility before the very tribunal, to whom he (the respondent) himself had appealed by publishing his Opinion. He has violated the equally sacred and inestimable right of trial by jury, in the arbitrary and lawless usurpation of the power to decide both upon the law and the facts, in a case, where, if he had possessed a particle of judicial delicacy or "decency," he would not even have presided as a judge, supposing the case to have been tried by a jury.

But we are told by the respondent that the liberty of the press is a stale topic of declamation, the "*decantatum*" of libellers, in all ages; and contemptuously passes it over as if it were a mere idle theme for babbling demagogues, and wholly unworthy of the grave and solemn consideration of this tribunal. May it please the court, I hope that I may not live to see the day, when the liberty of the press shall be scouted and sneered out of the Senate of the United States by a vain and arrogant pretender to judicial infallibility—a mere upstart in office bewildered by the worst examples of the English Bench and by the merest smattering of the common law. It would, indeed, be a most extraordinary contrast, if almost at the moment that the people of France are driving an hereditary monarch from the throne of his ancestors for invading the freedom of the press, a petty judge of the United States should be permitted to commit a similar outrage, with impunity, in this boasted land of liberty, and then audaciously attempt—even before this august tribunal—to throw ridicule on the sacred privilege he had thus invaded.

If it shall be now decided that a federal judge, of whatever degree, may punish in this summary and arbitrary manner every person who dares to investigate and censure his public conduct, it will be impossible to calculate the pernicious consequences that may flow from the precedent. The president of the

United States—the Vice President—the members of the Cabinet—the members of the Senate and of the House of Representatives, are all public functionaries, whose conduct is assuredly as much entitled to be protected from public scrutiny as that of a district judge of the United States. And yet every one would admit that the liberty of the press would be an empty sound, if these functionaries should be permitted to assume the power which has been exercised by the respondent. In the violent contests of party, and in the freedom which always characterizes the scrutiny of the press into the character and conduct of public men, what editor in the United States could repose for a moment in safety? At this very instant, there is not probably an editor of any prominence in the United States, of any party, who would not be incarcerated in the walls of some miserable state-prison, if the doctrines of Judge Peck were fairly and fully carried out to their ultimate consequences. Every justice of the peace, clothed with the authority of the United States, would be armed with the tremendous power of sending to prison, without trial, any citizen who dared to expose, through the public press, his folly or his wickedness. And when we reflect upon the great facility with which these inferior magistrates might be indefinitely multiplied throughout the United States, and the still greater facility, with which—by means of constructive contempts—they could torture every assault upon the minions of power into a contempt of their own authority—it must be apparent to every member of this enlightened court, that the precedent which would be established, by the acquittal of this respondent, would be in the highest degree dangerous to one of the most sacred and invaluable privileges of a free people.

We have so long enjoyed the blessings of a free press, that we seem to be more disposed to censure its unavoidable excesses than to appreciate its vast and inestimable advantages. However it may be thrown into ridicule, by those who are clothed with “a little petty brief authority,” it will still continue to be regarded here, as it has been regarded in every free country, as the indispensable safeguard of public liberty. Even Hume, the apologist of the Stewarts, admitted that no people could long preserve their liberty who did not enjoy a free press; and that no people could be long retained in a state of slavery, who did enjoy that blessing. He deliberately expresses the opinion—in the calmness of philosophical speculation—that it was solely to be ascribed to the freedom of the press that the people of England enjoyed a higher degree of freedom in his time than they did during the reign of Elizabeth; and that with a free press, even the subjects of the Turkish Sultan would soon cease to be slaves.

But not only the liberty of the press, and the right of trial by jury have been violated by the respondent, but every privilege that goes to constitute the freedom of the citizen. If such things may be done with impunity, what security has any citizen for the enjoyment of his liberty? A wise man of antiquity—one of the seven so celebrated in Greece—when asked what was the best possible form of government, answered, “that in which an injury done to the humblest citizen, is regarded and punished as an injury done to the whole community.” This single remark was sufficient, in my opinion, to secure to him the appellation by which he was distinguished. If, acting in the spirit of this political aphorism, every citizen of the United States should judge of the case of Mr. Lawless as if it were his own, how unanimous and indignant would be the sentence of condemnation pronounced against the respondent, by the American people? Mr. Lawless is an Irishman, and it is said, of high and excitable passions. If so, he must have exhibited a most extraordinary degree of philosophical forbearance in this affair with Judge Peck. For myself, I think I could not, and I most assuredly should not have exhibited so much. If I had been thus made the victim of judicial vengeance and judicial tyranny; if I had been sentenced to an ignominious punishment, by an act of flagrant usurpation, and reviled and calumniated as Mr. Lawless was, by the tyrant who pronounced the unlawful and iniquitous sentence, I should have been almost irresistibly impelled, by the

highest impulses of my nature, to drag the judicial monster from the seat he disgraced, as Virginius dragged the tyrant Appius from the throne he had polluted. I, therefore, call upon the members of this High Court of Impeachment, as they regard the most sacred rights of the citizen, and as they regard the dignity, respectability and authority of the judiciary, without which those rights cannot be preserved, to make an example of this high-handed offender, which will at the same time secure the rights he has violated, and rescue from general odium the authority he has so grossly prostituted.

Mr. Wickliffe, one of the managers, offered and read in evidence,

1. Exhibit A, annexed to the Respondent's answer, beginning at page 33.
2. Bond of M. P. Leduc.
3. Record of the District Court of Missouri, the United States *vs.* Stephen W. Foreman, for a contempt.
4. Record of same court, United States *vs.* Luke E. Lawless, for a contempt.
5. Record of St. Louis Circuit Court on the writ of Habeas Corpus at the application of Luke E. Lawless.

The court then adjourned to 12 o'clock tomorrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES *vs.* JAMES H. PECK.

Wednesday, December 22, 1830.

The court having been opened by proclamation, the managers attended. James H. Peck, the respondent, and his counsel also attended.

At the request of the managers, the oath prescribed by the 15th Rule was administered to

LUKE E. LAWLESS.

Mr. Buchanan, on Mr. Lawless' being sworn, requested the witness to detail to the court the facts of the case from the earliest stage, so far as his memory served him.

Mr. Lawless then proceeded, to the following purport:—

Among the Land claims submitted to the District Court of the United States for the district of Missouri, under the Act of Congress of the 26th May, 1824, was that of Antoine Soulard, for the confirmation of a grant made to him by the government of Upper Louisiana, of 10,000 arpents of land.

The cause was argued by the witness (Mr. L.) on behalf of the claimant, on a general demurrer filed by the District Attorney, at the first session of the court held in November, 1824; the substance of the witness's argument was afterwards printed and published, in pamphlet form, and a copy of it was, at the request of Judge Peck, handed to him, and was, as he himself stated to the witness, more than once read to him. After the argument on the demurrer was concluded, the demurrer was, by consent, withdrawn by the District Attorney of the United States, and an answer filed to the petition; an issue of fact was then directed by the Judge, to try whether such concession was made to Antoine Soulard, as in the petition was alleged. This issue was found for the petitioner, and the cause was then set down for hearing on the pleadings, proof, and general merits.

In March, 1825, the case was finally heard, and, on that occasion, the witness (Mr. L.) made another argument, more elaborate and developed, than the first, on behalf of the petitioners. The court took the case under advisement, and adjourned to November, 1825. Shortly after the hearing of the cause, the witness left the State of Missouri, and did not return until the month of July of the same year, and again left the State in September, and did not return until the beginning of December following. On his return, the witness was informed, that, at the

November session preceding, the court had delivered its opinion adverse to the claim of the petitioner, and had continued the case until the fourth Monday of December, in order that the witness, who was leading counsel, should be present when the record was made up, and the final decree regularly entered, on the fourth Monday of December. The final decree was accordingly entered; an appeal prayed and granted; an appeal bond approved, and the case then removed from Judge Peck's jurisdiction to that of the Supreme Court of the United States, where it now is under consideration. The witness heard no more of Judge Peck's proceedings or opinions in the matter, until the 8th March, 1826; when the witness, for the first time, saw in the *Missouri Republican*, a newspaper printed at St. Louis, an article headed "Peck Judge," purporting to be an Opinion of the Court, or argument of Judge Peck, in support and justification of the final decree, pronounced by him, as before stated, and entered on the record against the petitioners in the case of James G. Soulard and others vs. the United States. On reading the argument or Opinion, the witness thought that he discovered in it several erroneous positions, in fact and in doctrine, which were calculated to produce an injurious effect on public opinion, not only as respected the claim in question, but all the other claims depending or founded on incomplete French or Spanish titles. The witness found that this Opinion had produced a great sensation amongst those of his clients and others interested in the unconfirmed land claims, and had much diminished their hope of having them confirmed. The Opinion seemed calculated to effect a depreciation of the value of unconfirmed land, and to expose the proprietors of those claims to the danger of becoming the prey of speculators, who might then avail themselves of their alarm. The witness, too, when he examined the argument, found, that in the very outset of it, the Judge by no means advanced his propositions with confidence, but, on the contrary, treated the subject under discussion as new to him—full of doubt and difficulty, and as a labyrinth through which he wandered without a light or a clue to guide him: that on the conclusion of the Opinion the Judge seemed to invite further discussion. The witness, considering all this—and further, believing that not only in his character of counsel, but also in that of a private citizen, he had an undoubted right to point out, through the medium of a public journal, the errors which he saw, or believed that he saw, in the argument of Judge Peck, took up his pen and wrote the article signed "A Citizen," which was, at his request, published in the *St. Louis Enquirer*, of the 8th of April, 1826.

Some days after the article signed "A Citizen" was published, Judge Peck held a court under the Act of 1824. The witness appeared in his place as counsel at the sitting of the court. The Judge, soon after the court was opened, pulled a newspaper out of his pocket, and with some emotion, as it appeared to the witness, stated that it was the *Missouri Advocate and St. Louis Enquirer*—and, addressing himself either to the District Attorney, or generally to the persons present, (the witness was not certain to which,) demanded if anybody could inform him who was the editor of that paper? The witness supposed, from Judge Peck's manner, that the article signed "A Citizen," in that paper, was the object he had in view, and therefore, wishing to facilitate as much as possible any proceeding with reference to it, he stated that he knew who was the editor: that one Stephen W. Foreman, to the best of his belief, edited the *Missouri Advocate and St. Louis Enquirer*. Judge Peck then proposed that the witness should make an affidavit of the fact, which he accordingly did, and the Judge thereupon instantly dictated to his clerk a rule on Foreman, to show cause, on the next morning, why he should not be attached for publishing the article signed "A Citizen."

The order was served on Foreman, who appeared on the next morning before Judge Peck, attended by the witness as his counsel. The witness, as author of the article, felt it his duty to act voluntarily as counsel for the editor, whom he strenuously urged to avail himself of the occasion to vindicate the liberty of the

press, and rather to submit to any punishment that Judge Peck should inflict upon him, than surrender his right to what the witness deemed the exercise of usurped power.

The witness defended the editor on all the grounds, and by all the arguments and authorities, that suggested themselves. He contended that the article signed "A Citizen" was true intrinsically and in substance—was decorous and respectful in form, and indicated no intention whatever, such as the rule attributed to it. The witness also declared that no contempt was ever intended to be committed by it. In demonstrating the truth of the article, the witness compared it with the Opinion published in the Republican; and, so far as the humble abilities of the witness enabled him, vindicated the article on the same grounds (with one or two obvious exceptions) taken by the honorable manager who opened the impeachment. The witness then contended that, admitting the article to be as charged in the rule, a false statement tending to bring odium on the court—admitting it to be a malicious libel from beginning to end—the court had no jurisdiction of it as a contempt; that it was punishable only as an ordinary offence, for which the editor should be indicted and tried by a jury of his fellow citizens. The witness sustained these positions by all the arguments and authorities that occurred to him, and was followed by Mr. Geyer, who also volunteered his services in favor of the editor. After the witness had concluded his argument, he retired from the court; and when he returned he found Judge Peck about to make the rule absolute against the editor. The witness then assented to the editor's naming to the court the author of the article, which was done by the editor, who, after answering certain interrogatories put to him by Judge Peck, was discharged. The witness was induced to assent to his being delivered up as the author by the consideration that Judge Peck manifestly pointed to the witness, during his defence of the editor, as the author of the article, and seemed to address to him as author, and not as counsel, the acrimonious and impassioned observations which he thought proper from time to time to make use of. The witness also was of opinion that not only the liberty of the press, but divers other rights not much less precious and important, would be violated by this judicial proceeding, directed against the witness; and therefore the more willingly presented himself to perform what he deemed a sacred duty to himself and his fellow citizens.

The rule against the editor having been discharged, a rule was then made upon the witness, ordering him to show cause, forthwith, why an attachment should not issue against him for the false and malicious statements contained in the article, and also why he should not be suspended from practice in Judge Peck's court, as an attorney and counsellor therein. For the terms and tone of this rule, the witness begged leave to refer the court to the rule itself, as already given in evidence. On this rule the witness appeared by his counsel, who, proceeding to defend him upon the truth and intrinsic merits of the article, was stopped by Judge Peck, who intimated that no argument or observation would be permitted by him on that part of the subject, inasmuch as he, Judge Peck, on the arguments of the rule against the editor, had already decided that the article was untrue and malicious. The counsel for the witness then argued against the rule on the following legal grounds, to wit:—First, that supposing the article false and malicious, and everything that it was by the rule described to be in a moral point of view, it was not legally a contempt of court, to be punished by the summary exercise of Judge Peck's judicial power; but was, at most, a libel, to be prosecuted and punished in the ordinary way. 2d. That, supposing the article to be a contempt, the Judge had no right or legal authority to punish the witness by suspending him from his practice and function as attorney and counsellor of his court. Those grounds of defence were argued elaborately, and sustained by all the reason and authorities which suggested themselves to witness's counsel—they were, however, urged in vain. Judge Peck overruled them all, and made the rule for the attachment absolute against

the witness. On making the rule absolute, Judge Peck thought proper to enter into an examination or argument on the merits of the article, and for that purpose had it read to him paragraph by paragraph, and commented at large on each of them. In the course of his remarks, Judge Peck, in an impassioned tone, and with much vehemence of manner, indulged in the use of various epithets which the witness understood as directed against him personally, and which he felt to be insulting and offensive to him as a man and a gentleman. The witness listened for about half an hour to this harangue, which seemed to increase in virulence as it proceeded. At length, fearing that he might, if he remained any longer under the excitement of Judge Peck's language, be betrayed into some expression or even gesture, that might be seized upon as a new pretext for punishing him for contempt, the witness rose and left the court. Before he did so, he asked a gentleman of the bar, who was seated on his right, (Henry S. Geyer) whether he considered the act of the witness in leaving the court while the Judge was so speaking, could be deemed contemptuous or improper; to which Mr. Geyer replied that he saw nothing improper in his leaving the court under such circumstances, and that he did not think that he was under any obligation to remain there to hear himself abused.

From Judge Peck's court the witness went to the Circuit Court of the county of St. Louis, which was then in session, and before which a cause was on trial of considerable importance, (some twenty negro slaves depending on the final decision of it,) and in which the witness was leading counsel for the defendant, Mr. Peter Chouteau, sen. of St. Louis.

The witness remained in the Circuit Court for about two hours, and until he was notified by the Marshal that an attachment had been issued against him by Judge Peck, and that his presence was forthwith required in the District Court of the United States.

The witness, on presenting himself to Judge Peck, was informed that as he was now in custody under the attachment, he, the witness, had a right to require that interrogatories should be put to him for the purpose, as witness understood, of enabling him, the witness, to purge himself of a contempt. To which intimation the witness replied that he did not require any interrogatories to be propounded to him, and that if they were so propounded, he would not answer them. The Judge then dictated an order for the commitment of the witness to prison for the space of twentyfour hours, and that he should be suspended from practising as an attorney or counsellor at law in his court for eighteen calendar months from that day. The witness, for the precise terms of this, as well as all the other rules and orders made by Judge Peck, begged leave to refer the court to the rules themselves, as given in evidence. A copy of the order of commitment having been handed to the Marshal, the witness was forthwith conducted to the common jail of the county of St. Louis, and there locked up in a grated and empty room, in which felons and malefactors are frequently incarcerated. Two gentlemen of St. Louis, actuated by a friendly feeling, accompanied the witness to the jail, and were locked up along with him. The witness after some time requested the deputy jailer to show him the order of commitment, and having examined it, determined on addressing himself to the Circuit Court of the county of St. Louis, then in session, for a writ of habeas corpus. The witness accordingly forthwith prepared a petition, and had it presented to the Judge, who granted the writ, requiring the sheriff and jailer of the county to bring the witness before him with the cause of his detention. The witness was accordingly brought before the Circuit Court about three or four hours after he was committed, and was, after a short discussion on the character of the commitment and the cause of detention, discharged by the Judge from further confinement, on the ground that the paper purporting to be a commitment was not authenticated. The witness then returned to his family, and did not afterwards hear from Judge Peck on the subject.

The witness here declared that he had detailed all that he recollected touch-

ing the conduct of Judge Peck towards him, and which seemed to relate to the charge before the court.

The examination of the witness was then taken up for some time longer by Mr. Buchanan, with the view of further elucidating parts of the foregoing evidence ; this done, Mr. Meredith, on the part of Judge Peck, commenced the cross-examination.

[N. B. During the first day, the reporter of this trial (not having then the purpose of preparing a report of it for publication,) took no notes of the proceedings ; and the above is supplied from a sketch in the National Journal, which, it is believed, was revised by Mr. Lawless, and which that gentleman assured the reporter might be relied upon as correct.]

The Court then adjourned to 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Thursday, Dec. 23, 1830.

The managers, accompanied by the House of Representatives, attended.

The cross-examination of LUKE E. LAWLESS was resumed.

Question by Mr. Meredith. In your answers, yesterday, you stated to the court that you assented to your name's being given up, by Mr. Foreman the printer, as the author of the publication signed "A Citizen" in the Missouri Republican : Was this done at your own suggestion, or at the request of the editor ?

A. I think it was done at my suggestion. I am not quite certain. I certainly assented to its being done.

Q. Do you recollect having advised Mr. Foreman to submit to the sentence of the court ;—to bear the brunt of the proceeding ;—to go to jail, even, should that be necessary ; and engaging that, if any fine were imposed upon him, you would pay it ?

A. I do not recollect promising that I would pay the fine, should any be incurred : but I think I did advise him to abide the consequences ;—to "bear the brunt," as you say.

Q. Do you not recollect representing to Mr. Foreman, that this was a case which afforded a favorable opportunity to him to increase his own popularity, as well as the circulation of his paper, by presenting himself to the public as the victim of persecution and oppression ?

A. I may have represented to the editor that his taking a stand, on such an occasion, was calculated to recommend him to the favor of his fellow citizens.

Q. What was Mr. Foreman's reply ?

A. I do not recollect, precisely. I remember that he appeared to be vacillating : but he assented to my view of the matter generally.

Q. Do you recollect having requested a friend to call upon the printer, and urge him not to give you up as the author of the piece ?

A. I do not recollect. It may be that I did.

Q. Do you remember that Mr. Foreman replied to such representations of your friend, that "he was not inclined to suffer martyrdom on your account ?"

A. He made no such reply, to my knowledge.

Q. Will you state to the court what was the motive which afterwards induced you to change your determination ; and to consent that your name should be given up ?

A. As I stated, on my examination yesterday, my motives were, 1st, that Judge Peck, in the course of his argument on the alleged contempt, seemed, all along, to point to me as the author of the offensive publication ; and it is

very possible that, in the warmth of argument, I might, though unwittingly, have spoken of myself as the author : 2dly, that in my person would be violated, not merely the liberty of the press, but many other rights, equally precious.

Q. To what other rights do you allude ?

A. To the liberty of speech ; to my privileges as counsel ; and to my rights as a private citizen ; as also to the rights of all those on whose behalf I had been employed as counsel.

Q. Were not the rights of Mr. Foreman likely to be as deeply affected as yours, by any sentence of the Judge ?

A. That is a matter of opinion, and I decline answering the question.

[Mr. Spencer, on behalf of the managers of the impeachment, objected to having this question put. Mr. Wirt waived discussion, and the question was withdrawn.]

Q. You stated, yesterday, that after the argument on the rule of court against Foreman, the court overruled both your arguments and your authorities. Pray what were the *authorities* you produced on that occasion ?

A. Without referring to my brief, I cannot, on oath, state the authorities. I must decline answering the question, until I have my brief to refer to. I cannot draw on my memory for these details.

Q. You have, I suppose, to draw on your memory for all your testimony. Were any books produced by you ?

A. I am not certain. Authorities, I am sure, were cited.

Q. Do you mean that they were cited from a brief ?

A. Yes. I am not certain whether I read any authorities before the court, but I cited a number.

Q. Were you present in court when Mr. Foreman was discharged from the rule against him ?

A. I was not. I was not there when interrogatories were propounded to him.

Q. You do not know on what terms he was discharged ?

A. Not of my own knowledge. I heard something of it.

Q. You said, I think, that in the course of your argument on the rule against the printer, you disclaimed all intention of disrespect to the court. Was this on the part of Foreman, as his counsel, or on the part of the author of the piece signed "A Citizen" ?

A. On the part of Foreman, as his counsel ; and also, on that of the author. I argued, from the face of the article, that no disrespect could have been intended by the author of it, and I made the disclaimer, indirectly, with reference to myself.

Q. I understand you, then, to say, that you made a personal disclaimer of disrespect to the court in that publication ?

A. I made it on the part of the printer, and of the author ; and, as I said before, it is possible that, in the warmth of argument, I may unwittingly have spoken of myself in the character of the author ;—knowing as I did, that I was the author of the publication ; and with that feeling, I did, on the part of myself, disclaim all intention of disrespect to the court. The Judge, throughout, pointed to me, as if I were the author.

Q. Do you now speak from distinct recollection ; or is this an inference from the circumstances ?

A. I speak from distinct recollection.

Q. You say, then, that you recollect, distinctly, that on the argument of the rule against the printer, you acknowledged yourself to be the author of the publication called "A Citizen" ?

A. I acknowledged no such thing. I may, under the feelings of the moment, have unwittingly spoken as if I had been the author, and in this manner have spoken of the absence of any disrespect on my own part ; but I never ex-

pressly declared that I was the author, but endeavored to speak in the character of counsel.

Q. You say, then, that when, in this way, you spoke as if you were the author, you disclaimed all disrespect to the court ?

A. Yes. I considered Judge Peck as understanding me, in what I said of the author, to refer to myself.

Q. Did you make the same disclaimer, when the rule was afterwards made upon yourself ?

A. No. I said that I disclaimed any right to interrogatories, and that if they were filed, I should not answer.

Q. Will you state to the court whether, in any stage of the proceedings in reference to the alleged contempt, either in the argument against the rule on the printer or afterwards against yourself, you stated, that one object you had in view in the publication signed "A Citizen" was to guard claimants against speculators ?

A. It may be : but I do not recollect that I ever stated this to the court, as one of the grounds of that publication.

Q. You said that in the case of the rule against yourself, when your name had been given up, you made no such disclaimer of intention of disrespect as you had made when the rule was against the publisher, Mr. Foreman. Why did you not ?

A. In the first place, because I had counsel to argue the case for me ; I had stated to them the ground I wished them to take, and I did not choose to interfere. Secondly, because I had formed my opinion of the Judge's course, and I was unwilling to do what might seem in the smallest degree as assenting to it. I determined to let the thing take its course, and in no manner to become accessory to what I deemed an usurpation.

Q. Do you remember on what day of the week the rule against Foreman was made returnable ?—*A.* I do not.

Q. Was it not on Tuesday ?—*A.* I do not recollect.

Q. On what day of the week was the rule made absolute against you ?

A. I do not recollect.

Q. How long did the argument continue, in the case of the rule against Foreman ?

A. Part of two days, I think. I believe it was on the second day that my name was given up as the author of the publication.

Q. On what day was the rule against you served ?—*A.* I do not recollect.

Q. Do you remember whether you applied for further time, or for an adjournment of the argument ?

A. I have some faint recollection of having done so.

Q. Was your request denied ?

A. I believe it was. I think it must have been, as the proceedings went on, without any interruption, that I recollect.

Q. The denial, then, is matter of inference and conjecture on your part ?

A. Yes. I suppose that my request must have been refused, because I remember no interruption in the proceedings.

Q. You spoke, I think, yesterday, of the cause of Chouteau at the suit of certain negroes, as having been then on trial : do you recollect any application for delay in the course of that trial ?

A. I do not recollect ; it is probable there was : the case was an important one, as there were, I think, some twenty negroes in question. I was leading counsel for the defendant, in that cause. I had often been employed by Mr. Chouteau.

Q. Were you not in the Circuit Court, attending to this cause, at the time the rule was first served on you ?

A. I do not recollect where I was when it was first served on me.

Q. How long did that case occupy in the hearing ?

A. I cannot say. I was not there the whole time. I remember that the verdict was given against my client. I think the jury were out, when I was brought up on a *habeas corpus* from that court,

Q. Was the jury in that case addressed by counsel ?

A. I do not know. They were yet in the plaintiff's case when I was taken away from court.

Q. Who were associated with you as counsel ?

A. I think, Mr. Geyer, Mr. Spaulding, and I believe Mr. Cozens, if he was alive then. I know he had been employed with me in that cause. No,—Mr. Spaulding was not with me. The other counsel tried the cause.

Q. Did not you take part ?

A. I was listening to the case made by the plaintiff, for a short time, and engaged, probably, in cross examining witnesses. I was counsel for the defendant.

Q. At the time the rule was made against you, what length of time was occupied by the arguments of counsel ?

A. I can't recollect exactly ; probably two or three hours. They began in the forenoon, and spoke as long as they chose.

Q. The argument occupied only one day ? A. Only one.

Q. How long are the sessions of the District Court, generally—upon an average ?

A. It depends on the business before the court. The length of the sittings vary. They are, however, generally short.

Q. How many hours were consumed by the argument on the two rules, against Foreman, and yourself ?

A. Perhaps six, or seven—about six hours.

Q. How long was the court occupied in its animadversions on the contempt ?

A. About two and a half hours, as it appeared to me.

[The counsel for the accused here requested of the court that the transcripts of the rules against Foreman and Lawless, exhibited as part of the documentary testimony by the managers of the impeachment, might be put into the hands of the witness : which having been done, the cross examination proceeded.]

Q. What are the dates of these rules ?

A. The rule upon Foreman was made on the third Monday of April, and is in the following words : [Here the witness read the rule.]* The rule for the attachment against the editor was discharged, and a rule was then made against me, on the Thursday following. It is in the following words : [Here the witness read the rule.]†

Q. At what time of the day, on Thursday, was this rule served upon you ?

A. I can't recollect.

Q. Was it on Thursday that you asked the indulgence of the court for delay ?

A. I do not recollect on what day it was.

Q. At the time these arguments were held, was there a crowded auditory in the court room ?

A. Yes. It appeared to me to be more full than usual.

Q. What were the topics of argument, urged by your counsel and yourself, in reference to the first rule made against Foreman ?

A. I have already stated them. I could not do it more fully, unless I were to go into a speech. As I said yesterday, I attempted to demonstrate the truth of the article signed "A Citizen," on nearly the same ground as that taken by one of the honorable managers in the opening of this impeachment (Mr. McDuffie), with certain exceptions, however, which need not be stated, as they must be obvious to this court. As to the law argument, I insisted, first, that the publication was not libellous in its character, and involved no contempt of the court ; and, secondly, that if it were libellous, it might, as a libel, be pun-

* See above, p. 2.

† See above, p. 3.

ished in the usual way, by indictment ; and thirdly, that the court had no jurisdiction in the case.

Q. In addition to these, did you insist on any other topics ? Any popular theme ?

A. I did urge such topics as naturally grew out of these, and went to sustain them ; such as, the liberty of the press,—the trial by jury,—the liberty of speech : and I urged the general effect of the Judge's doctrines, if sustained, upon society at large.

Q. Did you not advert to the peculiar situation of Judge Peck, as sitting as judge in his own cause ?

A. Certainly. It was a leading feature in the case ; and as such it was insisted on, both by myself, and by my counsel, in the argument in both cases.

Q. Had there been any previous misunderstanding, or hostility,—any quarrel, or ill blood, between yourself and Judge Peck ?

A. No. There has never been any intimate intercourse between us, and there was no particular attachment ; but our relations to each other were of as amicable a kind as mere professional relations generally are.

Q. You have said that the court, in the course of its animadversions, employed the terms, "*false*," "*wilful*," and "*malicious* ;" Did the court apply these terms to the publication ? or to the author ?

A. It appeared to me that the terms were directed at the publication, and at me, through it. Throughout the course of the Judge's remarks I was treated as the author.

Q. Did the Judge address you personally ?

A. He directed his voice toward that part of the court room where I stood. He could not, indeed, direct his eyes toward me, because his eyes were bandaged.

Q. Did he name you ?

A. He did not.

Q. Did he speak expressly of the "*author*" of the publication ?

A. I do not know that he used the word *author*. He spoke of the publication, paragraph by paragraph.

Q. He did not, then, say that the *author* was a "*false and malicious libeller* ?"

A. I do not recollect that he did.

Q. You said, I think, that no interrogatories were exhibited to you ?

A. None.

Q. Will you state whether the court did not inform you that you had a right to purge yourself of the contempt, by your own oath ? and that the purpose of proposing interrogatories to you was, to enable you to do so ?

A. I understood the Judge to speak something about my having an opportunity to purge myself of the contempt.

Q. Did he not speak of it in the light of a privilege ?

A. I cannot say. I do not recollect the terms he employed.

Q. Did not the court ask you, whether you would answer interrogatories, if they were filed ?

A. No. I anticipated that. I stated that I did not want to have them filed, and that I should not answer, if they were. I was induced to do this, because I wanted to save, to the court, and to the public, the time that would be necessary in making them out.

Q. You said that you tendered to the court a written exception to the rule, and asked that it might be placed upon the records ; but that this was refused you. Please to look at this paper, and say whether this is not that which you so offered ? Be pleased to read it to the court.

[Here the managers interposed, and informed the witness that he need not read the paper aloud. The counsel for the accused said that they did not wish it, if the witness had the slightest objection to do so.]

A. I have none whatever.

[The witness then read the paper in the following words :]

"In the District Court for the District of Missouri, sitting at St. Louis on the 21st day of April, 1826, for the decision of land titles.

The United States)

vs.

L. E. Lawless.)

Be it remembered, that on the day and year aforesaid, the said court called upon the said defendant to know whether if there were interrogatories filed in this cause he would answer them, which the said defendant declined for the following reasons, which he assigned to said court in the words following: First, I refuse to answer the above interrogatories because this court has no jurisdiction of the offence charged upon me, in manner and form as the court has proceeded against me. Second, because the positions ascribed in the article signed 'A Citizen' are true, and fairly inferred, and extracted from the Opinion of this court in the case of Soulard's widow and heirs vs. the United States, as published."

Q. Was this paper intended as an appeal?

A. I cannot say. It was drawn by Mr. Magenis, who acted as my counsel. I desired him to draw up something in the form of an exception, and he did so; but I had, myself, no very distinct views how it was to be used. I thought we might avail ourselves of it, in some way.

Q. Was Judge Peck asked to sign that paper?

A. I am not certain.

Q. Did not Mr. Magenis ask some of the bystanders to sign it?

A. It may be. I cannot say. It is very probable. Mr. Magenis wrote it. (He is here as a witness.) For myself, I attached but little importance to it.

Q. It was read, was it not?—A. It was.

Q. In open court?—A. In open court.

Q. When it was read, was the purpose announced for which it was drawn up?

A. I do not think that it was.

Q. At the time you were committed, did the Judge give any particular order, as to the place in which you were to be confined?

A. I know of none, but what appears on the face of the order for commitment.

Q. Was the room, in jail, in which you were confined, appropriated to the confinement of felons? or of debtors?

A. To felons, and debtors too, as I was informed. It had gratings at the windows; it was very dirty; and it contained no chair, nor table. It was an apartment more fit for felons than for debtors.

Q. Were there any other rooms appropriated to debtors?

A. I cannot say. I know but very little about the economy of the jail. This I do know, that felons, particularly females, were sometimes confined in that room; for I saw them there; those, at least, who, I was told, were such.

Q. Were there any felons in the jail at the time of your confinement there?

A. I do not know. There may have been in the cells below.

Q. Then there were cells, for the confinement of felons?

A. Yes, for persons under sentence of death, and those charged with capital offences, as I suppose. There were no felons in the room with me.

Q. How long did you remain in that room?

A. About half an hour. After I had been there some time, I called for the jailor, and expostulated with him, a little, on the severity of keeping me in that room, assuring him that I had no intention to run away; and he at length permitted me to go into another room.

Q. Was not that room an office?

A. It was, I believe, sometimes used as an office.

Q. You said that a Mr. Soulard accompanied you to gaol; was he a party to the land suit in which you were counsel?

A. Yes.

Q. Did he remain in the gaol all the time you were there?

A. I do 'nt think he staid the whole time. He accompanied me there, from friendly feelings.

Q. How long was it, after your suspension from practice, that you appeared at the court held in Jefferson city?

A. I cannot say exactly. I think it was at the first court held there, after my term of suspension expired. I remember it was in the fall.

Q. Was it not two and a half years after your suspension?

A. Oh no; not so long as that.

Q. What was the case in which you appeared there as counsel?

A. Let me see. Was it not the case of Hampstead's heirs? or was it the case of O. Fallon?

Q. I will help your recollection. Was it not the case of Strother and Lucas?

A. Oh yes. It was that case. The cause is now before the Supreme Court on a writ of error from Judge Peck's decision.

Q. How long, then, was it after your suspension?

A. It must have been twentyone, or twentytwo months. I recollect that Strother signed the declaration in ejectment, which I should have signed as Counsel, if the term of my suspension had then expired.

Q. Was the case of Strother and Lucas argued at that term?

A. Not argued; the case was stated, and a nonsuit taken.

Q. How long after the nonsuit, was a new suit brought?

Q. Immediately after.

Q. Do you recollect during how many terms of court, you have attended at Jefferson city, since your suspension expired?

A. I believe I appeared at every court except two. In the spring I did not go up. In the case of Hampstead's heirs, I was obliged to go, as that case was an important one.

Q. Have you attended there more than two or three times?

A. Yes. The terms were held there semi-annually.

Q. Was Judge Peck aware that you were about to attend the court at Jefferson city? and did not you and the Judge pass and repass each other on the road?

A. I do not recollect. I think I heard of him on the road.

Q. How far is Jefferson city from St. Louis?

A. About 135 miles up the Missouri river.

Q. I think you said that when you applied for readmission, the Judge inquired of the clerk of the court, whether the term of your suspension had expired?

A. I did say so. The circumstance impressed itself so strongly upon my mind at the time, and I have so often reflected upon it since, that I cannot be mistaken. I thought it a very remarkable circumstance that he should have asked that question.

Q. Were the records of the court kept at Jefferson city?

A. They were not.

Q. Will you state to the court for what purposes Stoddard's History of Louisiana was cited in your argument in Soulard's case?

A. I cited it in order to show that nineteen twentieths of all the land titles in Upper Louisiana were held by the tenure of unconfirmed concessions, when Stoddard wrote his book; and that the regulations of O'Reilly never were held to apply to Upper Louisiana at all.

Q. Please refer to your printed argument, and show to the court that part where the extracts from Stoddard's book are given.

A. Here it is, on the 23d page. [Here the witness read as follows:]

“These regulations are noticed in Stoddard's excellent work on Louisiana. In page 252 Stoddard observes that ‘the regulations of O'Reilly were totally inapplicable to that part of the country, and the Spanish authorities there always conceded land on principles not received from them.’ Here we will observe, that

the authority of Stoddard has been acknowledged by the most enlightened men, as deserving of respect ; and, as a record of sound opinion and historic fact, we feel justified in calling the attention of the court to his work on Louisiana."

Q. Is that the only extract from Stoddard's work which was cited by you ? or is that the extract to which you referred, as going to prove that "nineteen-twentieths of the land titles of Upper Louisiana rest upon unconfirmed concessions?"

A. No: by no means. I referred to the book itself. Stoddard makes use of those very words ; as his book will show. It is in the congressional library, and may be referred to at any time. It is a book highly spoken of. The language I used is his own. I thought that the words had been quoted in this printed outline of my argument, but I find that they are not. They were quoted, however, at large, in the article signed "A Citizen."

Q. You said that in the argument on the demurrer of Soulard's case, you had a list of transfers and sales of such unconfirmed titles. Had you, then, in court transcripts from the record of such transfers and sales ?

A. No. I had only a list made out for my use by Mr. Leduc.

Q. You referred to these transfers, then, as existing in the clerk's office ?

A. Certainly. I considered the fact as notorious, and did not suppose that it would be disputed.

Q. You offered no transcripts of the records at all ?

A. No. The fact appeared not to be disputed.

Q. Were such transcripts, then, embodied in the record of Soulard's case ? and do they thus appear before the Supreme Court of the United States on the appeal ?

A. No. I do not think they were embodied in the record.

Q. Does the record of that case contain any such evidence ?

A. I do not know that it does.

Q. Why were these transcripts not embodied in the record ?

A. I cannot say, indeed ; possibly through inadvertence : perhaps, because of the notoriety of their existence. I wish they had been.

Q. In any of the subsequent land causes in which you were concerned, did you offer transcripts of these records in evidence ?

A. I do not recollect.

Q. Are they before the Supreme Court of the United States, in any of the records sent up to that court ?

A. Not that I know of. It was supposed that the judges of that court would, of course, be in possession of all the information necessary to their decisions.

Q. Did you consider Soulard's case so completely identified with the other land claims in which you were concerned, that the opinion given by Judge Peck in the case of Soulard would virtually decide the others ?

A. Yes. I thought that the doctrines laid down by him, if confirmed by the court above, would settle all the rest ; yet I considered Soulard's case as marked by features peculiar to itself.

Q. What were these ?

A. First, it was based on a record which had been accidentally destroyed : second, it was a claim resting on a peculiar kind of service : and thirdly, (by a fatality which seemed to attend it throughout,) this case had not been submitted, with the others, to the Board of Commissioners.

Q. Was Soulard's case tried at the first court held by Judge Peck ?

A. It was argued on demurrer at the first court.

Q. Was it the first cause tried ? *A.* I think it was.

Q. Did it stand first on the docket ? *A.* I think it did.

Q. In the argument of that case, was the ordinance of 1754 before the court ?

A. Yes. I had a copy of that ordinance in Spanish and English.

Q. Is this the copy which you had, and which you produced in that argument ?

[Here a manuscript was handed to the witness.]

A. It is.

Q. Is that a full copy of the ordinance of 1754 ?

A. That ordinance contains thirteen articles. I see here, (looking over the manuscripts,) but twelve.

Q. Is the whole of the twelve articles there ?

A. I am not certain.

Q. I ask you, whether the ordinance of 1754 was *in extenso* before the court ? or only a few of its articles ? And if so, which of them ?

A. The twelfth article is here *in extenso* in the Spanish. There appears to be but twelve articles here. I am not certain whether the whole was *in extenso* before the court. This is the manuscript which I read, and from which I argued. It is in the hand-writing of Col. Benton.

Q. Did you state how this came into your possession ?

A. I did. The translation was made in this city, and it was corrected for me, in some parts of it, which required correction, by my friend Col. Benton. On the argument at the hearing, I had a full copy, which I have with me here, though not in court.

Q. How was that full copy procured ?

A. I had it copied here, in Washington, for myself. It is all to be found in "White's Collection."

Q. Was this manuscript objected to, in the argument on the demurrer, as being a mutilated and incomplete copy ?

A. I do not know that it was objected to as false or incorrect. Col. Benton was present, and vouched for its correctness.

Q. You say that you withdrew the other land causes in which you were employed, after the opinion of Judge Peck had been given in the case of Soulard ?

A. Yes. There were 146 causes withdrawn.

Q. How long after the opinion in Soulard's case were these causes withdrawn ?

A. I do not exactly recollect. I know that the parties had paid near \$4,000 in costs before the suits were withdrawn.

Q. Why were these causes withdrawn ?

A. Because the parties felt certain, after hearing Judge Peck's decision in Soulard's case, that their causes would be decided against, and they hoped that if the Supreme Court should reverse his decision, Congress would interfere, and grant them some relief.

Q. Would not these parties have had the right of appeal ?

A. Unquestionably : but in many cases the remedy would have been worse than the disease.

A. In how many of these land causes were you concerned, in which you concluded, in consequence of Judge Peck's decision, not to file any petitions ?

Q. I really cannot say. In some—not many—perhaps some 10 or 15.

A. Is not the copy of the Opinion, which appeared in the St. Louis newspaper, a correct copy of that which was delivered in court ?

Q. I have not examined it. I take it for granted that it is. [Here the managers interposed, and presented to the counsel for the defence, an original newspaper, printed at St. Louis, containing a copy of the Opinion, and which they declared it to be their purpose to offer to the court in evidence.]

A. When you wrote the article signed "A Citizen," had you in your mind any doubt that the Opinion here published was a correct copy from the original ?

Q. I did not know. I could not judge. I had not heard the Judge's Opinion delivered, and I had formed no opinion on the subject. I had read his *decision* as it was spread on the records of the court, but I was absent at the time the *Opinion* was delivered.

Q. You considered what was in the paper as coming from Judge Peck,—did you not ?

A. I did. I saw the words “Peck, Judge” printed over the article. It was described as being the Opinion of Judge Peck, and I so understood it.

Cross-examined by Mr. Wirt.

Q. I do not know if I distinctly apprehended either the last question or your answer. You were asked I believe whether the article in the Missouri paper, containing an opinion in Soulard’s case, had the semblance of being an anonymous publication. I now ask you whether, in making your strictures upon it, you treated it as an anonymous article, or as the Opinion of Judge Peck in the case of Soulard’s heirs ?

A. I treated it as a defence of Judge Peck’s decision, inserted by him in a St. Louis newspaper.

Q. Is it not usual, in Missouri, for a Judge to assign the reasons for his decision of a cause ; which statement of his reasons is familiarly called his “opinion ?”

A. Yes. I believe the custom is general in Courts of Chancery.

Q. The decree is put on record, but the opinion is not filed ?

A. Not that I know of.

Q. Is it usual in your country, to record at large, the reasons of a decision ?

A. No. It is not usual in the inferior courts. It is done in the Supreme Court only, and there it is required by law.

Q. Did the Opinion in the case of Soulard, as published, begin thus: “Court of the United States for the State of Missouri—Peck, Judge ?” and, after a brief statement of the case, is it not followed by an article headed “Opinion of the Court ?”

[The managers here remarked, that the original paper was present in court, and would speak for itself. Mr. Meredith replied that it was not in evidence. The question was then repeated.]

A. Yes, I believe so.

Q. At the end of the publication, after saying that the decree must go against the title of Soulard, is there not the following statement ?

“In the course of this Opinion, a more extensive range may, at first view, appear to have been taken, than was necessary to the determination of the cause before the court. The questions, however, which have been discussed and decided, will, upon a nearer view, be found to belong to the cause, and their discussion to have been in some degree necessary to the elucidation of the questions involved in it. The title to more than a million, perhaps millions, of acres of land, was supposed to depend upon the decision of the questions which have been considered ; and the Opinion having mainly proceeded upon a view which had not been taken at the bar, and having been extended to an inquiry into the source and nature of the Spanish titles to lands in Louisiana, and to an inquiry concerning the laws under which those titles were derived ; and the decision of most of the points, therefore, having proceeded chiefly upon grounds which had been little or not at all examined in the argument of the cause, it is deemed proper to remark, that counsel will not be excluded from again stirring any of the points which have been here decided, when they may hereafter arise in any other cause.”

And did you consider this as the overture of an anonymous writer, or of the Judge of the court ?

A. I considered it as the language of a writer in that paper ; not as judicial, it not being spread on the records of the court.

Q. You do not understand me. This article appeared as the production of an anonymous writer. Did you consider this overture for the hearing of counsel, on certain points in this Opinion, as the overture of an anonymous writer ?

A. I considered it as the act of Judge Peck, but as extra-judicial ; as a publication of his, in the newspaper, and as being unnecessary.

Q. Did you not know it as the Judge's Opinion ?

A. No. An opinion I always hear with respect, when delivered from the bench ; but I consider an opinion published in this way as not judicial.

Q. Had you no knowledge that the Judge had delivered an Opinion in this case ?

A. I knew nothing about it. I had the record containing his *decision*. His reasoning I considered as of no value. I knew he had decided against my client.

Q. Did you not know how that Opinion came to be published ?

A. No, not at that time. I understood, afterwards, but not until after this impeachment.

Q. You said, yesterday, that your supposing the Judge to have invited discussion on his Opinion, was one consideration that induced you to write the article signed "A Citizen," did you not ?

A. Yes.

Q. Was this paragraph which I have just read that which you considered as the Judge's invitation ?

A. Yes. I considered it as evidence that the court was ready to have its errors pointed out by any hand, and that the Judge himself felt uncertain as to the correctness of his opinion. I regarded it as encouragement, held out to any one who could point out his errors. I took this concluding paragraph in combination with that at the commencement of the article, in which the Judge speaks of his doubts and difficulties in deciding the cause ; and I did consider the Judge as being, himself, in doubt, as to the soundness of the decision he had given. You have read the concluding paragraph ; please to read the other also.

[Here Mr. Wirt read as follows :]

"The interests to be affected by the decision of the questions arising in this case, are extensive. The questions themselves are novel. There is nothing in relation to them which can be regarded in the nature of a precedent or authority to influence their decision. They are now, for the first time, without any light from this source, presented for judicial determination. In their investigation, it is necessary to explore an extensive field,—a region of waste, where darkness obscures, and labyrinths embarrass ; where the desolating hand of revolution, and of time, has removed many of those landmarks which at any time were scarcely distinguishable. Hesitation and distrust, therefore, must reasonably accompany the inquiry."

Q. Was this, or was it not, the true description of the state of things in relation to these causes ? Was not the investigation a novel one ?

A. Perfectly so, to Judge Peck.

Q. Was it not a novel investigation to a United States lawyer ?

A. That I cannot say. These are matters of opinion.

Q. Was it not a new case ?

A. Yes ; before that court.

Q. Do you recollect whether, by the act of Congress of 1824, the court, when it confirms a claim, is not required to indicate the treaty, law or ordinance, on which it grounds its confirmation ?

A. I must refer to the act before I can answer the question. I recollect that it refers to such usages and laws of the ceded country as would have operated on the claim, had the country not been ceded.

Q. Do you not recollect that the judge is required by that act to refer to the particular treaty, act or ordinance on which he rests his decision ?

A. Yes. I do now recollect that it does.

Q. What Spanish law was in possession of the court, when it decided on the case of Soulard ?

A. I cannot say.

Q. Had you, before that court, the regulations of all the Spanish Governors—Gayoso, Morales, and O'Reilly ?

A. Yes.

Q. Had you before the court all the laws of the Indies ?—A. No.

Q. Had you, in the argument on the demurrer, any other part of the ordinance of 1754 than that which has now been shown ?

A. I do not believe I had.

Q. Did you consider your publication as an argumentative discussion of the soundness of the Judge's Opinion ?

A. No. I meant, professedly, to avoid discussion ; and merely to give, in a succinct manner, what I considered as the errors in that Opinion.

Q. In that publication you say, that you " shall confine yourself to little more than an enumeration of the errors in the Opinion, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and besides, is not (as regards most of the points) absolutely necessary." What was your meaning in this language? Why was it not necessary?

A. Because I only needed to show, that if such errors existed, the danger was not so great as might be imagined, in relation to the remaining land claims in Missouri.

Q. Did you not mean that the Judge's errors were so gross and palpable, that they required only to be stated, in order to become self-evident?

A. It may have been so. Many of them certainly appeared so to me, because I was acquainted with the subjects to which they related.

Q. Had you not asserted, in your argument, that the ordinance of 1754 was in force in Louisiana? and did you not rely on it, as the basis of the authority under which the concession to Soulard was given?

A. That was one of my arguments. I did contend that the Governor General of Louisiana possessed the same power which that ordinance vested in the Governor General of Havana ; and I inferred this from the peculiar circumstances of the province of Louisiana at that time. I relied upon that ordinance as having a general bearing in favor of the grant, especially when taken in connexion with the existing usages of the country.

Q. I understand that your argument was, that the long established usage for Lieutenant Governors of Louisiana to issue such concessions of land as that to Soulard, was, in itself, evidence of the authority of such concessions.

A. Yes, that was one of my arguments.

Q. You relied, did you not, upon the ordinance of 1754, as the source of such usage?

A. I contended that that ordinance might fairly be considered as in force in Louisiana, because Louisiana, as a province, was in a similar situation with that of Havana.

Q. Well ; did not the court decide that that ordinance was *not* in force in Louisiana, and conferred no authority to issue concessions of land?

A. It appeared to me so.

Q. And you considered this as an error in judgment?

A. Taking the whole case together, I did think, that the court was in error, in not considering the usage and the ordinance as mutually explaining and supporting each other. The acts of the Lieutenant Governors were not to be considered as gratuitous assumptions of power.

Q. I wish to know whether you considered the decree of the Judge, declaring that the ordinance was not in force, as an error of judgment?

A. I thought it was an error that he allowed to that ordinance no force.

Q. How then did it happen, that this did not appear in your publication, in the list of errors you there stated?

A. I do not know indeed. I could easily have increased the list of errors in the Judge's Opinion. I have an additional list which I have made out since, with a copy of which I can furnish you, to-morrow morning.

Q. You are very obliging. Did it not occur to you that the omission of this error in your list would give the greater effect to the errors which you did state?

A. That never occurred to me.

Q. You say that the Judge decided that a sub-delegate in Louisiana was prohibited by the act of '54 from making grants of land for services "rendered, or to be rendered:" of which description were the services alleged in Soulard's case? were they services rendered, or services to be rendered?

A. They were services rendered.

Q. The words "to be rendered" then had no application to Soulard's case?

A. No.

Q. Were there other land claims depending which rested on services "to be rendered?"

A. I cannot recollect. It is probable there were. I do not know.

Q. Had it not been contended by you, that the usage of granting such concessions of lands ought to be held as sufficient evidence of the authority to make them, in the absence of any prohibitory law to the contrary?

A. I believe such an argument was relied on; and the more confidently, because the United States Commissioners, in their confirmation of titles, went on that ground; and Congress confirmed their decision.

Q. The absence of a prohibitory law was relied on as giving force to such grants as that to Soulard?

A. It may have been.

Q. Did the court rely on the ordinance of 1754 as a prohibitory law?

A. I do not recollect.

[At this point of the cross-examination the managers of the impeachment interposed.]

Mr. Buchanan observed that they had thought it best, on the whole, to indulge the counsel for the respondent in putting many questions to the witness which they supposed to be irrelevant. But, if they understood the object of the counsel in the last question, they objected to its being answered. The Opinion of the respondent as published in the Missouri Republican, is before the court, together with the strictures of Mr. Lawless thereon;—and all the Spanish laws relating to land titles in Louisiana, from 1754 to 1799, will be given in evidence in order to enable the court to judge whether these strictures are correct and whether they are justified by this Opinion. It is for the court, and not for the witness, to decide these questions. If therefore it be the purpose of the counsel to go into the Opinion, paragraph by paragraph, and ask the witness his construction of each, we must object to such a course. The witness has been asked, whether the court did not rely on such and such a ground, to sustain particular clauses of the Opinion. This Opinion is before the court, and will speak for itself. We ask what can be the object of these inquiries?

Mr. Wirt, on behalf of the respondent, replied: One of the great difficulties of the respondent arises from a want of familiarity, on the part of this court, with the subject of his decision, and of the publication which followed it. Nor is this the smallest reflection on or disparagement of the intelligence of this honorable Court. The difficulty has been acknowledged by the Supreme Court of the United States. They own the difficulty they experienced, in seizing upon the points of a case so peculiar, and fully appreciating their bearing. If the Opinion of Judge Peck had had reference to a body of law with which all the members of this court are familiar, or of usual occurrence to us on the Atlantic frontier, it would only be necessary to read the Opinion, and the strictures upon it, in order to judge whether the former has, or has not, been misrepresented in the latter. But, to judge of that question, it is requisite to be familiar with the ideas to which the Opinion refers. There may be, in the strictures upon it, a semblance of true representation, while they convey, in fact, a vital misrepresentation of all the doctrine it contains. One of the great questions to be decided is, whether the party has been guilty of a contempt. This is alleged to have consisted in a wilful misrepresentation of the Opinion of the Court, tending to degrade the court, to destroy the public confidence in its decisions, and to call either the intelligence or the integrity of the judge into question. There are two points to be settled; 1st. Was the opinion of the court misrepres-

sented? and, 2d, if so, with what view? In Mr. Lawless' article the Judge is represented to have decided, that, by the ordinance of 1754, a sub-delegate in Louisiana is *prohibited* from issuing grants of land for services rendered, or to be rendered. The objection made by the Judge, in his plea, to the use of the word *prohibited*, is said to be a mere quibble. Our object, in putting the present question to the witness, is, to show that such is not the fact. I asked the witness whether the counsel in the case of Soulard did not rely on the usage under which the Governors of Louisiana were in the habit of making grants of land for various purposes? He replies, that they did: and that they argued that this usage was the more to be relied upon, in the absence of any prohibitory law. The opinion of Judge Peck was, that the mere usage proves nothing, unless these grants received the habitual sanction of the government;—that the sanctions any of them did receive were mere emanations of the royal power;—and that before such a grant could be confirmed by a *court*, some positive authority to make it, must be shown. It was, therefore, unimportant, whether the ordinance of 1754 were prohibitory, or not;—the question was a question of positive authority, not a question of prohibition. The honorable manager, in his opening of this impeachment, pressed with all his power the idea that there was but a mere shadow of distinction between a *want of authority*, and a *prohibition*. In some cases, it is true, these may be convertible terms: but, in this case, they are not so. The counsel for Soulard did not pretend that there was any written authority for the grant under which he claimed. They relied on the existence of usage, and the non-existence of any prohibitory law. It is, therefore, necessary that the specifications must be taken up. Mr. Lawless represented the Judge as having decided that the grant was *prohibited* by the ordinance of 1754. I was asking whether this was not the drift of the witness's argument in his publication: and whether the Judge had referred to that ordinance as prohibiting such grants. I think the question important. I know the examination is tedious: but it must be remembered that not only Judge Peck's tenure of his present office, but also his capacity in future to hold any office of honour or profit, is at stake.

Mr. Storrs. Let the question which the counsel wish to put be distinctly stated.

By the Court. Let the question be reduced to writing.

[The question was then written.]

Mr. Buchanan. We have no objection to that question. The question having been put, the witness replied,

A. I understood the Judge as having laid it down, in his Opinion, that, by the ordinance of 1754, a sub-delegate, either in New Spain, or in Upper Louisiana, was, substantially, and in effect, prohibited from making a grant of land for such services as were pleaded by Soulard, whether those services were rendered, or were to be rendered. And, as all the parts of my article are to be taken together, my meaning will be explained by the 5th section of the publication, where I speak about the meaning of the word *mercedes*. I take the two parts of my article together. And I did understand the Judge to have decided, that, with the exception of a reward to an informer, and a grant to an Indian, a sub-delegate was prohibited from making a grant of land for services anywhere.

Q. You considered that the Judge's having decided that there was no authority to make these grants, was, in substance, deciding that they were prohibited?

A. I considered his decision as tantamount to a decision that such grants were prohibited.

Q. Was that the light in which the prohibitory question was argued?

A. In what argument?

Q. I allude to the argument of which you have spoken to-day.

A. I argued, that the usage was the more to be relied on, as there was no prohibition of such grants by any law. I insisted, that the fact of the usage, and the fact of its not being prohibited, were to be taken together. I said that

the usage had never been countervailed by any ordinance, of force in Upper Louisiana.

Q. Was this the part of the Judge's Opinion which you considered as asserting that such grants were prohibited by the ordinance of 1754?—

“It would appear that the policy apparent in O'Reilly's regulations did extend itself to the province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid. The reverse of this is true; his grants are invalid unless authorized by an express authority from the king, either as derived through the Governor General in the form of laws or otherwise.”

[Here the managers required that the question should be reduced to writing. Mr. Wirt having again read the clause in the Opinion to which the question referred,

Mr. Buchanan observed that the managers now clearly perceived whither the question was intended to lead. The Senate were to have the opinions of Mr. Lawless presented to them, in order to enable them to judge whether there was any discrepancy between two papers both of which were before them. To this the managers should object.

Mr. Wirt replied, that the object in putting the question, was not to get Mr. Lawless' construction of the Judge's Opinion. The witness had said that he understood the Opinion as going to decide that the ordinance of 1754 contained a prohibition of grants by the sub-delegates: what the Judge's counsel wanted to know was, whether that clause of the Opinion which had just been read was the clause from which he drew that inference? and they wanted this, in order that the Senate might judge whether the misconstruction of the Opinion *could* have been an innocent misconstruction.

However, if the question was objected to, they were willing to change its form, so as to ask, whether the witness could point out the particular parts of the Opinion from which he drew his inference? Mr. Buchanan replied that the court had before them the publication of the witness, in which he has placed his assumptions in one column, and the passages in the Opinion from which these assumptions are deduced in a parallel column. The counsel could refer to that.* The witness objected to being limited to this; and insisted on his right to quote any other passages of the Opinion which he might consider as warranting the inference he had drawn.

Mr. Buchanan, on behalf of the managers, now addressed the court:—We object that the task of comparing the Opinion with the strictures upon it, shall be imposed upon Mr. Lawless. That task has been already performed, and ably performed, on the part of the respondent, in the answer to the article of impeachment. *Cui bono?* why ask Mr. Lawless, in his capacity of witness, what clauses of the Opinion of the Judge supported each particular assumption contained in the article signed “A Citizen?” when both papers are before a tribunal competent to compare and to decide upon them? Should such a course of examination be persisted in, it would occupy an almost endless time, without attaining any beneficial result. The managers wish to obtain the decision of the court, whether such questions shall be put, or not. Their principal objection to these questions is the useless waste of time which they will occasion. After the witness shall have pointed out the passages which he considers as supporting his inferences, what would it amount to? it would only be his opinion.—No fact would be settled. The court would at last return to the very point from which it had started.

The question, having been reduced to writing, was read by the president of the court, in the words following:—

* A paper of this form accompanied Mr. Lawless' memorial to the House of Representatives.

“The witness is asked to refer to such parts of the Opinion of the respondent in Soulard’s case, as support the first specification in the article signed a citizen.”

Mr. Wirt addressed the court in reply:—We repeat, that the misfortune of this case results from its novelty, and from the branches of law which it comprehends. It is not a mere reading of the Judge’s Opinion which will enable any man to form a correct opinion, either as to the construction of the Opinion itself, or as to the correctness of the representation of its doctrines contained in the article signed “A Citizen.” As to the Opinion, all who are conversant with law must know, that a correct apprehension of its meaning depends upon a knowledge of the course of argument which it was intended to meet. This must be previously known, before any one is in circumstances fairly to judge of its construction. With this view we went into a subject which cannot be before this court, viz. the course of argument to which the Judge is responding. Thus, by seeing the point of the argument to which the court was replying, the true dimensions and bearing of its Opinion can be ascertained. It is necessary, further, that the evidence on which it was founded should be known, viz. the law which bears upon the case, which constitutes the true foundation on which the Judge said what he did say. It is true that the Opinion, as well as the article of Mr. Lawless, is accessible to this court; and the proposition which would confine the examination of the court to these papers alone is an inviting one, inasmuch as it promises to save both time and trouble: but I repeat the question, whether it is possible to apprehend the whole bearing and force of the Judge’s reasoning in the Opinion, without knowing the law on which it was founded? The first thing requisite is, to see the true meaning of the Opinion: but this cannot be seen, with clearness, unless this court shall know the law on which it rests, as well as the course of argument which raised the points on which it has given a decision. I examined the witness in order to show that, in his article, he shifted the point of view taken by the court. In his argument he had relied on the usage existing in Upper Louisiana; and he insisted that this usage proved its own authority; and still more clearly, inasmuch as it was not rebuked, nor even reprov’d, much less prohibited, by any positive law. This was the question on which the Judge had to decide:—such was the opinion of Soulard’s counsel, and also the prevailing opinion in Louisiana. The Board of U. S. Commissioners seem to have taken the same view. Under these circumstances the people of Louisiana were told, by Mr. Lawless, that Judge Peek had decided that the foundation on which their titles and their hopes rested was impeached by a positive prohibition in the ordinance of 1754. It was not the question, whether these grants had been authorized by the regulation of O’Reilly; but whether, in the silence of that instrument on the matter, the usage (confessed to have long existed,) rose, by its own vigor, into an authority for such grants as that made to Soulard? and the question was one of prohibition, or no prohibition. What was likely to be the effect of such a decision as the Judge was represented as having made, on the vast amount of land claims in Missouri, and on the minds and feelings of the claimants, I leave this court to judge. The Judge was charged with saying, that the ordinance of 1754 contained a prohibition of such grants, when he had said no such thing. The witness is now asked to point out those parts of the Opinion which, in his own apprehension, went to support the assertion he had made. Such a question is fair, both as respects the witness and the respondent. If he cannot do this, and it shall appear that the question of prohibition or no prohibition was not in truth the question before the court, this court can judge of the effect of throwing out such an assertion in Louisiana. As to what one of the honorable managers asserted, and endeavored to show, that the Opinion justifies all that Mr. Lawless said of it, I think we have heard enough on that subject. The managers have presented an elaborate argument to sustain the proposition that there has been no misrepresentation. We might have replied; but we thought that

it would not be strictly regular, and therefore we chose to abstain. But the result is, that the opening argument has made its lodgement in the minds of this court, while it remains uncounteracted by anything advanced on the other side. The managers now claim to take the point for granted, that no misrepresentation has been made ; and questions going to prove the contrary are, it seems, to be precluded. We ask this court to suspend its opinion, until we shall have had an opportunity of showing, (which we shall show,) that not one of the specifications of error, in the article published by Mr. Lawless, can be sustained ; and, that there was not one of them which was not calculated to throw a fire-brand among the people of Missouri.

Mr. Storrs, in behalf of the managers, replied, that it was not their intention at this time to enter into the merits of the case : in other words, they did not choose to sum up the cause at present. It was, indeed, true, that the manager who opened the charge went, pretty fully, into the question, whether the Opinion of the Judge did or did not justify the commentary contained in Mr. Lawless' publication. There were some expressions in the respondent's answer which had not been expected by the managers, and which went to reflect upon the House of Representatives ; a public body entitled to be treated at least with decorum. The answer, after going into a full justification of Judge Peck, declares, that the respondent is, at last, cheered by the hope "that the subject will *now* be mastered before it is decided." We were prepared, said Mr. Storrs, to take anything which a high judicial officer might think fit to throw into his answer : but the nature of his reply seemed to require that the views taken by the House of Representatives, of the other side of the question, should be presented before this court, who have as yet heard but a single reply to the whole array of reasoning contained in the Judge's answer.

Mr. Wirt here stated, that he was desired to declare, on behalf of the respondent, that not the most distant intention to reflect upon the House of Representatives had been entertained by him. But, viewing that House as being constituted by the constitution only the impeaching body, it was not expected that it should enter so fully into the case as it was the duty of this court to do.

Mr. Storrs resumed. The reflection to which he had alluded had not disturbed the managers, and should not : nothing should provoke them to depart from the language of decorum which belonged to their duty, and became themselves. But he well remembered when the defence had been read before this court, (and with a beauty and propriety such as he, for one, had never before witnessed in any court of justice,)* the emphasis which was laid by the counsel on the word "*now*." It was certainly proper that the opposite counsel should be permitted to show to the court, what was the argument which had been urged before the District Court, in the case of Soulard, whether on the demurrer, or on the final hearing. These were facts, and they might elucidate the Opinion. There was no difference of sentiment on that point. Again, it was equally proper, to ask the second question, Did you believe that the Opinion which appeared in the Missouri paper was what it purported to be? The witness might have answered in the negative ; which would have gone to convict him, as to the motive with which he had written and published his strictures. But, now, the counsel for the defence pressed the inquiry a step further. They now say to the witness, "point out your views as to which clauses of the Opinion justified you in the inferences which you made and published." Can this court fail to see to what this course of inquiry leads? Every clause in the article of Mr. Lawless will be taken up, in succession, and this court is to hear the opinion of the witness as to the points it contains. This is not to try the question before the court ; it is to try the ability of Mr. Lawless, in comparing the Opinion and the commentary. The question seems to be asked with a view to show, that the witness cannot point out any particular passages from which his

* It was read by Mr. Meredith.

inferences are drawn ; and hence the court is to infer that he cannot have been innocent in his misapprehension of the Opinion. And cannot this court judge of that? Our objection to the inquiry is, that it establishes no fact, but merely elicits Mr. Lawless' opinion. Let us, then, suppose that he cannot point out any specific clauses which will justify the inferences he made ; this will still be but Mr. Lawless' opinion. It is possible the court may think otherwise. Then we come to the true ground. The Judge complains that the commentary of Mr. Lawless on his Opinion was not a fair one. He volunteered to issue a certain paper from the press, which, as we say, became by its publication the property of the public. It now belongs to the Judge to show, not what may be Mr. Lawless' opinion, but to show that the commentary was an unfair one. This is a fact, not to be determined by the notions of the people of Louisiana, or the people of Missouri. The Judge says that the commentary was not a fair one. If the commentary itself does not contain enough to show that it was unfair, he ought never to have committed its author. It is not for him to say, that others would misunderstand it. He was acquainted with the cause, and when he had published his Opinion, it is to be assumed that the whole community knew it. The same thing is to be assumed with respect to the publication of Mr. Lawless ; for both, by being printed in a public newspaper, were put as completely into the possession of the public as they could be. The question, therefore, must depend on the papers themselves. It is not enough to show, that in Louisiana, or in New York, or in Virginia, or in Europe, there might be persons so unacquainted with the case as to be led into error by the article signed "*A Citizen.*" Whether the Opinion was, or was not, misrepresented, this court is to judge ; it is competent to judge. It does not need the opinion, either of Mr. Lawless, or of the managers. On this point he can shed no more light than any other witness. Without assuming the possession of more information than others, we undertake to show, that the Opinion does justify the inferences contained in the commentary. To ask of the witness, how do you prove this assertion? and how do you prove that? may put his ability to the test, but it settles no fact in the case. It is very possible that able counsel may, by multiplying queries of this kind, puzzle even a lawyer from the bar of Missouri ; but, should the witness fail to answer, he will thereby prove only his own incompetency ; and on this ground we object to having the question presented to him.

The question having been reduced to writing and read to the court by the president in the following words :

"The witness is asked to refer to such parts of the Opinion of the respondent in Souldard's case as support the first specification in the article signed "*A Citizen,*"

The question was put whether the witness should be required to answer it, and was determined in the affirmative.—Yeas 32—Nays 10.

Those who voted in the affirmative were—Messrs. Barnard, Barton, Bell, Brown, Burnett, Chambers, Chase, Clayton, Dickerson, Foot, Forsyth, Frelinghuysen, Hendricks, Iredell, Johnston, Kane, Knight, King, Livingston, Marks, Naudain, Robbins, Ruggles, Seymour, Silsbee, Smith, (S. C.) Sprague, Tazewell, Tyler, Webster, Willey, Woodbury—32.

Those who voted in the negative were—Messrs. Baker, Dudley, Ellis, Grundy, McKinly, Poindexter, Sanford, Smith, (Md.) Troup, White—10.

The court then adjourned to 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Friday, December 24, 1830.

The managers, accompanied by the House of Representatives, attended.

The respondent, James H. Peck, and his counsel, also attended.

On motion of Mr. Foot, ordered that the Secretary notify the House of Representatives, from day to day, that the Senate is sitting as a High Court of Impeachment for the trial of James H. Peck, Judge of the District Court of the United States for the District of Missouri.

Mr. Wickliffe, on behalf of the managers, stated to the court that one of the witnesses, Mr. Melody, from Missouri, had been summoned under a misapprehension, he not being acquainted with any of the facts in this case. Under these circumstances the managers had no wish to detain him here; yet felt themselves without authority to dismiss him. They therefore stated the fact to the court, in order that, unless the counsel for the respondent should wish him to remain, he might be discharged, have his expenses paid, and be suffered to return to his home.

After consultation, the counsel for Judge Peck declared it to be their wish that the witness should not be dismissed.

The cross-examination of Luke E. Lawless was then resumed. Cross-examined by Mr. Wirt.

Q. What part of the Opinion of Judge Peck do you refer to, as supporting the allegation in the first specification of your article signed "A Citizen?"

A. I beg leave to state that, in order to enable me to answer this question accurately, I must be permitted to refer to a written analysis, which I have made for my own use, and that of the Hon. managers, (if they may think proper to use it,) in which I have taken a note of those parts of the Opinion which, as I conceive, sustain me in the inferences I have drawn from it.

Q. Does the analysis consist merely of extracts from the Opinion?

A. It contains extracts from the Opinion; from my printed argument; from the Judge's answer to the impeachment; and also from the appendix to the answer.

Q. The statement made in your publication is in these words: "Judge Peck seems to me to have erred in the following assumptions, as well of fact as of doctrine; 1st. that by the ordinance of 1754 a sub-delegate was prohibited from making a grant in consideration of services rendered, or to be rendered." I ask you to refer to such parts of the Judge's Opinion as justify you in making this charge?

A. In justice to myself, and in consideration of the peculiar situation in which I am placed,—being called upon to answer, on oath, as to the particular parts of the Opinion on which I rest my charges of error,—and as it may become a question how far I make out a justification of those charges,—I must submit to this court, whether I am not entitled to make use of, and to refer to Judge Peck's own construction of the Opinion, given by him in his answer before this court? It will be impossible for me to demonstrate that I was correct in making the charges of error which I did, unless I am allowed to combine, with extracts from the Opinion, other matter, having a direct bearing upon it. In the concluding paragraph of my article I expressly referred to my argument in the cause; and the specifications into which I entered were mainly suggested by that argument; an outline of which has been printed for the use of the Senate, and is now in evidence. I submit whether I may not refer, now, to what I referred to then; and further, to the construction since put, by the Judge himself, upon his own argument? which latter, especially, will be an additional proof of the fidelity with which I interpreted it.

Mr. Wirt said that he had no manner of objection to whatever the court may be pleased to hear from the witness. I would simply remark, said he, that the question now is, 1st. whether a publication signed "A Citizen" misrepresented the Opinion of the Judge? and, 2d. if it did, with what intent? whether the article misrepresented the Opinion, is to be ascertained by reference to the Opinion. The article alleges that the Judge was guilty of errors, both in fact, and in doctrine. The question I put was, in what part of the Opinion is it that the Judge has decided "that by the ordinance of 1754 a sub-delegate was prohibited from making a grant in consideration of services rendered, or to be rendered?" If he answers this, I have no objection that he be heard at large in his own vindication, if the court deem it proper.

Mr. Buchanan. The gentleman stated the question he wished to propose to the witness: we presented our objections to it; but the court decided that it should be put. We bowed with all respect to the decision of the court. One great question to be settled was whether the article published by Mr. Lawless did, or did not, misrepresent the Opinion published by Judge Peck? This court decided that in order to ascertain the true state of the case, it was proper Mr. Lawless should refer them to such parts of the Opinion as supported each of his specifications of error.

This being the decision of the court, it follows, as a necessary consequence, that Mr. Lawless has a right to refer you to such parts of his argument in Souldard's case, as he believes will shed light upon the Opinion of the Judge. In this manner his argument on each point, the Opinion of the Judge on the same point, and the specification of error deduced from this Opinion will be presented before the court in a form so distinct and simple, that they will be able to comprehend it at a single glance. He now asks that he may be permitted to specify the parts of his argument to which the article signed "A Citizen" referred. We conceive this to be manifestly proper, under the decision which the court has already made.

Mr. Meredith. We have no objection to that. We thought the witness wished to use the answer of Judge Peck, in order to show the construction put, by the Judge, upon his own Opinion, and in that way to show that, in some respects, it agrees with the publication. The question we propose is a very simple one: that the witness shall refer to those parts of the Opinion which, at the time he wrote the article signed "A Citizen," he supposed justified the first specification of error in the Judge. The question is easily answered. He has only to refer to the Opinion. We have no objection that he should go farther, and refer to his own argument, oral, or printed: but we do object to all reference by the witness to the answer. If it be permitted, it will lead to interminable debate, not only between the managers and the counsel for the respondent, but between them and the witness.

The witness then went on to reply.

A. I refer to pages 66, 67, 68, 69 and 70 of the Documents as printed for the use of the Senate, (containing the Judge's Opinion.) I refer to the whole current of reasoning in that part of the Opinion contained in these pages.

Q. Please to read the passages to which you refer. A mere reference to pages will not enlighten the court.

The witness then read as follows:—

"A view of the whole ordinance removes all doubt as to the general intention to *sell*, and not to *give*, the royal lands, except to the inhabitants of towns, for pasturage and commons, according to their wants, and to the Indians as mentioned in the laws 14 and 15, just recited, and except so far as the grants which may be made to those who shall give information against persons occupying lands without title, authorized by the 7th and 8th sections, may be considered as in the nature of gifts.

"From this view of the ordinance the ambiguous meaning of the term *mercedes*, to be found in its preamble, produces no difficulty. The sense in which

that *term* must be received, is to be determined by a view of the whole ordinance ; it need not necessarily be interpreted to mean gifts ; but may as well be interpreted to mean grants ; if, however, it necessarily imported gifts, effect is sufficiently given to it in this sense, by the gifts to be made to the inhabitants of towns for commons and pasturage, and to be made to the Indians as directed in the 14th and 15th laws before adverted to.

“ If, then, this ordinance was to be made the basis upon which the right to confirmation in this case should be determined, the claim could not be confirmed on the ground that the concession was not made upon a *sale for money*, and at the *reasonable value* of the land, but was made in consideration of *public services*—a consideration unknown to the ordinance except in the case of an *informers*, as authorized in the 7th and 8th sections, where lands are authorized to be adjudged in moderate quantities to those who shall give information of them as being occupied without title. This is the only species of *service* for which this ordinance authorizes a concession. This is the only case in which a sub-delegate is made the judge of the value of services. He is not made the judge of the value of services of the nature of those upon which the concession in question is alleged to have been issued.”

I now go on to page 67.

Q. You read the whole of those passages to which you refer as justifying the first specification in your article?

A. I refer to the whole of the pages I mentioned : but for brevity's sake, to save the time of the court, I shall read only the passages I consider most material.

The witness then read as follows :—

“ In examining this reasoning, if it be admitted that the concession of an inferior officer is to be considered as *prima facie* authorized, this presumption, like all others, can stand only so long as it shall remain unopposed by evidence or presumptions of a higher nature. A presumption can weigh only so far as it is calculated to induce belief ; and so soon as it shall cease to do this, in consequence of the existence of facts inconsistent with such belief, it ceases to make a *prima facie* case ; ceases to furnish ground upon which a decision can rest. The presumption which arises in favor of the validity of the acts of the supreme authority, especially such as the enactment of regulations and the acknowledgment of the authority of these for a series of years, is of a higher nature than that which arises in favor of the legality of a single act, or even a series of acts, such as concessions of land by the Lieutenant Governor ; particularly when these acts are to be subject to the approval and confirmation of that supreme authority which gave those laws that were to regulate the subject of concessions.”

“ It would appear that the policy apparent in O'Reilly's regulations did extend itself to the province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid. The reverse of this is true ; his grants are invalid unless authorized by an express authority from the king, either as derived through the Governor General in the form of all laws, or otherwise. Can it be believed that there existed an express authority which authorized this grant of 10,000 arpents without any reference to settlement, cultivation, or property qualifications ? The view which has been taken excludes such belief, and with it every presumption in favor of the legality of the concession.

“ But the evidence of the late Lieutenant Governor is introduced to prove that, in Upper Louisiana, that officer was unrestricted as to quantity, though the witness does not pretend that he had any authority, other than the law, to make such concessions. The amount of his evidence is, that the law clothed him, as Lieutenant Governor, with power to make concessions, and imposed no limitation as to the extent of the grant. Does the witness mean to prove that there existed any *unwritten law*, in virtue of which the officer mentioned,

or any other officer of the crown, was authorized to make grants of the royal domain? If he does, the evidence is untrue. It may be assumed, with certainty, that *no unwritten law, no principle of the Spanish Constitution* gives to any officer of the crown the power to grant the royal lands; and that such power, to be legitimate, must be derived from some authority other than the constitution of Spain, or any unwritten law, usage, or custom. An express *written authority* was indispensably necessary to authorize the Lieutenant Governor of Upper Louisiana to grant lands. The existence of such authority might be inferred from circumstances, but its existence is indispensable to the validity of a grant. Can it be inferred in this case, that there existed a written authority in the nature of a law, or otherwise, in virtue of which the Lieutenant Governor of Upper Louisiana could grant lands, without regard to settlement, cultivation, the means of the cultivator, or the extent of the grant? It cannot, because the general law, as well as the general policy of the Spanish government, as evinced in all the regulations mentioned, is at war with such inference. If such authority did exist, it being an exception to the general law and policy, must be shown, and is not to be implied or presumed. The witness proves no such authority; he refers to none; he alleges the existence of none, in such way as to prove anything. If he intended to prove the meaning of the regulations, that is not the subject of proof; these the court must construe for itself, &c."

I also refer to the rest of pages 68, 69, and 70, as far as these words on page 70:—"These discordant provisions of this act make it difficult to ascertain its intention, as to the rule of decision which the court is to adopt."

Q. Are these all the parts of the Opinion on which you intend to rely, as to the first specification in your article?

A. They are all the passages I can now extract.

Q. And these, as you think, justify your assertion that Judge Peck decided that the ordinance of 1754 *prohibited* a sub-delegate from making concessions of land?

A. Yes, as taken in connexion with the other matters I have referred to. I considered him as deciding that that ordinance did, virtually, prohibit a sub-delegate from making a concession of land: as deciding that the want of express power was tantamount to a prohibition. I refer also to that part of my argument which refers to this point; and also to the Judge's answer, which shows that he admitted that sub-delegates did exist, in some shape, in Upper Louisiana: and I refer to this admission as connected with the position he took as to the form of the ordinance of 1754.

Q. You apply this reference to the first specification in your article?

A. Yes. I also refer to pages 63, 73, 74, as proving that the Judge recognized the existence of the sub-delegate function in Upper Louisiana.

[Here the witness read as follows:]

"Had the Lieutenant Governor of Upper Louisiana his appointment as sub-delegate from the Viceroys or Presidents of the Audiencias? or had he a sub-delegation from one so appointed? It has been proved on behalf of the petitioners that he had not. The evidence of the late Lieutenant Governor of Upper Louisiana, to this point, is, that he and his predecessors acted as sub-delegate, *without* any commission as such; that he, and they, performed the functions of that office in virtue of their commission as Lieutenant Governor, which issued from the Governor General of Louisiana; that the practice in other parts of the province, in this respect, was the same as in Upper Louisiana; in all, the Lieutenant Governors were, *ex officio*, sub-delegates."

Q. You consider this as a recognition by the Judge of the existence of the office of sub-delegate in Upper Louisiana?

A. This, in connexion with the other passages I refer to.

[Here the witness farther read as follows:]

"The regulations which we have do not permit us to believe that there existed others. Morales, in the preamble to those made by him, mentions those of

O'Reilly and of Gayoso in a manner which implies that these were all of which he had any knowledge, and shows, that he was making regulations which were to offer the *only means by which lands were to be obtained*. His language is, 'That all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted or sold; that those who are in possession, without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants, as sub-delegates of the Intendancy, may be informed of what they ought to observe,' &c. This preamble excludes the presumption that other laws existed, by which titles could be obtained; and the regulations themselves exclude all belief that any law existed, under which a confirmation of the title in question could have been claimed."

Here is a recognition of the office by the Judge himself, with a reference, too, to the words of Morales.

I farther refer to what was before the Judge in the cause, and which forms part of the appendix to the Judge's answer, viz. to part of the letter of Juan Ventura Morales to Don Carlos Dehault Delassus, dated New Orleans, 26th August, 1799, in the words following :

"I have seen the instructions which you, sir, (in the belief that, as Lieutenant Governor of the establishments of the Illinois, the officers of the Royal Treasury of the post of New Madrid, subject by order of the deceased Governor, Don Manuel Gayoso de Lemos, to this command, (that of New Orleans) must be subordinate to you,) have framed the government of the commandant Don Roberto Mackay, in his quality of sub-delegate of the Intendancy, and of the magazine keeper, Don Juan Lavellee, copies of which instructions you enclosed to me in your official letter of the 30th of June last. No. 59.

"In answer, I must say, that, it being contrary to law that one *sub-delegate* should transfer his powers to another, and it being opposed to the regularity of business, that that should be certified upon report which is not present, the instructions given by you cannot nor ought to have effect; and the more so, inasmuch as the sub-delegation of the Intendancy is local, and that the magazine keeper cannot recognize, as his immediate chief, any other than those who exercise the sub-delegation."

I also refer to the certificate of Gilberto Leonard and Manuel Armirez, in the following words :

"We, Don Gilberto Leonard, Treasurer of the army, and Don Manuel Gonzalez Armirez, Ministers of the royal treasury; and formerly accountant and treasurer, ad interim, respectively, of the province of Louisiana, during the Spanish Government, continuing our functions, until the entire conclusion of the affairs of said departments; do certify that, in pursuance of a decree of the Senor Intendant General ad interim, the Senor Colonel Charles Dehault Delassus, formerly commandant of the Post of New Madrid, and Lieutenant Governor of St. Louis of the Illinois, with the sub-delegation of the Royal Treasury in both situations, (con la subdelegacion de Real hacienda in ambos destinos) quitted the capital in the beginning of the year 1796."

I refer lastly to Morales' own regulations, where he styles himself "sub-delegate," and addresses himself to the commandants as sub-delegates.

Q. You refer to part of the regulations of Morales?

A. Yes, to the preamble—it may be seen in page 217 of White's Collection.

[Here the witness read as follows:]

"That the Commandants, as sub-delegates of the Intendancy, may be informed of what they ought to observe," &c.

Q. These, then, are all the clauses of the Opinion to which you refer, together with the documents you have now mentioned, as going to justify you in the 1st specification of error charged in your article?

A. Yes. I rely on his Opinion, on my argument, and on the other documents I have now referred to.

Q. I understood you, yesterday, as stating that you relied on the ordinance of 1754, as a *collateral argument*; and to have said that the Judge decided that "to some extent" that ordinance was not in force. I ask you, now, whether you did not strongly rely on that ordinance? or whether your reliance on it was of a light and transient kind?

A. I relied on it as being important, and as very useful, to show that there was a legal source, tangible and specific, to which might be traced the power of the sub-delegate, which, it was admitted, did, by custom, exist in Upper Louisiana. I contended that it was not rational to suppose that this power of sub-delegate started up of itself, spontaneously, on the banks of the Mississippi, and was at once recognized by the authorities existing there. That it was reasonable, rather, to suppose, that it arose from some appointment, virtual, if not express; that it had its origin in some law. In looking round for laws that might possibly contain some such enactment, I could find none, unless I went up to the ordinance of 1754; on the 12th article of which I thought I found that which I sought; and I argued, that the article came into force in Upper Louisiana when that province was ceded to the crown of Spain. I insisted that Morales recognized some law for it;—that it could not become law in Louisiana, merely by his adoption; but that it derived authority in virtue of the powers vested in him as Governor. And I am sorry to be obliged to state, that Judge Peck fell into an error, as to the nature of the law, as to the period when it was enacted, and the number of articles it contained. In referring to it he repeatedly speaks of "the 81st article," whereas the law contains no more than 14 articles. The Judge, in his Opinion, is guilty of a cardinal error, in the outset of his reasoning on this ordinance, by confounding a law of 1754, with a law of 1786;—being an error of just 32 years in the date of the ordinance, and involving still greater differences as to the provisions which the law itself ordains. He refers to this ordinance in the first paragraph of his Opinion; and the reference is repeated in the next page. It is, I presume, hardly necessary to say, that I never made, in the course of my argument, such an assumption as the Judge there attributes to me.

Q. You say that the Judge committed an error, when, in quoting from the ordinance of 1754 he stated the words quoted to be contained in "the 81st article of the ordinance of the king of Spain." Let me ask you whether the ordinance of 1754 is not itself part of a larger body of regulations, on which it is engrafted, being attached to the 81st article of this larger code? In the book before me it is said that No. 10 belongs to Article 81, which No. 10 is the ordinance of 1754.

[Here an explanation took place between the counsel for the respondent and the managers, in which reference was made to several collections of Spanish Law, in order to show how the Judge came to refer to "the 81st article" as he does in his Opinion. But before any conclusion was come to, the inquiry was dropped, as being a digression from the course of examination.]

Q. The question I put to you was, whether you relied on the ordinance of 1754 in a serious, or only in a light and transient, manner?

A. Seriously.

Q. You said that the Judge erred "to some extent" in his decision in relation to the ordinance of 1754: what was your meaning in that expression "to some extent?" Had not the court decided that that ordinance was not in force in Upper Louisiana?

A. Certainly.

Q. To what "extent" then did he err?

A. In keeping that ordinance wholly out of sight, even admitting that the law was not then in force; we relied on a positive usage and the absence of any prohibition.

A. You considered, did you not, the ordinance of 1754, and its inapplicabil-

ity to the case of Soulard, as not overruling the usage, but leaving it to stand upon its own ground ?

A. Yes. I took that ground. I insisted that if there was no law to be got at, the court must take the usage as authority, especially seeing it had been sanctioned by the Governor General, and also by the Congress of the United States, (as to a certain extent of land.)

Q. Your argument was, that the ordinance of 1754 did not prohibit such grants as that to Soulard ?

A. Yes. I thought that the Judge considered the sub-delegate as virtually prohibited from making such grants.

Q. That was not my question. You said that the ordinance of 1754 was the source of the authority for these grants—if it was not, then the only result would be that the usage must stand, until some prohibitory law was produced.

A. Yes ; taking also into view, all that had been done to confirm the usage.

Q. You considered the authority of the officer called sub-delegate to make concessions of land as standing, without any express authority, till some prohibitory law appeared ?

A. Certainly, putting the ordinance of 1754 out of the question.

Q. You considered, then, the decision of the Judge that the law was silent as to the authority for these grants, as justifying you in asserting that the law prohibited them ?

A. Yes ; I understood him to say that the operation of that regulation extended to sub-delegates everywhere ; and that it virtually prohibited the granting of such concessions in any part of the Spanish territories.

Q. You were not prepared to answer a question I put to you yesterday ; perhaps on reflection you will answer it now. I asked you whether, at the time Soulard's case was before the District Court of Missouri, there were not other cases also pending in that court, which rested on services "to be rendered ?"

A. I am not certain ; I think not.

Q. I wish to remind you of some claims of this description, in which you were perhaps interested, or of which you may have had some knowledge.

A. There was, I remember, one claim which had reference to a distillery ; and one which referred to digging in the mines : but I do not consider these as resting on services "to be rendered."

Q. Were you not concerned in a case of Delassus for a league square of land ?

A. I was.

Q. Was not that claim founded on a grant the consideration of which was, that the grantee should supply the government with a certain quantity of lead annually ?

A. The grant was coupled with no condition whatever. It was indeed to enable the grantee to supply the Government with lead.

Q. Have you got a copy of the concession in that case ?

A. No. There is a transcript of it in this city. It was to enable the grantee to get out a certain quantity of mineral, provided the land should be found to contain any: but the grant was not to be forfeited, if it should turn out that there was no lead there. It was a substantive contract.

Q. Was not the original contract that the grantee should supply the Government with a certain quantity of lead every year ? and was not the grant of land made in order to enable him to comply with his contract ?

A. Yes, but it was an absolute grant : it was made to him as an act of special favor, in consequence of a recommendation from the Governor General.

Q. Are you aware of the existence of a claim of John Smith T. as the representative of St. Vrain ?

A. Yes ; but I am not acquainted with the particulars of the case : Mr. Benton and Mr. Magenis were, I think, the counsel concerned.

Q. Was there not a claim of Chouteau, for 1281 arpents of land, then pending in that court ?

A. I believe it was. I think it must have been.

Q. On what condition did the grant, referred to in that claim, rest ?

A. It was to enable the claimants to carry on a certain distillery which they had established. They wanted some facilities, as to a supply of wood, and matters of that kind ; and they prayed the Governor for a grant of land.

Q. Did not the petitioner represent this distillery as a great accommodation to the public ?

A. Yes ; I think he did.

Q. Was not the service he was to render yet future ?

A. Perhaps it might have been, in part.

Q. Were not these claims then pending ?

A. I think they were.

Q. Do you know anything of a claim of Clamorgan for 500,000 arpents of land ?

A. Yes ; there was a special exception of it in the act of 1824.

Q. That was another claim. This is his claim for land to enable him to raise hemp. Was not such a case before the court ?

A. Perhaps it was. I am not certain. I will look at my docket. It was, I think, the largest claim included within the law of 1824. [Here the witness looked over a paper.] I do not see it here. Perhaps it was pending : I cannot say.

Q. Your second specification of error in the Judge's Opinion is in these words: "that a sub-delegate in Louisiana was not a sub-delegate as contemplated by the above ordinance ;" that is, by the ordinance of 1754 ?

A. Yes ; and in support of this I refer to pages 63 and 73 of the documents.

Q. You considered, at one time, this assumption by the Judge as being supported by this clause of the Opinion, viz. "According to this evidence, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the intention of the ordinance." Do you still rely on that clause ?

A. I refer to what I have already specified, viz. pages 63, 73, 74, of the documents ; to exhibits K and L in the appendix to the Judge's answer ; and to the regulations of Morales.

Q. You considered the discussion by the court as establishing the proposition that the Lieutenant Governor of Upper Louisiana was not a sub-delegate in the view of the ordinance of 1754 ?

A. I considered the Judge as having said that the Lieutenant Governor was not a sub-delegate in the meaning of that ordinance ; inasmuch as he decided that that ordinance was not in force in Upper Louisiana.

Q. You did not understand the Judge as having inquired whether the Lieutenant Governor was, or was not, a sub-delegate under the ordinance of 1754 ?

A. Yes ; I understood him as establishing the doctrine that the Lieutenant Governor was not a sub-delegate, as under the ordinance of 1754 : though he did admit him to be a sub-delegate in some sense, I could not well understand what.

Q. You would not have considered the opinion as meeting and sustaining your specification unless you had thrown it into this precise form ?

A. Instead of giving the argument of Judge Peck, or his admissions that the Lieutenant Governor was a sub-delegate in some sense, I merely stated that he denied him to be a sub-delegate under the ordinance of 1754. I could not spread out all his train of argument : it would not have been possible to do this within the limits of a newspaper article. I concentrated what I had to say as much as I could, and merely gave what I understood to be the Judge's conclusions, viz. that a sub-delegate, to wit, a Lieutenant Governor, was not a sub-delegate as contemplated by the ordinance of 1754.

Q. Your 3d specification of error in the Judge's Opinion is "that O'Reilly's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power, either of the Governor General, or the sub-delegates under the royal order of August 1770." Was the order of August, 1770, then known in Missouri ?

A. No. Its terms were referred to, as I thought, gratuitously. The Judge referred to regulations of a date anterior to the order, in order to determine what the order was, or would be.

Q. Were the contents of the order of August, 1770, not known at the date of your publication?

A. No. They have been ascertained very recently—I understood they were obtained by Judge Peck since the date of my article.

Q. From the language of your article, would it not be inferred, that the Judge seemed to have supposed that the order of August, 1770, received something of its character from the regulations made in February of the same year?

A. I said that Judge Peck was in error in referring to the regulations of February in order to determine anything about the order of August following.

Q. You do not understand the bearing of my question. The order of August was then unknown. My question is, whether it was or was not the impression in Missouri that you were then in possession of all the Spanish orders and regulations which governed the land claims in that State, and that there were not some which had not yet come to light?

A. Yes; and that I thought was the error of the Judge.

Q. What I want to know is, whether the impression then existing in Missouri was not, that the ordinance of August, 1770, would, when obtained, throw light on the grantees' power, so as to countenance the claims to land in that State?

A. I do not know that such was the general impression—I wished, myself, to see the order, and was very well pleased with it when I did.

Q. I wish you to state another fact. In your article, as published, were not the words "*February*" and "*August*" in italics?

A. Yes. I thought that the error lay in referring to those dates; and placing these words in Italics made that error the more striking.

Q. Was it not done with a view to attract the attention of the reader to the absurdity of considering a regulation of prior date, made by an inferior officer, as explanatory of an order of the king made on a subsequent day?

A. Certainly; but I did not use such terms as you have now done—I said nothing about any "absurdity."

Q. Please now to refer to that clause of the Judge's Opinion in which he is guilty of this absurd error.

A. I repeat, that I was far from venturing on the use of such expressions.—I had not the least intention of using such terms. I never used the word "absurd," or charged any part of the Opinion with "absurdity," (whatever my private opinion may have been.) I refer the court to page 62, and to page 66, together with the context.

[Here the witness read as follows:]

"We have the testimony of *Morales*, the Intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military Government, after the order of the King of Spain, that is, in virtue of the order of the 24th of August, 1770, the powers of the civil and military government both centred in the Governor General. To him belonged the power to divide and grant lands in virtue of this order."

[He then read from page 66 as follows:]

"The presumption, arising in favor of the authority of the Governor General to make regulations for the distribution of the royal lands, is fortified by the length of time during which grants were made in pursuance of those regulations, and which, it is reasonable to believe, were made with the knowledge of the Spanish Court; and is further supported by the recital, contained in the preamble to the regulations of *Morales*, that the *power to grant lands belonged to the civil and military government since the order of the king of 1770*. What this order was, what power, what discretion it vested in the Governor General in making grants of the royal domain, and what restrictions it imposed, is left to be

inferred (in the absence of the order) from the regulations themselves, and the other acts of the Governor General under it."

"That the regulations of O'Reilly are of a date anterior to the order of the king of 1770 does not appear to affect their authority. There would not, necessarily, be such a repugnancy between this order and those regulations as to annul the latter. The subsequent sanction of these, and the presumption of their being authorized, thence arising, must be considered sufficient to give them the authority of law, whether the power to make them was comprised in the general and extraordinary powers given to the Governor General, O'Reilly, previous to the order of 1770, or not."

Q. Then it is the statement by Morales, that, subsequent to August, 1770, all powers, both civil and military, centred in the Governor General,—and the Judge's referring to this, and saying, (in connexion with that reference,) that these grants continued down to 1798 or 9, in conformity to the regulations of O'Reilly,—which you considered as justifying you in what you said?

A. I refer, again, to what I referred to before. I could refer to a fact stated in the answer of the Judge, but I do not consider it my province to go farther.

Q. Your fifth specification is as follows: "That the word *mercedes*, in the ordinance of 1754, which, in the Spanish language, means *gifts*, can be narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money."

A. You have passed over the fourth specification.

Q. I thank you. I did not intend to pass it over. The fourth specification, then, is in these words: "That the royal order of August, 1770, (as recited or referred to in the preamble to the regulations of Morales, of July, 1799,) related exclusively to the Governor General." What part of the Opinion do you refer to, as justifying this specification?

A. I refer to page 62 of the documents, and to the clause on that page which I read a few minutes since.

[Here the witness read as follows:]

"We have the testimony of *Morales*, the Intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military Government, after the order of the King of Spain, that is, in virtue of the order of the 24th of August, 1770; the powers of the civil and military government both centred in the Governor General. To him belonged the power to divide and grant lands in virtue of this order."

I consider this position as erroneous; and my fourth specification was intended to convey that idea. The error lay in this, that the Judge excluded the power of the Lieutenant Governor, or sub-delegate, under the order of 1770, to make inchoate concessions of land, and to originate a claim; but made the Governor General the exclusive source of title of any kind.

Q. Was there any doubt on your mind that the power to grant the lands of the king was in the Governor General?

A. No. I had no doubt of that fact.

Q. You thought, then, that there was power in the sub-delegate to grant an incipient title, and that the regulation of 1770 was cited by Morales as if it related to the granting of lands: and the error was, that Morales had said that that order related alone to the Governor General?

A. Yes. That Morales understood the order differently from Judge Peck.

Q. You thought, then, that there was nothing in that order to exclude an incipient power elsewhere?

A. I referred to it, to show, that the Judge confined the whole granting power to the Governor General, and put the sub-delegate entirely out of view.

Q. Is this the whole of what you refer to?

A. No. I refer to the other passages I read.

Q. The fifth specification is in the following terms: "That the word *mercedes*, in the ordinance of 1754, which, in the Spanish language, means *gifts*, can be

narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money." Did you understand the Judge to assume that the word "*mercedes*" meant *gifts* only?

A. No. That was my own proposition: the correctness of which I could substantiate by an explanation given, by the Judge, in the other House of Congress, of the philology of the word.

Q. Was this imputed to the Judge as his assumption?—A. No.

Q. The preamble of your specifications declares that the Judge seems to have erred "in the following *assumptions* as well of fact as of doctrine," and then, this specification follows, among the rest. I now ask you, whether the Judge assumed that the word "*mercedes*" meant "*gifts*" only?

A. He supposed that it meant sometimes gifts, and sometimes grants; but, by his construction, I thought he narrowed it down to a reward to an informer, or a gift to an Indian.

Q. You escaped my question. I asked you whether Judge Peck said, in his Opinion, that the word "*mercedes*" meant *gifts* only?

A. No: He said that it meant gifts, or grants.

Q. The next point in this specification is, that Judge Peck assumed that the word "*mercedes*" might be narrowed down to a grant to an Indian. Will you refer to any part of the Opinion which supports this assertion?

A. I refer to page 65 of the documents.

[Here the witness read as follows:]

"The 8th section of the ordinance directs, that 'a proper reward shall be given to those who shall inform of lands, grounds, places, waters, and of uncultivated and desert lands, and shall be allowed a moderate portion of those of which they shall have informed as being occupied without title;' the 7th section having authorized the sub-delegates to determine the quantity to be granted for such service."

Q. I wish you to make your answers specific; not to take the whole of your specification together, but to refer to its several parts, and point out your authority for saying that Judge Peck affirmed that the word "*mercedes*" could be narrowed down to a gift to an Indian?

A. I do not confine my reference merely to what I have read, but I read further, and take the whole together.

[Here the witness read on page 66, as follows:]

"A view of the whole ordinance removes all doubt as to the general intention to *sell*, and not to *give*, the royal lands, except to the inhabitants of towns, for pasturage and commons according to their wants, and to the Indians as mentioned in the laws 14 and 15, just recited, and except so far as the grants which may be made to those who shall give information against persons occupying lands without title, authorized by the 7th and 8th sections, may be considered as in the nature of gifts.

"From this view of the ordinance the ambiguous meaning of the term *mercedes*, to be found in its preamble, produces no difficulty. The sense in which that term must be received, is to be determined by a view of the whole ordinance; it need not necessarily be interpreted to mean gifts; but may as well be interpreted to mean grants; if, however, it necessarily imported gifts, effect is sufficiently given to it in this sense, by the gifts to be made to the inhabitants of towns for commons and pasturage, and to be made to the Indians as directed in the 14th and 15th laws before adverted to.

"If, then, this ordinance was to be made the basis upon which the right to confirmation in this case should be determined, the claim could not be confirmed on the grounds that the concession was not made upon a *sale for money*, and at the *reasonable value* of the land, but was made in consideration of *public services*—a consideration unknown to the ordinance, except in the case of an *informer*, as authorized in the 7th and 8th sections, where lands are authorized to

be adjudged in moderate quantities to those who shall give information of them as being occupied without title. This is the only species of *service* for which this ordinance authorizes a concession. This is the only case in which a sub-delegate is made the judge of the value of services. He is not made the judge of the value of services of the nature of those upon which the concession in question is alleged to have been issued."

Q. The only part of this quotation in which the Judge speaks of "*mercedes*" as meaning *gifts*, is this sentence; "the sense in which that term must be received is to be determined by a view of the whole ordinance. It need not necessarily be interpreted to mean *gifts*, but may as well be interpreted to mean *grants*. If, however, it necessarily imported *gifts*, effect is sufficiently given to it, in this sense, by the gifts to be made to the inhabitants of towns, for commons, and pasturage, and to be made to the Indians, as directed in the 14th and 15th laws before adverted to." Do you consider the Judge as having, in this sentence, narrowed down the term *mercedes* to "a gift to an Indian?"

A. I read further, and I repeat, that my reference is to the whole together.

Q. Here, where a gift to an Indian is intended, the language of the Judge refers to the sense of *mercedes*, as translated to mean *gifts*. The other part, that you quoted, refers to the idea of a *reward*. You say, then, that he narrowed down the term to "a reward to an informer?"

A. What he says about a reward to an informer is in reference to this word *mercedes*. In arguing the cause of Soulard, we contended, that *mercedes* is a pregnant word; that it means "gratuitous gifts, and bounteous rewards, made by the king, for services conducing to the public good:" that the force of this term shed light over the whole law, and gave to it a general and a generous application; but the Judge narrowed it down to "a gift to an Indian and a reward to an informer."

Q. We wish the court to be better informed as to the meaning of this word *mercedes*; and I now ask, in what part of the ordinance of 1754 is this word found?

A. I will show. In the commencement of that ordinance, after the well-known words "Experience having proved the inconveniences that arise to my subjects of the kingdom of the Indies from the decree issued by royal order of the 24th of November, 1735, &c." The king, having concluded the preamble by the words "and my royal treasury also suffering, both in the amount of sales of these lands, and in the consequent neglect of agriculture and tending of cattle," goes on to say, "I have therefore resolved that in the *mercedes*, sales, and compromises, of royal cultivated and uncultivated lands, &c." We contended that these words did not belong to the preamble, but to the body of the ordinance; and with a view to show the force of the term, we referred to the language of pre-existing laws, particularly to book IV, title 12, of the Recopilacion de India, where the Governor General is allowed, indefinitely, to make grants of lands for services rendered. This law is referred to in the ordinance itself of 1754. If the court will examine the law referred to, they will find that the granting power is indefinite.

Q. You say, then, that you relied on the force of the word *mercedes* not here only, but also in Laws of the Indies, book IV, title 12?

A. No. The court was referred to the whole current of the Spanish laws. We construed the word by its use in pre-existing laws, and hence inferred that it covered such grants as that to Soulard.

Q. I wish you to apprehend my question distinctly, and to conform your answer to it. Do you say that the place you have mentioned in the preamble to the ordinance of 1754 is the only place where the word *mercedes* occurs in that ordinance?

A. I do not know whether it occurs again or not. The translator of the ordinance renders the word *mercedes* "grants."—The word "grants" occurs

frequently in the ordinance as translated ; but I do not know whether *mercedes* is in the original in each of these places ; probably not.

Q. The ordinance has the following words, "I have therefore resolved that in the *grants*, sales, and compromises of royal cultivated and uncultivated lands, now made, or which may hereafter be made, the provisions of the regulation shall be faithfully observed and executed." Did you understand this clause as referring to all the subsequent articles? Does article 1st contain the word *mercedes*, and does it occur again in that ordinance?

A. I told you that I am not sure. It is often rendered "*grants*," and the word "*grants*" occurs frequently. I considered the word *mercedes* to have a dominant effect.

Q. You said that your argument looked back to all the pre-existing laws?

A. I thought that all the Spanish land laws in the transatlantic Spanish dominions might be looked to.

Q. Do you now refer to the argument on the demurrer?—A. Yes.

Q. You say that you referred to the other laws referred to in the ordinance of 1754?

A. I think not :—I do not know.—The argument on the demurrer was only by way of experiment :—no other lawyer would undertake it, as the subject was entirely new ; and I was urged to make the trial. But I was not, by any means, as well satisfied with the argument on the demurrer, as with that on the hearing of the cause.

Q. Do you know where the reference is to be found?

A. I will endeavor to find it. We were not restricted to the laws referred to in the ordinance of 1754.—Morales refers to all the previous laws, I read from the second article.—"Nor shall severe strictness be used towards those already in possession of Spaniards, or persons of other nations, and in regard to all the requirements of laws 14, 15, 17, 18 and 19, title 12, lib. 4, of the *Recopilacion de Indias*, shall be observed."

Q. What other article refers to the Spanish laws?—A. Article 4th.

Q. In your argument on the demurrer, were articles 2d and 4th before the court? I mean in the MS. translation you have produced here?

A. I do not know. The MS. is in your hands, and it will speak for itself :—I referred to that MS.

Q. Did your printed argument refer to all the articles of the ordinance, as being before the court?

A. I do not know indeed.

Q. The whole of what you referred to, as before the court, extends from article 1st to article 5th, leaving out articles 2d and 4th :—was it not so?

A. It may have been.

Q. The argument could not have referred to these, as the articles were not before the court :—could it?

A. I do not know ; the case was argued more fully afterward.

Q. The parts of the Opinion you have referred to are those on which you rely, as proving that the Judge narrowed down the word *mercedes* to a reward to an informer. Did he not put his interpretation of that term on a specific article?

A. Certainly, as I understood him—he referred to some part of the ordinance of 1754, in order to narrow down the meaning of the word.

Q. Does the word occur in the article he mentioned?

A. I do not know. What I considered his error was, that he narrowed down the term to a gift to an Indian, or a reward to an informer ; and (with great respect,) I do so still.

Q. The 8th section is in these words—[here the counsel read as follows :]

"A proper reward shall be given to those who shall inform of lands, grounds, places, waters, and of uncultivated and desert lands, and shall be allowed a moderate portion of those of which they shall have informed, as being occupied without title. This shall also be included in the public notice which the sub-

delegates to be appointed shall cause to be published in their respective districts.”
—Did the Judge ground his restriction of the term on this article?

A. It may have been that :—I do not know exactly.

Q. Is it on the same clauses of the Opinion that you rely, as proving that he narrowed down the term *mercedes* to “a mere sale for money?”

A. That part of the specification was a mere inference *a fortiori* :—if the word could not, with propriety, be restricted to a gift to an Indian, or a reward to an informer, still less would it be narrowed to a mere sale for money.

Q. I ask, what part of the Opinion is it, in which the Judge attempted to narrow the term to a “sale for money?”

A. He took the alternative ground that *mercedes* meant either *gift* or *grant*. The term *grant* is familiarly used as applying to a sale, such a sale as is made by the Spanish Government. I thought it an error to restrict the term to the word *grant*, since *grant* may mean a mere sale for money. I argued, then, that if it was improper to narrow it even to a grant, *a fortiori* it must be erroneous to understand it as referring to a mere sale.

Q. Then it was because the Judge construed *mercedes* to mean *grants*, that you thought him in error?

A. I thought that if the word was rendered grant, it might be pushed even to signify a sale for money, which I viewed, *a fortiori*, as an error.

Q. Your opinion was that the Judge made the discussion to turn upon the force of the word *mercedes*?

A. I thought that he had that word in his eye, throughout.

Q. Were you not aware that holding up the Judge before the public as having narrowed the word *mercedes* to a grant to an Indian, or a reward to an informer, had a tendency to expose him to the ridicule and contempt of the public, as having made an absurd and ridiculous decision?

A. I had no such intention. I do not know what might have been the tendency of such a representation ; that must be left to the views and feelings of the reader :—some might think such a decision absurd ; some might think it ridiculous : I certainly thought it a great error. I did not think it could expose him to *contempt*, as he entered into a long discussion on the subject, and seemed anxious to place his views before the public.

Q. When asked whether you did not think your representation of the Judge’s decision calculated to expose him to public ridicule and contempt, you reply, that you did not think it calculated to expose him to *contempt*: did you not consider it calculated to expose him to ridicule?

A. If I must give an answer on oath to that question, I say no; I was not certainly aware that it would.

Q. Nor to the resentment of the land claimants?

A. No : not to the resentment of any one ; and no consequences would result from the resentment of any man which would be dangerous to Judge Peck.

Q. Why not?

A. I knew the character of the people I was among : and I knew that the language I used was not calculated to excite them to violence, if they had been ever so ferocious.

Q. You say, then, that you were so aware of the character of the people of Missouri, that you were sure such an error in the Judge would not expose him to their resentment or ridicule?

A. No. It might make them think his decision very erroneous, and perhaps absurd. But such was not my intention; my article was a condensed abridgement of my views of the Opinion. The Opinion itself was long, and no person not equally familiar with the subjects it embraced, could have concentrated it into such a small space. The article appeared eight days after the Opinion was published, and I saw the Opinion then for the first time.

Q. You were aware that the Judge had decided that the ordinance of 1754 was not in force in Upper Louisiana?

A. Yes. I so understood him.

Q. Were you not aware that this would operate to abate his errors before the public?

A. It never occurred to me. The people in general knew, or thought, very little about such a law. I do not suppose there was one out of the eighty clients I had, (supposing me to have had that number,) who had ever heard or dreamt of such a thing as the Spanish ordinance of 1754.

Q. Talking of the ignorance of the people of Missouri, when was your argument published?

A. In 1824.

Q. Was it intended for the edification of the land claimants?

A. No: it was meant principally for the bar. A great part of the land claimants there are, literally, not reading men. There are, indeed, a certain portion who do read, and who wish to know the foundation on which their rights rest:—but, to the most of the people, my mentioning, or not mentioning, that the Judge had decided the ordinance of 1754 to be of no force in Upper Louisiana, would be of no consequence whatever.

Q. Your argument was in 1824:—did it not embrace all the articles of the ordinance of 1754 then known in Louisiana?

A. I cannot say what may or may not have been known in Louisiana; it included all that we thought worth talking about in court, I believe.

Q. Did you not, then, know of other articles in that ordinance?

A. Certainly; but I did not put them all into my argument. I had the MS. which Col. Benton put into my hands:—all the articles I think are there but two.

Q. When was the argument holden on the demurrer?

A. In November term, 1824.

Q. Was the cause still pending?

A. Certainly; it was as I have stated, a sort of experimental argument, to break the ground. The subject was new, and none of the bar would venture to touch it: even the District Attorney declined, alleging that he was not prepared. The demurrer was afterwards withdrawn by consent, and we then went into the argument of the cause on the merits.

Q. You thought, then, the omission of some of the articles of the ordinance a matter of no consequence?

A. I referred to other errors.

Q. Your 6th specification is in the following words: “that O’Reilly’s regulations were, in their terms, applicable, or were in fact, applied to, or published in, Upper Louisiana.”—I ask you, whether the question was ever raised, whether O’Reilly’s regulations had, or had not, been published in Upper Louisiana?

A. Certainly; the question arose as to their being law in Upper Louisiana, and they could not have been law if they were not published. I refer to pages 25 and 26 of my argument on the demurrer. The printed argument contains the following passage:—

“But, supposing these regulations (particularly those of Morales) to be either laws, ordinances, or simply regulations having the force of law, we submit, that, to show their applicability to Upper Louisiana, it must appear that they were *published* or promulgated in that province. This has not been, nor can be done; for the proof exists to the contrary. We have proved, by witnesses of the first respectability, that the regulations of Morales, so far from having been promulgated, were sent back by the Lieutenant Governor to Morales, with a remonstrance and various written objections to their operation, and that the Intendant never replied to those objections, or insisted on enforcing his regulations in Upper Louisiana.”

Q. Will you refer to any part of the Opinion where the Judge ever said that those regulations had been published in Upper Louisiana?

A. Yes. I refer to pages 67 and 68 of the documents.

[Here the witness read as follows :]

“In examining this reasoning, if it be admitted that the concession of an inferior officer is to be considered as *prima facie* authorized, this presumption, like all others, can stand only so long as it shall remain unopposed by evidence or presumptions of a higher nature. A presumption can weigh only so far as it is calculated to induce belief; and so soon as it shall cease to do this, it ceases to make a *prima facie* case; ceases to furnish ground upon which a decision can rest. The presumption which arises in favor of the validity of the acts of the supreme authority, especially such as the enactment of regulations and the acknowledgment of the authority of these for a series of years, is of a higher nature than that which arises in favor of the legality of a single act, or even a series of acts, such as concessions of land by the Lieutenant Governor; particularly when these acts are to be subject to the approval and confirmation of that supreme authority which gave those laws that were to regulate the subject of concessions.”

“It would appear that the policy apparent in O'Reilly's regulations did extend itself to the province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid. The reverse of this is true; his grants are invalid unless authorized by an express authority from the king, either as derived through the Governor General in the form of laws, or otherwise. Can it be believed that there existed an express authority which authorized this grant of 10,000 arpents without any reference to settlement, cultivation, or property qualifications? The view which has been taken excludes such belief, and with it every presumption in favor of the legality of the concession.

“But the evidence of the late Lieutenant Governor is introduced to prove that, in Upper Louisiana, that officer was unrestricted as to quantity, though the witness does not pretend that he had any authority, other than the law, to make concessions. The amount of this evidence is, that the law clothed him, as Lieutenant Governor, with power to make concessions, and imposed no limitation as to the extent of the grant. Does the witness mean to prove that there existed any *unwritten law*, in virtue of which the officer mentioned, or any other officer of the crown, was authorized to make grants of the royal domain? If he does, the evidence is untrue. It may be assumed with certainty, that *no unwritten law, no principle of the Spanish constitution*, gives to any officer of the crown the power to grant the royal lands; and that such power, to be legitimate, must be derived from some authority other than the constitution of Spain or any unwritten law, usage, or custom. An express *written authority* was indispensably necessary to authorize the Lieutenant Governor of Upper Louisiana to grant lands. The existence of such authority might be inferred from circumstances, but its existence is indispensable to the validity of a grant. Can it be inferred, in this case, that there existed a written authority, in the nature of a law or otherwise, in virtue of which the Lieutenant Governor of Upper Louisiana could grant lands without regard to settlement, cultivation, the means of the cultivator, or the extent of the grant? It cannot, because the general law, as well as the general policy of the Spanish government, as evinced in all the regulations mentioned, is at war with such inference. If such authority did exist, it being an exception to the general law and policy, must be shown, and is not to be implied or presumed. The witness proves no such authority; he refers to none; he alleges the existence of none, in such way as to prove anything. If he intended to prove the meaning of the regulations, that is not the subject of proof; these the court must construe for itself.”

I also refer to page 11, of the Answer, No. 2.

At this point of the cross-examination, the Court adjourned to Monday next.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Monday, December 27.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel also attended.

The cross-examination of LUKE E. LAWLESS was resumed.

Q. By *Mr. Wirt*. Is not this the original order of 1754, as contained in the ordinance of 1786? please to compare it with the MS. translation in your hands, and say whether it is not correct.

[Here a volume was handed to the witness.]

A. It appears to be.

Q. The word "*mercedes*" occurs in the sentence immediately preceding the 1st article, and it occurs in no other part of the ordinance.

A. If you have examined the ordinance, and cannot find the word anywhere else, then I take it for granted that it is not anywhere else in the ordinance; but I will look. [Here the witness, having examined, said that he did not see the word in any other part of the ordinance.]

Q. Is there any article in this ordinance which regulates the mode of making gifts and gratuitous grants?

A. There is none which regulates that particularly;—but the error of the Judge consisted in confining himself to this ordinance, in order to narrow down the meaning of the word, and in excluding himself from a reference to pre-existing laws. The whole code and context of law ought to have been consulted.

Q. In the argument on the demurrer, was any other code of law before the court than the ordinance of 1754, with the regulations of O'Reilly, Gayoso and Morales?

A. No.

Q. On what Spanish law did you rely in your second argument?

A. On Lib. IV. title 12 of the *Recopilacion*—and on all the laws, under that head, which are in *White's Collection*, page 38.

Q. Is this the same text as that inserted in the *Collection of Land Laws* printed by order of Congress?

A. Yes. I am not quite certain whether I referred to these laws in the second argument in the case of *Soulard*, or in the argument of subsequent cases.

Q. Did you conceive the sentence of the ordinance which immediately precedes the first article, as a positive enactment, or as a mere recognition of the purpose of the king?

A. As a recognition.

Q. Was the word "*mercedes*" shown to the court as existing in any other part of the ordinance of 1754 but the preamble?

A. Not that I know of. The argument turned on the force of the word, as it stood there.

Q. Was the word admitted at the bar to mean *gifts*?

A. I do not understand the question.

Q. I mean to ask, whether the counsel for the United States admitted that the word *mercedes* meant *gifts*?

A. I cannot say, indeed, how *Mr. Bates* understood it.

Q. Was not the interpretation of that word controverted?

A. Yes. I think the Attorney for the United States labored to show that the sense in which the Judge has since interpreted it was the true meaning.

Q. Was not your interpretation of the word contested by him?

A. It is very possible:—it may have been:—I think he did contest it:—but I cannot charge my memory on the subject.—I did not consider what he said as deserving of great attention, as he did not profess himself acquainted with the Spanish language.

Q. The word was understood by the court to mean *grants*,—as it has been translated?

A. Yes, certainly.

Q. You said, I think, in the course of the present examination, that the Judge referred, in his Opinion, to the 81st *article* of the ordinance of 1754, whereas that ordinance contains but 14. Will you read to the court the title of that book you now have in your hand?

[The witness read the title in Spanish.]

Q. Please to read it as translated.

A. "Royal Ordinance."

Q. What is the 81st *article* of that work?

A. It treats of the power of the Intendant.

Q. Does, or does not, that 81st *article* adopt the ordinance of 1754 as a part of itself?

A. Certainly. The ordinance of 1754 is No. 10 of the appendix to the 81st *article*.

Q. Does not the *article* adopt that ordinance?—A. Yes.

Q. What is the caption? or what words are at the head of the ordinance, as it there appears?

A. "Belongs to the 81st *article*."

Q. Were not the regulations of Morales before the court?—A. Yes.

Q. Does not Morales refer to, and cite, the 81st *article* of the ordinance?

A. He refers to it. I refer, on this subject, to the following passage, (in page 60) of the Judge's Opinion:—

"It is contended on behalf of the petitioners, that the 81st *article* of the ordinance of the King of Spain became in force in Louisiana immediately on the ratification of the treaty of Fontainbleau, of the 3d of November, 1762; or, at all events, on the occupation of Louisiana by Spain in 1769, under that treaty."

It will be manifest from *article* 81st, that it was passed in 1786; and I held that the reference to that *article* as coming into force in 1762 was an erroneous reference.

Q. You say that the regulations of Morales were before the court: and this is the preamble to those regulations—"Wishing to perform this important charge, not only according to the 81st *article* of the ordinance of the Intendants of New Spain, of the regulations of the year 1754, cited in the said *article*, and the laws respecting it, but also with regard to local circumstances, and those which may, without injury to the interests of the king, contribute to the encouragement, and to the greatest good of his subjects, already established, or who may establish themselves, in this part of his possessions:"—Morales, therefore, refers to *article* 81st, as citing and adopting the ordinance of 1754: now please to look at your manuscript, and see if that ordinance is not headed "81st *article*?"

[Here the witness examined the manuscript.]

A. This proves more than I expected to be able to show. It is the very identical *article* of 1786. When questioned on this subject before, I felt and expressed some doubt, whether in my argument on the demurrer, I pointed the attention of the Judge to this *article* of 1786. I find, now, that I did.

Q. There is no doubt of it. But what I ask is, whether the first object that strikes the eye, at that part of the manuscript, is not the words "81st *article*," and whether it does not refer to the ordinance of 1754?

A. Certainly.

Q. What is the caption to the ordinance of 1754, as it stands there?

A. "No. 10 corresponds to *article* 81st."

Q. Had not the Judge before him, on the argument of the cause, the whole of the *article* of 1754?

A. I believe he had.

Q. Was not that copy obtained from the Department of State? and did it not contain the translation, made by order of government?

A. I believe so.

Q. That copy being before the Judge, you, nevertheless, suppose him, in referring to "the 81st article," to mean the 81st article of the ordinance of 1754, in ignorance that that ordinance contained but 14 articles?

A. I supposed the Judge's error to lie in confounding two laws that were distinct from each other. By the letter of the King of Spain in 1798 (subsequent to the date of the concession to Soulard, which was in 1796) the ordinance of 1786 is enforced in Louisiana generally. I contended that the Judge, in determining the validity of that concession, might not look to an ordinance which did not come into force till 1798. He appeared to me to err, from confounding ordinances which were wholly distinct.

Q. You said, however, that the Judge committed an error, and showed a want of acquaintance with the subject on which he was adjudicating, since he referred to the 81st article of an ordinance which contained only 14.

A. He does distinctly make that reference in so many words.

[Here Mr. Buchanan interfered, on behalf of the managers, and observed, that the error to which the present inquiry related was not one of those mentioned by Mr. Lawless in the article signed "A Citizen." These questions, therefore, seemed to be irrelevant.

Mr. Wirt admitted that this was not one of the errors charged in the article; but insisted that the questions were relevant, inasmuch as the witness had made this charge of error openly, before this court, in the course of his examination on Friday last, and his words had been taken down by the Stenographer who is preparing a report of the trial.

The witness said that he considered the error as important in its bearings, and he did not retract the charge.]

Q. As you now have the whole of the ordinance of 1754 before you, in the original, I ask you whether the manuscript translation produced by you before the court contained the whole of the articles of that ordinance?

A. I think not. It contains, I believe, all but one or two.

Q. Please to read the numbers of the several articles in that manuscript.

A. I will first read the title, which will show what this manuscript purports to be. [The witness here read as follows:]

"Extract from a book entitled 'Royal Ordinances for the Establishment of the Military and Provincial Intendants of the Kingdom of New Spain,' published by order of his Catholic Majesty at Madrid, in the year 1786."

Q. Which is the 1st article of the ordinance of 1754 there given? Article No. 1, is it?

A. There is no description of the article.

Q. Are not the articles numbered there? Please to read the numbers in order.

A. Article No. 1: No. 5: No. 9: No. 10: No. 11: No. 12.

Q. You have mentioned six articles. How many does the ordinance contain?

A. It contains, as I have already said, 14 articles.

Q. We will now proceed to the specification on which we were engaged when the examination broke off yesterday. It was the sixth, and is in the following words: "That O'Reilly's regulations were, in their terms, applicable, or were in fact applied to, or published in, Upper Louisiana." To what part of the Opinion do you refer, in support of this charge of error?

A. I refer to pages 66, 67 and 68 of the documents, and pages 25 and 26 of my printed argument.

Q. Was there, or was there not, evidence before the court, going to prove that O'Reilly's regulations were made as well for Upper as for Lower Louisiana?

A. I did not consider that there was any.

Q. Who was the principal witness adduced by you to prove the practice of former Lieutenant Governors, as to the granting of land?

A. Carlos Dehault Delassus, the former Lieutenant Governor.

Q. Now please to turn to page 41 of the documents, and see whether in the printed deposition of that witness, there is not the following sentence: "The regulations of O'Reilly, Gayoso and Morales were for the government of Upper Louisiana, and were delivered to the Commissioners of New Orleans?"

A. It appears so; but I consider such an assertion as very singular, because the whole evidence of Delassus goes to show the fact that those regulations never were in force in Upper Louisiana.

Q. By the Court. "Does the book giving copies of a part of the articles, contain all which related to the questions in Soulard's case?"

A. No: not all; because it was contended that the previous laws, referred to in that ordinance, also related to the case. But it contained all the articles of the ordinance of 1754 which were thought necessary by Soulard's counsel.

Q. Did the court think so? Or does not the court, in its comments on that ordinance, refer to other articles besides those which you produced?

A. I understand the court, in its commentary, as taking a view of the whole ordinance.

The Hon. Mr. Woodbury, a member of the court (who had proposed the last question presented by the court) said he would modify it so as to make it more explicit. Having been modified, it was put to the witness by the President of the Senate in the following words:—

"Does the book giving copies of a part of the articles, contain all the articles which related to the questions in Soulard's case, in the opinion of his counsel?"

A. Yes.

Q. I again ask, did it contain all the articles of that ordinance which were necessary, in the opinion of the court?

A. I cannot say: I believe the court looked through the whole ordinance.

Q. By Mr. Buchanan. Did that manuscript contain all of the ordinance of 1754 which you had in Missouri at the time you argued the demurrer?

A. Yes.

Q. By Mr. Wirt. Was not that manuscript, according to its very title, extracted from the book which is now under your hand?

A. Yes.

Q. The regulations of O'Reilly having been stated to refer to Upper Louisiana, was there any evidence before the court showing an authority from the King of Spain to alter the regulations of O'Reilly? I mean, as existing at the time of the grant to Soulard?

A. The only regulations spoken of before the court were those of O'Reilly, Gayoso, and Morales.

Q. Those of Gayoso were subsequent to the grant. The regulations of O'Reilly alone, therefore, could then be in force. Were any other regulations shown?

A. None; but we contended that the regulations of O'Reilly were not in force in Upper Louisiana.

Q. The seventh specification of error made in your article is in these words: "That the regulations of O'Reilly have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them." On what part of the Opinion do you rely to show that the Judge made this assumption?

A. I refer to page 67, together with the context generally. [The witness here read as follows:]

"From what has been said, it appears that the regulations of O'Reilly, of Gayoso, and of Morales, are the *only laws* which regulated the distribution of lands in Louisiana, under the Spanish government. Was the concession, in this case, authorized by these laws? It is not pretended that it was; and that it was not, is unquestionable. But it is insisted, for the petitioners, that the regulations of O'Reilly did not extend to Upper Louisiana; and that those of Gayoso and Morales, being of a date subsequent to the concession, ought not

to affect it ; that, if the regulations did not authorize this concession, they did not prohibit it ; and that, as it is not prohibited, a presumption arises in favor of its legality ; that this presumption sustains the validity of the concession, and is sufficient to authorize its confirmation by this court."

[He also read from page 68 the following words:] "The regulations of O'Reilly were made for the entire province." [He read further as follows:]

"It would appear that the policy apparent in O'Reilly's regulations did extend itself to the province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid."

I also refer, (if I am allowed so to do,) to the Judge's answer, page 26.

Mr. Wirt said he did not consider a reference to the Judge's answer as strictly regular ; but he had no other objection to the witness's referring to anything Judge Peck said.

Q. Your 8th specification is in these words : "That the limitation to a square league of grants to new settlers in Opelousas, Attakapas and Natchitoches (in 8th article of O'Reilly's regulations) prohibits a larger grant in Upper Louisiana." To what part of the Opinion of the Judge do you refer, as justifying you in charging upon him this assumption?

A. I refer to pages 67 and 68, as on the last question ; also to page 27 of Judge Peck's Answer ; and also, to another very important fact, viz. that the Judge has since admitted this to be an error, and retracted it, in his Opinion, or Argument, in support of his decree (pronounced at the last session of his court under the act of 1824,) in the case of Chouteau's Heirs vs. the United States. The Argument, or Opinion, in that case, was published in the Missouri Republican of the 2d and 9th February last.—Perhaps those publications and newspapers which I here offer will be admitted ; if not, I wish that Mr. Edward Charles, the editor and printer, now in court, may be called to prove them.

Mr. Storrs, on behalf of the managers, said that that inquiry had better be deferred.

Q. The ninth specification is as follows : "That the regulations of the Governor General Gayoso, dated 9th of September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804."—Was it not contended by the counsel for Soulard that, as his concession took place prior to the regulations of Gayoso and Morales, those regulations could not react, so as to annul the grant?

A. Certainly. We insisted that subsequent regulations could not annul an existing grant by which a vested right had been created : and we also took the ground that those subsequent regulations had respect to new settlers only.

Q. Your argument was, as I understand it, that the regulations of Gayoso did not annul the grant to Soulard, and could not act on an existing interest, or an existing grant, or on a vested interest under it. Was it, then, because you think that the Judge gave to those regulations a retrospective operation, that he was in error?

A. I have answered already.

Q. I will endeavor to be explicit. The Judge reasons thus : The regulations of Gayoso and Morales called upon all persons, having incomplete grants, to exhibit their titles ; and they stated, that certain acts were necessary, in order to complete those titles ; which acts Soulard had not performed. The publications of these orders gave warning to those claimants, that, if they did not perform such acts, their grants would be considered null and void. The Judge based his Opinion, in the case of Soulard, on the omission to perform these acts. Did he not?

A. The Judge considers the regulations of Gayoso as requiring something to be done by a grantee, and that the omission of this, on the part of Soulard, for-

feited the concession he had received ; but we contended, that the regulations did not apply to such settlers as Soulard, but only to new settlers ; and that, even if they did apply to him, they did not require him to perform those acts, because they had no retrospective operation.

Q. The Judge then said that Soulard's grant must have been forfeited, according to these regulations, because Soulard had omitted to do what the regulations required ?

A. Yes : but we denied that the regulations applied to such grantees.

Q. To what part of the Opinion do you refer, on this specification ?

A. To page 72.

“ The 14th section of Gayoso's regulations operates directly upon the present claim ; it declares, that ‘ the new settler to whom lands have been granted shall lose them without recovery, if, in the term of one year, he shall not begin to establish himself upon them, or if, in the third year, he shall not have put under labor ten arpents in every hundred.’ ”

“ So, likewise, does the 4th section of the regulations of Morales, which declares, that ‘ the new settlers who have obtained lands shall be equally obliged to clear and put in cultivation, in the precise time of three years, all the front of their concessions, or the depth of at least two arpents, on penalty of having the lands granted remitted to the domain, if this condition is not complied with.’ ”

I also refer to the answer of the Judge, page 27.

Q. Your tenth specification is in these words : “ That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself of his own regulations.” On the trial of Soulard, were not these complete titles brought in evidence, in order to prove the position you held ? and were they not objected to by the District Attorney ? and was not that objection overruled by the court ?

A. They were offered, in order to show the construction which Gayoso himself had put upon his own regulations ; and they were objected to by the District Attorney ; but the objection, I think, was overruled by the court.

Q. Now please to turn to page 48, where you will find the following words :

“ To which said depositions, the defendants, by their attorney, except, and tender their bill of exceptions in the words and figures following, to wit : Be it remembered, that, at the trial of this cause, the petitioners produced, as a witness for them, Don Charles Dehault Delassus, the last Spanish Lieutenant Governor of Upper Louisiana, who, among other things, deposed, that confirmations had been had of concessions granted by him as Lieutenant Governor, and by his predecessor, Don Zenon Trudeau ; to the receiving of which as evidence the District Attorney objected, alleging that the confirmation of all concessions of land under the Spanish authority must be matter of record, and is not susceptible of oral proof ; which objection was overruled by the court, and received said evidence for the purpose of showing the practice of the Lieutenant Governor to make concessions, and the recognition on the part of their superiors, of their power to make such concessions ; to which decision of the court, the District Attorney excepts.”

A. I have looked at that page, and find no objection of the District Attorney to the production of these complete titles on record.

Q. Were not complete titles, then, made by Gayoso, received by the court ?

A. They were, and they are on record. I refer on this head to the Opinion, page 73 :—

“ But complete titles have been produced, to show, that, in some instances, the regulations have not been conformed to by the Governor General, and by the Intendant, in confirmations made by them ; and it is thence insisted, that they were not in force in the province of Upper Louisiana, or, that if they were in force there, they were only intended to provide for grants to emigrants and new settlers, and were not intended to provide for grants to the inhabitants generally ; and that some law must be presumed, which authorized grants of

land to the inhabitants generally, in pursuance of which the confirmations mentioned were made. In answer to this, it may be observed, in addition to what has been before said relative to this subject, that the regulations of Gayoso refer, by express words, to the province of Upper Louisiana, by the name of Illinois, the name by which it was then known; and that the regulations of Morales are general, and are indubitably intended to extend to every part of the province. This is equally the intention of each set of the regulations which have been mentioned. The regulations which we have do not permit us to believe that there existed others. Morales, in the preamble to those made by him, mentions those of O'Reilly and of Gayoso in a manner which implies that these were all of which he had any knowledge, and shows, that he was making regulations which were to offer the *only means by which lands were to be obtained*. His language is, 'That all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted or sold; that those who are in possession, without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants, as sub-delegates of the Intendancy, may be informed of what they ought to observe,' &c. This preamble excludes the presumption that other laws existed, by which titles could be obtained; and the regulations themselves exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.

"That the Governor General, who exercised a legislative power generally, and particularly for the distribution of lands, should feel himself authorized to dispense with the observance of any of the provisions of his own laws, is not strange. Such a dispensing power is incident to the legislative department of every Government. Legislation implies discretion in respect of the rules which are to be prescribed. The Governor General, with whom it was to exercise the power to make the law, could change it, or could dispense with its observance, either on his part, or on the part of the claimant; and it is probable, that instances of the exercise of this dispensing power were not rare. That he should have been influenced by the particular circumstances of any case not within the law, or even by personal considerations of regard, in making grants, not provided for by his own laws, is a presumption more to be relied upon than that which is contended for on the part of the petitioners."

Q. You think, then, that the court having admitted that these confirmations by Gayoso did raise a presumption in favor of the claim, but that this was overruled by the stronger presumption created by the words of the regulations themselves, justified you in making the charge of error in your tenth specification?

A. Yes. He allowed the presumption, but overruled it. On this article, also, I refer to the Opinion of Judge Peck delivered by him in the case of the heirs of Chouteau against the United States; in which he admitted that this was an error, and retracted it. This Opinion is not in evidence; but it can be produced before this court.

Mr. Buchanan said that this must be deferred for the present.

Mr. Wirt requested that the answer of the witness might be taken down.

Q. In your eleventh specification you attribute to the Judge this assumption, "That although the regulations of Morales were not promulgated as law in Upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, from the official station which he held, to have had notice, of their terms." Your assumption is, that the regulations of Morales were not promulgated in Upper Louisiana. Now as to the fact. Please to refer to page 45, exhibit G, which is in the following words:

"For the government of that sub-delegation, and knowledge of the inhabitants of that district, and others concerned in the re-partition of grant to land and soil, I transmit to your hands six copies of the regulations I have made, and which are to be observed until his majesty decide otherwise. They are to be published in the ordinary mode in which general orders of his majesty concern-

ing the public welfare are done ; and of which your worship will give me the corresponding notice.

“ God preserve your worship many years.

“ JUAN VENTURA MORALES.

“ *Sor. Commandante of St. Louis, Illinois.
New Orleans, July 17th, 1799.*”

Morales, here, directs the publication of his regulations in the ordinary mode. Was there any evidence before the court to show what that ordinary mode was?

A. Mr. Delassus proved that no promulgation of the order had taken place.

Q. That is not what I ask. I ask you whether there was any proof before the court, to show what was the ordinary mode of publication?

A. I do not recollect ; but refer to the evidence of Delassus that there was no promulgation of these orders. So far was he from sending them to the posts, that he returned them to Morales, with his objections. I have a note, written by Mr. Delassus on the subject, and which has the indorsement of Judge Peck himself.

Q. Please to look at page 47, where you will find the following :

“ *Maria P. Leduc* deposed that, in February or March, 1800, he copied the French part of the regulations of Morales, and pasted them on a board, and set them on a fence in front of the Lieutenant Governor’s house, where they remained about eight days, until they were washed away by the rain. Has sometimes seen publications made through the street by beat of drum, particularly the proclamation of Casa Calvo and Salcedo, and also regulations made by the Lieutenant Governor for the government—he remembers no other instance. He arrived at St. Louis in 1799 ; witness was private secretary to Lieutenant Governor Delassus.”

Here is one witness as to the mode ; was there any other evidence as to that point ?

A. I remember none ; but here is nothing about a drum being beaten, (if that circumstance is of any importance.)

Q. Please to refer to page 50, where I find the following words :

“ STE. GENEVIEVE, *November 15th, 1800.*

“ Seeing the above petition—Let it be forwarded to the Lieutenant Governor, to order, on the same observing that the petitioner possesses the requisite qualifications to comply and fulfil his demands.

“ FRANCOIS VALLE.

“ In consequence of the above decree, leave is given to the petitioner to establish himself *provisionally*, under the condition and charge, on his part, to demand his concession to his Lordship, the Intendant, according to the provisions of the regulations.

“ CHARLES DEHAULT DELASSUS.

“ Copy conformable to the original delivered to M. Jean Bte. Janis.

“ FRANS. VALLE.”

Here you see that Mr. Delassus gives leave to a settler to establish himself “ according to the provisions of the regulations.”

A. Certainly, I see that : but *what* regulations ? Gayoso had made regulations as well as Morales. The name of Morales is not referred to.

Q. Do Gayoso’s regulations refer to new settlers ?—*A.* Yes.

Q. Was Francois Valle a new settler ?—*A.* It appears so.

Q. Was Baptiste Janis a new settler ?—*A.* He may have been.

Q. Please turn to page 49, Exhibit O, where I find the following petition :

“ To Don Francis Valle, captain of militia, and commandant civil and military of the post of Ste. Genevieve : John Baptiste Janis has the honor to represent, that he resides as an inhabitant of Ste. Genevieve since a great length of time ; that he has not yet demanded any grant to land, but being desirous to participate with the other inhabitants of this post, to the benefit of his majesty,

he hopes of your justice that you will be pleased to grant him a concession for him, his heirs and assigns, to a certain tract of land situate in the district of Ste. Genevieve, bounded southerly by the river establishment, westwardly by lands of M. Baptiste Valle ; eastwardly by lands of M. Francis Moreau ; and northwardly by the domain of his majesty. The said tract being about 12 arpents fronting the said river, by 20 arpents in the rear, which would form a superficies of about 250 arpents, said land not being as yet granted to anybody. The petitioner being the head of a numerous family, owner of slaves, and large quantity of cattle, hopes that you will find him worthy of this favor. In so doing your petitioner will ever pray.

“BAPTISTE JANIS.

“STE. GENEVIEVE, *November 10th, 1800.*”

Do you consider this as no recognition of the Intendant and his regulations?

A. No. The regulations were sent back to Morales by the Lieutenant Governor, with his objections.

Q. Refer to page 53. There is the certificate of Soulard in the following words :

“Don Anthony Soulard, Surveyor Particular of all the establishments of Upper Louisiana. At the request of the interested, and in conformity to the 16th article of the instructions of the Intendant, I certify, to all whom it may concern, that the above plat and certificate of survey are in all their parts conformable to the originals, made under date of the 8th of March, 1799 ; and to the record of the said plat, remaining in the office under my charge.

— “ANTONIO SOULARD.

“ST. LOUIS, *June 17th, 1802.*”

This certificate refers to the 16th article of the regulations of Morales ?

A. It does ; but I do not consider this as at all availing against the fact that those regulations were never published.

Q. Mr. Delassus, in his testimony, says only “that he does not remember to have caused those regulations to be published ?”

A. He says this ; but he says much more. I read from his testimony as follows :

“That he received six copies of the regulations of Morales, officially transmitted to him, as announced by the letter already referred to, upon the margin of which letter he noted, in Spanish, that the letter was answered, and that the regulations were not to be complied with until further orders. That he did answer the letter of Morales, as noted in the margin thereof, and accompanied his answer with objections, a rough draft of which is herewith presented, marked (M.) That he knows that Morales received the letter and objections ; at least, that Morales made other communications to witness in answer to those made by him, at the same time and through the same medium. That, as Lieutenant Governor, he had a right to suspend the execution of any order, which, to him, appeared prejudicial to the interest of the king or people, until fresh instructions. That he received, afterwards, other letters and communications from Morales, referrible to the department of sub-delegate, and that he never mentioned the subject of those regulations. That he does not remember to have caused those regulations to be published. That he gave no orders to his inferiors relative to the regulations of Morales, because he did not intend to obey them himself, and had remonstrated against them. His acts in relation to the granting of lands, since the regulations of Morales, were approved, because he received the letter of approbation from the Marquis Casa Calvo, of the 30th May, 1805, marked (N.) heretofore offered ; and because he thinks his acts or grants were confirmed ; and because, if his acts had not been approved, he would have been informed thereof. That he is not certain whether any concession made by him was confirmed. He received from Morales answers to all his communications, except that objecting to the regulations. The practice in relation to the con-

cessions of land in Upper Louisiana was, to return the *proces verbal*, and plat and concession, to the party ; and the Governor below had no other means of knowing to whom lands had been conceded. Witness says he recollects one instance of receiving a note from the Governor below, or from the Intendant, either when he was Governor here or at New Madrid, desiring to know whether a certain person, to whom he, witness, had made a concession, had the requisite qualifications. Says he did not consider the regulations of Morales as obligatory upon him, but that, if any person had made application to him for a grant, he would have made it as though the regulations had not been made. He says, the regulations were not binding on him, because of the reasons mentioned in the objections heretofore offered in evidence. He has seen several ordinances of the King of Spain in relation to the granting of lands, but he does not recollect the date of them. The regulations of O'Reilly were so old that they were not regarded ; those which governed witness were those made by Carondelet. When he went to New Madrid to command, he found the regulations of Carondelet ; he left them there when he came here to command. They had authority only in Upper Louisiana. Those regulations authorized the granting of lands according to the number of family and means, and according to the object in view in granting. He consulted no ordinances of the king for his duties—but the orders and instructions of the Governor ; which were authoritative to him. He was likewise governed by the usage and customs of his predecessors."

Q. Among the exhibits, page 53, I find the following :

"Don Juan Ventura Morales, Contador principal of the Royal Armies, Intendant pro tem. of the royal finances of the provinces of Louisiana and Western Florida, Superintendent, Sub-delegate, Judge of arrivals, of lands, and royal soil :

"Whereas Don Anthony Soulard, in the name of Don James Delassus de St. Vrain, Captain of the militia of St. Louis of Illinois, appeared before this tribunal, and represented that said St. Vrain had obtained from the Lieutenant Governor of those countries a concession of 300 arpents of land, by decree of the 6th December, 1798, and situate on the river Mississippi, in the aforesaid district of St. Louis, about eleven miles northwardly from the town, bounded on the north side by lands of Louis Brazeux and vacant lands ; on the south side, by lands of John Graham and vacant lands ; and eastwardly by vacant lands ; and soliciting that the corresponding titles, conformably to the survey laid by him before this tribunal, with the figurative plat, and in conformity with the measurement, lines, and boundaries, made by the said Anthony Soulard, pursuant to the decree of the same Lieutenant Governor, and which survey contains 900 arpents in superficies, as appears by the document to which I refer, to be delivered to him. And having ordered the fiscal of the royal finances to examine the same, and as from his answer no objection is made, as appears by his act of the 23d instant, by which he disposed that the title be delivered to the before named Don James Delassus St. Vrain, of the conceded 900 arpents of land, included in the aforesaid map or plat, conformably to the measurement of the same. Therefore, and using of the faculty vested in this Intendancy, and in the name of the King, our Lord, (whom God preserve) ratifying, as I do ratify and approve the said concession made by said Lieutenant Governor, and approving the measurement made, I do grant to said Don James Delassus St. Vrain, Captain of the St. Louis militia, entire and direct domain to the 900 arpents of land in superficies, herein mentioned, conformably to the rhumbs, distances, and boundaries described, in the said plat, and in the place where the same is situated, in order that himself, and his successors, as lawful owners, may use, dispose, and enjoy the same at their will and pleasure, giving him power to remain in possession of the same as he now is, and into which I place him and put him, without prejudice of a third who may have a better right ; under the condition that, as well the said named Captain of militia, Don James Delassus St. Vrain or his successors on the said land, which has

been given to him without any interest, fee, or any contribution whatever, in favor of the royal finances, they are to observe and comply, and conform with the contents of the third, fourth, sixth, seventh, and ninth articles of the instruction, made and published by this Intendancy, bearing date July 17th, 1799, conformably to the locality, quality, and circumstances of the land hereby granted, and of which he is to take notice, and not to allege or plead ignorance; under the penalties imposed on the same in case of contravention. In consequence of which, I have ordained these presents to be delivered to him; signed with my hand, sealed with my seal of arms, and countersigned by the undersigned scrivener of the royal finances, who with the contadory principal shall take cognizance of these dispositions.

“Given at New Orleans, the twentyeighth day of April, one thousand eight hundred and two.

“JUAN VENTURA MORALES.

“By order of the Intendant :

“CHARLES XIMENES.”

Please to look at the condition here mentioned, viz. that Delassus is to observe the 3d, 4th, 6th, 7th, and 9th “Articles of the Instructions made and published by this Intendancy.”

A. You appear to wish me to be estopped from attributing certain doctrines to the court.

Mr. Wirt disclaimed any such intention, and protested his desire to be, only to elicit the truth.

A. I answer, then, that the Judge did admit, and strenuously insist, that there was a promulgation in Upper Louisiana; and further, that if there had been none, Soulard received sufficient notice of the regulations to render them obligatory on him, he being bound by what he knew; privately, or officially, I care not which. I refer on this subject, to page 75 :

“In answer to that portion of the argument, on behalf of the petitioners, which denies the force of law to the regulations of Morales, in Upper Louisiana, for their supposed want of promulgation, it is only necessary to remark, that such a publication is proved as must have brought them to the knowledge of the ancestor of the petitioners. The official station which he held does not permit us to believe, from the publication proved, that he could have been ignorant of the forfeiture to be incurred by a failure on his part to comply with the commands contained in these laws. It is, therefore, unnecessary to decide whether, according to the principles of justice which prevail in our courts, this tribunal can regard a forfeiture as incurred, even under the Spanish government, and by a subject of that government, for disobedience to laws which had never been promulgated.”

Q. You understand the Judge, then, to have said, that though the regulations were not promulgated, still Soulard was bound by them?

A. Yes, expressly.

Q. Your 12th specification, charges the Judge with this assumption: “That the regulations of Morales exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.” You admitted, I think, that there were no regulations before the court but those of O’Reilly, Gayoso, and Morales?

A. None that I know of.

Q. What part of the Opinion supports you in this specification?

A. I refer to page 73 :

“The regulations which we have do not permit us to believe that there existed others. Morales, in the preamble to those made by him, mentions those of O’Reilly and of Gayoso in a manner which implies that these were all of which he had any knowledge, and shows, that he was making regulations which were to offer the only means by which lands were to be obtained. His language is,

‘That all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted or sold ; that those who are in possession, without the necessary titles, may know the steps they ought to take to come to an adjustment ; that the commandants, as sub-delegates of the Intendancy, may be informed of what they ought to observe,’ &c. This preamble excludes the presumption that other laws existed by which titles could be obtained ; and the regulations themselves exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.”

Q. Your thirteenth specification reads, “ That the complete titles (produced to the court) made by the Governor General, or the Intendant General, though based on incomplete titles, not conformable to the regulations of O’Reilly, Gayoso or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom these incomplete titles emanated ; and must be considered as anomalous exercises of power, in favor of individual grantees.” This charge is of the same character with the 10th.

A. Yes ; and I make the same references as under that specification ; referring, also, to the Judge’s recantation of his Opinion.

Q. You say that the court did receive these complete titles in evidence ?

A. Yes.

Q. Did not the court go further, and receive even parol evidence for the same purpose ?

A. I do not exactly remember, but the record will show.

Q. The record does show this.

A. Perhaps it does ; but the Judge gave no weight, either to the parol evidence, or the complete titles.

Q. In your fourteenth specification you charged the Judge with assuming “ That the language of Morales himself, in the complete titles issued by him on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to, as furnishing the construction which he, Morales, put on his own regulations.” Where is this language of Morales, to which you refer ?

A. I will show. [Here the witness read as follows:]

“ In those complete titles, which are ready to be produced for the inspection of this court, the Governors General specifically refer to the concession, and recognize the power of the Lieutenant Governor to make it. No new condition is imposed, other than that of complying with the ‘Reglamento del asunto,’ that is to say, the general regulation of the government touching lands granted.”

And again,

“ In those complete titles the Intendant General specifically refers to and recognizes the concession obtained from the Lieutenant Governor. The terms used in the title in favor of Antoine Soulard are these : ‘ *Por quanto habiendose presentado en este tribunal Don Antonio Soulard, representando que habia obtenido del Teniente Gobernador de Sn. Luis de Illinois, Dn. Zenon Trudeau, la concession de mil y quarenta y dos arpanes de tierra ;*’ which, translated into English, are as follows : Inasmuch as Don Antonio Soulard has presented himself to this tribunal, submitting that he has obtained from the Lieutenant Governor of St. Louis of the Illinois, Don Zenon Trudeau, the grant (or concession) of 1042 arpents of land.”

Q. This reference, I perceive, relates to documents which were not produced in Soulard’s case ; and the language of Morales, which you have now quoted, is liable to the same objections : I want you to produce the language of Morales, having reference to the case of Soulard, as that alone can be relevant to this specification.

A. I cannot say whether I quoted this in Soulard’s case or not ; all the evidence we produced is not spread on the record. There were complete titles

which we relied upon in the argument, but which the record does not show. We used two or three, with a view to illustrate the ground we took on the subject of usage.

Q. Was not the decree postponed by the court with the express view of giving you time to prepare your appeal to the Supreme Court?

A. Yes.

Q. Were you prevented by the court from inserting in the record any part of the evidence you pleased?

A. Not at all.

Q. You inserted, then, all that you deemed material?

A. I could have wished that more should have been inserted; but I think I omitted nothing that was very material.

Q. This being an assumption, as you say, in Soulard's case, it must be founded on that case. I therefore wish you to cite the language of Morales referred to in that case.

A. The argument itself was submitted to the Judge as printed, and he had it before him.

Q. Is the language you have read in Soulard's case?

A. I cannot certainly say, without an inspection of the complete titles. [The witness here again read from the argument the latter of the two clauses before quoted.] It was attempted to screw us down to the quantity of land limited by the regulations of Morales; and it was for that reason that we introduced this testimony.

Q. In what part of the Opinion is it, that the court said that the language of Morales is not to be referred to?

A. I refer, as before, to page 73.

Q. Your 15th specification is in these words: "That the uniform practice of the sub-delegates, or Lieutenant Governors, of Upper Louisiana, from the first establishment of that province, to the 10th of March, 1804, is to be disregarded as a proof of law, usage, or custom herein." Do you know of a book called "*Livre Terrien*?"

A. Certainly. I know a good deal about it.

Q. What is it?

A. It is a book in which the Lieutenant Governors recorded certain titles and surveys.

Q. In which they recorded their concessions of land?

A. Not universally. They recorded titles and surveys in it.

Q. When was the use of this book discontinued?—A. In 1796.

Q. When does it begin?

A. I think there are some titles recorded in that book as early as the year 1766.

Q. Is there, then, in all these thirty years, a single instance to be found, in that book, of a concession of land "for services, rendered, or to be rendered?" are you able to refer to one?

A. I do not know that I am; I cannot recollect all that the book contains.

Q. Is there a single concession, in that volume, for a quantity of land above a league square?

A. Yes. There are several, if I remember right. I think there is one of 3000 arpents to a Mr. Gratiot, or Mr. Labaame. I am not quite sure whether that is in the *Livre Terrien* or not. I think it is.

[The managers here suggested that the book ought to be put into the witness's hands. The counsel replied that the book was in Missouri, and could not be produced.]

Q. Was it contended that the *Livre Terrien* was a proof of the limits of the power of the Lieutenant Governor?

A. I do not recollect. I believe there is a grant to Gratiot in it for a league square. But there are other cases not recorded in that book.

Q. Can you specify any?—A. Not particularly.

Q. Was not the evidence of the uniform practice of making grants by the Lieutenant Governors for thirty years, supposed to be covered by the *Livre Terrien*?

A. That the Lieutenant Governors were not bound by the regulations of O'Reilly, Gayoso, or Morales, there is evidence on the face of that book; inasmuch as it records grants which went beyond the limits laid down by O'Reilly. Those regulations declared that 320 arpents should be the maximum, if on the banks of the river Mississippi; and a league square in Natchitoches, Attacapas and Opelousas; and it was contended that, if these regulations were in force in Upper Louisiana, no grants could have gone beyond 320 arpents; and even that, on certain conditions only; whereas the *Livre Terrien* will show grants of all dimensions, from 40 arpents to 3,000. Those regulations could not have had an application to Upper Louisiana without rendering the country a desert. They would restrict cultivation or concession to the banks of the river, which, generally, in Upper Louisiana are that part of the country least fit for settlement.

Q. Do you not understand the regulations of O'Reilly as allowing concessions, for agricultural purposes, in proportion to the agricultural means of the settler?

A. Certainly, for every purpose; but they limited the grants, as I have before stated, both as to the location and quantity.

Q. To what part of the Opinion do you refer, as supporting this 15th specification?

A. I refer to the Opinion negatively; because, although this uniform practice was referred to, and argued, it is, in the Opinion, totally disregarded. It was seriously relied upon by the counsel of Soulard; yet, by the decree, it was set aside as of no value. I do not point to any specific clause of the Opinion, but refer to the whole Opinion, and to the decree, as compared with my printed argument:—Especially page 7 of that argument.

Q. In your 16th specification, you charge the Judge with virtually declaring "that the historical fact, that nineteen twentieths of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles," and you told us, I think, that this historical fact is gathered from Stoddard's History of Louisiana?

A. Yes; and I refer the court to Stoddard's book, page 252.

Q. Stoddard was a military officer, was he not, who received the charge of the province in 1804?

A. He was an officer, both military and civil.

Q. Do you consider an historical work of this kind, a proper species of evidence to be considered by a court?

A. I considered it as an historical evidence, and a very persuasive one: I conceived it the duty of the court to allow its whole weight to truth of this kind, from whatever source it could be obtained. The character of Stoddard was high and unimpeachable, and his memory is to this day revered in Louisiana: I thought the book strong historical evidence, especially as taken in connexion with the other evidence adduced before the court.

Q. Do you hold that a court is bound to refer to evidence like this?

A. I think a court is bound to consult all sources of information which have a bearing on the law.

Q. Were not these historical records as accessible to you as they were to the court? and could you not have obtained copies of them?

A. Yes, I suppose I might: they were in the archives of the province.

Q. You, then, considered Stoddard's History, and a general reference to certain records in a public office, as evidence on which a court ought to base its opinion?

A. Yes, certainly.

Q. To what part of the Opinion do you refer, as sustaining this 16th specification ?

A. I refer to my printed argument, pages 7, 8, 9, 10, 25 and 26,* to show that the question was raised; and to the Opinion, to show that it was disregarded.

Q. Where is it that the court made the assumption that such an historical fact is to have no effect ?

A. I refer to the fact, (which can be proved) that Judge Peck has acknowledged, that he examined Stoddard's book.

[Mr. Wirt here said, There is no doubt of that fact; it will not be controverted.]

The fact appears in the opinion delivered by Judge Peck in Chouteau's case.

Q. That is not admissible at present. I ask to what part of the Opinion do you refer ?

A. To page 67.

"The presumption which arises in favor of the validity of the acts of the supreme authority, especially such as the enactment of regulations, and the acknowledgment of the authority of these for a series of years, is of a higher nature than that which arises in favor of the legality of a single act, or even a series of acts, such as concessions of land by the Lieutenant Governor; particularly when these acts are to be subject to the approval and confirmation of that supreme authority which gave those laws that were to regulate the subject of concessions."

Q. Your 17th specification charges the Judge with assuming "That the fact that incomplete concessions, whether floating, or located, were, previous to the cession, treated and considered, by the government and population of Louisiana, as property, saleable, transférable, and the subject of inheritance and distribution *ab intestato*, furnishes no inference in favor of those titles, or to their claims to the protection of the treaty of cession, or of the law of nations." You said, I think, that the only evidence produced by you, before the court, of these sales, transfers and dispositions, was a list, made out from the proceedings in the clerk's office ?

A. Yes. A list made out for me by Mr. Le Duc. The facts appeared to be admitted. [Here the witness read from his printed argument :]

"The perfect security with which the inhabitants of Louisiana acted on these concessions,—bought, sold, transferred, and disposed of them by act *inter vivos*, or by last will and testament, demonstrates the existence of the usage, and the general impression that those concessions were legally made, and by proper authority.

"Judicial sales of intestates' estates, including incomplete titles of this description, have been made not only under the sanction of the Lieutenant Governor of Upper Louisiana, but have been ratified by the supreme authority at New Orleans."

Again:

"It has been already observed that original concessions, and the land granted by them, before any complete title had been issued thereon, were objects of sale and transfer *inter vivos*, and of distribution and sale as property of testators or intestates. In support of these propositions we refer to the records in the office of the clerk of the Circuit Court for the county of St. Louis.

"Amongst a number of others, we find the following sales and transfers recorded :

"1st. 18th February, 1775, public sale sanctioned by Pedro Piernas, Lieutenant Governor, of $2\frac{1}{2}$ arpents by 40, belonging to the estate of Guillaume Bizet, purchased by Charles Bizet.

"2d. 2d October, 1774, public sale of a tract of land of 5 arpents by 40, at the place called Belle Fontaine, under the decree of the Lieutenant Governor Pedro Piernas, for sale of same, at request and demand of Mr. John Bte. Sarpy, attorney in fact of Louis Chamart : said land purchased by P. Perrault, No. 42.

* See the Appendix.

"3d. 13th November, 1774, public sale of land, the property of J. B. Martigny, containing 4 arpents in breadth by the depth from the Mississippi to the hill, purchased by Charles Bizet, No. 143.

"4th. 4th July, 1799, public sale of the property of the deceased Laelege Ligest, to wit : a tract of 6 by 40 arpents of land in Big Prairie, bought by Madame Chouteau, No. 264, by *virtue* of the decree of Fernando de Leyba, Lieutenant Governor.

"5th. 4th July, 1799, public sale of the mill and dependencies belonging to the estate of Laelege Ligest, deceased, bought by Auguste Chouteau, sold by virtue of decree, F. de Leyba, Lieutenant Governor, No. 265.

"6th. 12th June, 1801, public sale after the failure of Hyacinthe St. Cyr, (merchant,) made at the request of the creditors, and by virtue of a decree of Charles D. Delassus, Lieutenant Governor, 919 arpents, situate on Crevecoeur, county of St. Louis, purchased by James Richardson, No. 1500 : on same day, as part of same estate, 573 arpents at St. Ferdinand : on same day, ditto, 12 arpents by 40, No. 1500. [The No. is that which the document bears in the index to the Spanish and French records in the clerk's office.]

"7th. 14th April, 1802, deed of partition before Lieutenant Governor Delassus, between the heirs of Madame Cerre, of divers tracts held under incomplete titles, No. 1500.

"It is submitted that the concession at present under consideration is equally legal with all those above referred to, and which have been recognized as such by the supreme Spanish authority; and is equally legal, and equally the subject of sale, transfer, and distribution, as any of those recorded in the office of the clerk of the Circuit Court for the county of St. Louis."

Q. What is the distinction between concessions *floating*, and *located*, of which you here speak?

A. A *floating* concession is a concession to an individual of a certain quantity of land in such place as he may select, in any part of the royal domain, where it can be located without injury to the rights of others. The concession to Soulard before it was located by survey, was of this description. It might be located anywhere in Upper Louisiana.

Q. To what part of the Opinion do you refer under this specification?

A. I have already referred to my printed argument, pages 7, 8, 9, 10, 25, 26. I refer also to exhibit A, generally; to the Opinion, page 67; and particularly, to the documents exhibiting the deposition of Delassus, page 37 to 41; also to the complete titles exhibited before the court; and to Exhibit L, page 45, being the letter of the Marquis De Casa Calvo to Mr. Delassus.

Q. On the list to which you refer, was there any one case of floating title?

A. I must look before I can reply. [Here the witness consulted a paper.] I do not see any such cases.

Q. You say, in your 18th and last specification, that it was assumed by Judge Peck "That the laws of Congress, heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles, of a precisely similar character, which remain unconfirmed." By the act of 1824, the court is required to refer to certain acts of Congress, in examining land titles; are these the laws to which you refer in this specification?

A. Yes; extending from 1805 to 1824.

Q. You mean, then, to say, that there were certain laws of Congress before the District Court, which called for the confirmation of such a claim as Soulard's, but which the court disregarded?

A. No. I mean no such thing. To explain what I did mean, I refer to my printed argument, page 33. [The witness here read as follows:]

"As an additional argument in favor of a liberal construction of titles such as the present, we rely also on the peculiar nature of the present law, and all the former laws of Congress on the same subject. The character of all of them is essentially *remedial*. When, therefore, in any of those laws, a principle of pro-

tection is conceded by Congress, it is submitted that the claimant in this court is entitled to the benefit of that principle. In no other rational sense can the provision in the present act be understood, which authorizes the court to frame its decree as well with reference to those laws as to any other law or usage.

“It has been contended at the bar on behalf of the United States, that a penal or disqualifying effect should be given to certain of those acts of Congress. This position it has been the duty of the counsel for the claimant to refute in argument, and is here noticed only on account of its self-evident error.”

I also refer to the Opinion, page 77 :

“That part of the act which requires the court to determine ‘the question of the validity of the title, according to the several acts of Congress,’ &c. has been adverted to, on behalf of the claimants, but not seriously relied upon as furnishing the ground of a claim to confirmation in the present case.

“Upon this point it is only necessary to remark, that there is certainly no act of Congress which would authorize the confirmation of the present claim, or any part thereof.”

Q. On this part of the Opinion, then, you rest, in defence of your 18th specification?

A. Yes. It was contended that, inasmuch as grants of the same kind had been confirmed by the United States Commissioners, whose decision was ratified by Congress, a principle was furnished which ought to protect the concession to Soulard ; and that if Soulard’s claim had been before the Commissioners, they would have confirmed it, to the extent of a league square ; (which was as far as their powers would go;) and in support of this position we referred to cases where the Commissioners had confirmed parts of concessions, (being restrained from confirming the whole,) in which cases their acts had been afterwards ratified by Congress. This was our argument ; and it being disregarded by Judge Peck, I considered my 18th specification as justified.

Q. The decision of the Judge is, that there existed no act of Congress calling upon the District Court to confirm such a claim as that of Soulard. Did you refer to any act which did ?

A. We referred to the acts of Congress, and the confirmations by the Commissioners since ratified by Congress.

Q. The court says that there is no act of Congress which would justify the confirmation of Soulard’s claim. I now ask you what acts there are which would justify it ?

A. The acts of 1807, and of 1814, furnish a principle which could be appealed to, in aid of this claim ; and as they show that this is a sort of concession which Congress protected, by confirming other claims less meritorious. All this, however, is matter of argument.

Q. You say, then, that your opinion was, that wherever Congress confirmed a claim, the court was bound to confirm all similar claims ?

A. I have already endeavored to answer this question clearly ; and I fear that, by answering it too often, I may get into a cloud ; but if this honorable Court does not understand my first answer I will repeat it.

Q. Have you seen a petition purporting to be the petition of Luke Edward Lawless to the House of Representatives, and which is appended to a report made to that House by the Judiciary Committee ?

A. Yes. I wrote it myself.

Q. Is this a correct copy of that petition ?

A. Yes ; I believe it is.*

Q. Document No. 4 appended to that report exhibits two columns, one containing extracts from the article signed “A Citizen,” and the other containing extracts from Judge Peck’s Opinion. Was this also presented by you to that House ?

* See the Petition in the Preliminary Proceedings in the House of Representatives.

A. Yes. It does not contain a complete view of the subject, but I thought it might aid the deliberations of the committee ; so I placed the extracts in juxtaposition.

Q. Is this a correct copy of that document ?

A. Yes.*

Q. When was the petition presented ?

A. It was sent on to Mr. Scott of Missouri in the session of 1826-7 ; and it was presented in December following. The Judiciary Committee of the House of Representatives moved to be discharged from its consideration, and that I should have leave to withdraw my petition and documents, late in February, succeeding. The petition was not, I believe, acted upon at the next session : but I never lost sight of it ; and I acknowledge that I exerted myself to the utmost to have it placed before the highest tribunal of the country. When I last presented it, I addressed myself to a member of Congress from another State than Missouri ; because Mr. Bates, who was then the Representative from the State of Missouri, in the House of Representatives, had been District Attorney for the district of Missouri ; and as I did not certainly know what was his view of the case, I thought, upon the whole, that it would be more delicate not to trouble him in the matter. I therefore addressed myself to Mr. McDuffie ; who had the goodness to present my petition.

Q. You say that Mr. Strother and yourself were concerned in these land causes ?

A. We were.

Q. Do you know the number of acres involved by all the claims for which you and he were counsel ?

A. Not exactly. There was one very large claim. Excluding that, the residue might perhaps have amounted to 150,000 acres ; possibly, not more than 100,000. I really cannot tell.

Q. What was the large claim to which you referred ?

A. It was a claim of Clamorgan.

Q. He had two claims ; one for 512,000 arpents, which was excluded by the act of 1824 ; and another for 536,000 arpents, which was not excluded. Was the petition filed in this latter cause ?

A. I think it was not filed until the time limited in the act of 1824 had been extended. It was not on the docket which I had, before the extension of the time. It may, however, be on the docket, afterwards. It was withdrawn sometime before the act expired.

Q. Was it withdrawn after Soulard's case had been decided ?

A. Yes. None were withdrawn before that. There were 145 claims withdrawn, as I learned from the marshal of the court, but not until the sum of near \$4,000 in costs, had been paid by the unfortunate claimants. Such, at least, is the amount stated to me by the marshal.

Q. Were these costs paid by those who withdrew their causes ?

A. That amount covers all the costs. I applied to the marshal to learn the amount, and such was his statement. The great amount of costs incurred was one of the grievances in the case. These costs had been paid by those poor people totally in vain.

Q. In vain ?

A. Yes : utterly in vain : given to the winds.

Q. Could they not wait the result of the appeal ?

A. No. They were shown by their counsel that there must be a decree against the whole of their claims, and to continue the suits would involve them in an amount of costs such as the counsel could not calculate. They were therefore advised to withdraw the suits, and to await the decision of the Supreme Court, which might establish principles favorable to their claims ; in

* See the Appendix.

A. When I entered the court room, Mr. Magenis was addressing the court, as counsel for Mr. Lawless. I cannot say how long he spoke. He was succeeded by Mr. Geyer. Mr. Strother next commenced, but dropped the argument, as I thought, abruptly; for what cause I knew not. I cannot recollect the arguments of counsel, as I did not charge my memory with the facts, having no expectation to be called upon to testify in the case. Soon after the argument was concluded, Judge Peck called upon Mr. Bates to read the printed article signed "A Citizen." It was read by paragraphs, and the Judge commented upon each, at considerable length. His manner was vehement, and indicated considerable excitement. I think the words "slanderer," "falsehood," and "misrepresentation" were used. I thought the Judge intended to apply these epithets to the author of that piece. I recollect but one particular passage of his remarks. It was that in which he stated, that it was the usage in China to punish slanderers by causing their houses to be blackened. I think I continued in the court room not more than half an hour after the Judge commenced; when I left the room, and was not present afterward.

Q. By Mr. Buchanan. What was your understanding as to the application intended by the Judge, of what he said respecting the law of China?

A. Having represented the piece as slanderous, and the author, of course, as a slanderer, I inferred that the Judge thought that the punishment he described would have been proper for the author of that piece, if he had been in China.

Cross-examined by Mr. Meredith.

Q. Were you accustomed often to visit the District Court, before the time you now refer to? And had you an opportunity of being familiar with the usual manner of Judge Peck upon the bench?

A. No. I do not think I was ever present in a court where he presided, before.

Q. Was Mr. Lawless present, while you were there?

A. During the greater part of the time.

Q. Did you hear any remark addressed, personally, to him by the Judge?

A. I think not.

Q. Is it distinctly in your recollection whether the court referred to the publication, or to the author of the publication, in terms?

A. The court had the publication under review, and no doubt it was the language in that piece, of which the Judge took notice.

Q. Do you say, that the remarks of the Judge on that publication as being false, calumnious and malicious, formed the ground from which you inferred the imputation on Mr. Lawless as the author?

A. Certainly.

Q. By Mr. Spencer. Had you not understood, at that time, that Mr. Lawless had been given up as the author of the piece, before those remarks of the Judge?

A. Yes. That was fully on my mind during the whole time.

Q. By Mr. Meredith. Was this the only time in which you were present in the District Court. Were you never present when it was held in the Baptist church?

A. No.

Q. By Mr. Buchanan. What was the manner of Mr. Lawless during these remarks of the Judge?

A. My position was such that I could not distinctly see Mr. Lawless. I could only occasionally get a glimpse of him. At those times I thought that his countenance indicated considerable excitement. But he remained in his seat, and did not speak audibly, to my knowledge.

Q. By Mr. Spencer. Was the remark of the Judge with regard to the custom in China made before, or after, Mr. Lawless left the room?

A. I am not certain.

[Here the examination closed.]

ARTHUR L. MAGENIS *was called and sworn.*

Q. By Mr. Buchanan. Please to relate to the court all your knowledge of the proceedings of the District Court of Missouri, on certain rules of court made against Mr. Foreman and Mr. Lawless for a contempt.

A. I think it was some short time before the session of the District Court of Missouri, held for the trial of land claims, in April, 1826, I received an intimation, (but from what source I know not,) that on the first day of the term, some notice would be taken by the court of a certain piece published in a St. Louis paper called, I think, "The Missouri Advocate," or some such name. I went, in consequence, to the room where the court was held. I think that when I entered it, Mr. Lawless was addressing the court, and to the best of my opinion, was endeavoring to demonstrate that the publication in that paper was not a misrepresentation of the Opinion of the Court, delivered in the case of the heirs of Antoine Soulard. I think I was not in court when the rule was made against the printer of the article. I do not believe that I entered until the commencement of Mr. Lawless' argument. I understood him to be of counsel for the printer. In the argument of Mr. Lawless there were several interruptions by the Judge. The precise expressions used by him I cannot repeat. Perhaps they were the words, "this is a misrepresentation,"—"that is not true,"—or something of that kind. I do not know that I remained in court till Mr. Lawless had concluded, but I was informed, by him, or by some other person, that the reasons urged by him were adjudged insufficient; that the rule had been made absolute, and that Mr. Lawless, either by the evidence of the printer, or by his own avowal, stood before the court as the author of the piece signed "A Citizen." Whether on the next day, or at what particular point of time, I know not, he requested me to appear for him, and to show cause on the rule now made against him as the author. As his counsel I appeared, and argued against the rule. I think that either Mr. Geyer, or Mr. Strother, followed me. Mr. Strother was cut short, by Mr. Lawless, or by his direction, for the reason, (if I recollect right,) that in the course of his observations, (for argument I cannot call it) he rather admitted, than otherwise, that the court had authority to proceed against Mr. Lawless for a contempt. He also seemed to me to speak in an apologetic tone. Whether the interruption was made on the ground that he was apologising, or that he was making an admission as to the jurisdiction of the court, and its authority in the case, I cannot pretend to say: perhaps both. But I am sure that the admission was made either expressly, or impliedly, by Mr. Strother, that the court had authority to proceed in the case as for a contempt. I think that before I rose to address the court I inquired, perhaps of the Judge, what had been the precise point decided by the court in the case of the printer; and I think that I asked the court, if the point was still open to argument as to the article being a misrepresentation or not. I think I understood that this question had been settled by the court; that it was a misrepresentation, and that the matter it contained was in the nature of a contempt. I understood that I was confined to the single point, whether its author could be punished as for a contempt. I argued that even admitting the matter was libellous, or was a misrepresentation, or was published in terms that would authorize a process for contempt, were the cause still pending, yet as the cause had been decided, and had passed away, the court had now no jurisdiction in the case, as for a contempt. This was the only point I made. Whether I read any authorities in support of my argument, I am not certain; I rather think I did. I also argued to show that, even admitting the legality of the proceeding, as for a contempt, it would be more advisable for the court not to exert its authority; since, if the language was so gross as to amount to a contempt, it must be a libel, and so might be punished by indictment; which I thought was a preferable course. I was heard, throughout, without interruption. I do not know that I remained in court during the whole of Mr. Geyer's argument: perhaps I did. It seems to me that when the coun-

A. When I entered the court room, Mr. Magenis was addressing the court, as counsel for Mr. Lawless. I cannot say how long he spoke. He was succeeded by Mr. Geyer. Mr. Strother next commenced, but dropped the argument, as I thought, abruptly; for what cause I knew not. I cannot recollect the arguments of counsel, as I did not charge my memory with the facts, having no expectation to be called upon to testify in the case. Soon after the argument was concluded, Judge Peck called upon Mr. Bates to read the printed article signed "A Citizen." It was read by paragraphs, and the Judge commented upon each, at considerable length. His manner was vehement, and indicated considerable excitement. I think the words "slanderer," "falsehood," and "misrepresentation" were used. I thought the Judge intended to apply these epithets to the author of that piece. I recollect but one particular passage of his remarks. It was that in which he stated, that it was the usage in China to punish slanderers by causing their houses to be blackened. I think I continued in the court room not more than half an hour after the Judge commenced; when I left the room, and was not present afterward.

Q. By Mr. Buchanan. What was your understanding as to the application intended by the Judge, of what he said respecting the law of China?

A. Having represented the piece as slanderous, and the author, of course, as a slanderer, I inferred that the Judge thought that the punishment he described would have been proper for the author of that piece, if he had been in China.

Cross-examined by Mr. Meredith.

Q. Were you accustomed often to visit the District Court, before the time you now refer to? And had you an opportunity of being familiar with the usual manner of Judge Peck upon the bench?

A. No. I do not think I was ever present in a court where he presided, before.

Q. Was Mr. Lawless present, while you were there?

A. During the greater part of the time.

Q. Did you hear any remark addressed, personally, to him by the Judge?

A. I think not.

Q. Is it distinctly in your recollection whether the court referred to the publication, or to the author of the publication, in terms?

A. The court had the publication under review, and no doubt it was the language in that piece, of which the Judge took notice.

Q. Do you say, that the remarks of the Judge on that publication as being false, calumnious and malicious, formed the ground from which you inferred the imputation on Mr. Lawless as the author?

A. Certainly.

Q. By Mr. Spencer. Had you not understood, at that time, that Mr. Lawless had been given up as the author of the piece, before those remarks of the Judge?

A. Yes. That was fully on my mind during the whole time.

Q. By Mr. Meredith. Was this the only time in which you were present in the District Court. Were you never present when it was held in the Baptist church?

A. No.

Q. By Mr. Buchanan. What was the manner of Mr. Lawless during these remarks of the Judge?

A. My position was such that I could not distinctly see Mr. Lawless. I could only occasionally get a glimpse of him. At those times I thought that his countenance indicated considerable excitement. But he remained in his seat, and did not speak audibly, to my knowledge.

Q. By Mr. Spencer. Was the remark of the Judge with regard to the custom in China made before, or after, Mr. Lawless left the room?

A. I am not certain.

[Here the examination closed.]

ARTHUR L. MAGENIS *was called and sworn.*

Q. *By Mr. Buchanan.* Please to relate to the court all your knowledge of the proceedings of the District Court of Missouri, on certain rules of court made against Mr. Foreman and Mr. Lawless for a contempt.

A. I think it was some short time before the session of the District Court of Missouri, held for the trial of land claims, in April, 1826, I received an intimation, (but from what source I know not,) that on the first day of the term, some notice would be taken by the court of a certain piece published in a St. Louis paper called, I think, "The Missouri Advocate," or some such name. I went, in consequence, to the room where the court was held. I think that when I entered it, Mr. Lawless was addressing the court, and to the best of my opinion, was endeavoring to demonstrate that the publication in that paper was not a misrepresentation of the Opinion of the Court, delivered in the case of the heirs of Antoine Soulard. I think I was not in court when the rule was made against the printer of the article. I do not believe that I entered until the commencement of Mr. Lawless' argument. I understood him to be of counsel for the printer. In the argument of Mr. Lawless there were several interruptions by the Judge. The precise expressions used by him I cannot repeat. Perhaps they were the words, "this is a misrepresentation,"—"that is not true,"—or something of that kind. I do not know that I remained in court till Mr. Lawless had concluded, but I was informed, by him, or by some other person, that the reasons urged by him were adjudged insufficient; that the rule had been made absolute, and that Mr. Lawless, either by the evidence of the printer, or by his own avowal, stood before the court as the author of the piece signed "A Citizen." Whether on the next day, or at what particular point of time, I know not, he requested me to appear for him, and to show cause on the rule now made against him as the author. As his counsel I appeared, and argued against the rule. I think that either Mr. Geyer, or Mr. Strother, followed me. Mr. Strother was cut short, by Mr. Lawless, or by his direction, for the reason, (if I recollect right,) that in the course of his observations, (for argument I cannot call it) he rather admitted, than otherwise, that the court had authority to proceed against Mr. Lawless for a contempt. He also seemed to me to speak in an apologetic tone. Whether the interruption was made on the ground that he was apologising, or that he was making an admission as to the jurisdiction of the court, and its authority in the case, I cannot pretend to say: perhaps both. But I am sure that the admission was made either expressly, or impliedly, by Mr. Strother, that the court had authority to proceed in the case as for a contempt. I think that before I rose to address the court I inquired, perhaps of the Judge, what had been the precise point decided by the court in the case of the printer; and I think that I asked the court, if the point was still open to argument as to the article being a misrepresentation or not. I think I understood that this question had been settled by the court; that it was a misrepresentation, and that the matter it contained was in the nature of a contempt. I understood that I was confined to the single point, whether its author could be punished as for a contempt. I argued that even admitting the matter was libellous, or was a misrepresentation, or was published in terms that would authorize a process for contempt, were the cause still pending, yet as the cause had been decided, and had passed away, the court had now no jurisdiction in the case, as for a contempt. This was the only point I made. Whether I read any authorities in support of my argument, I am not certain; I rather think I did. I also argued to show that, even admitting the legality of the proceeding, as for a contempt, it would be more advisable for the court not to exert its authority; since, if the language was so gross as to amount to a contempt, it must be a libel, and so might be punished by indictment; which I thought was a preferable course. I was heard, throughout, without interruption. I do not know that I remained in court during the whole of Mr. Geyer's argument: perhaps I did. It seems to me that when the coun-

sel had concluded, no adverse argument, as I remember, having been offered by Mr. Bates, the District Attorney, the court proceeded to deliver its Opinion, and that Mr. Bates was requested to read for the Judge the article signed "A Citizen." The court, as he read portions of the publication, would cause him to stop, and comment on the part read. I think the words "malicious," "slandrous," "misrepresentation," and others of such tendency, perhaps "calumniator," were used by the court. An allusion was also made by the Judge to a law or custom prevailing in China, which, as the fact was new to me, made an impression on my memory. His precise words I cannot give; but, so far as I recollect, the statement was in substance this, that in China it was a law, or custom, (I do not recollect which) that a convicted slanderer or calumniator should have his house painted black, as emblematic of the heart of the inhabitant, and as a warning to all persons to beware of him.

Q. By Mr. Buchanan. Did Mr. Lawless continue in the court room during the whole time the Judge was delivering his Opinion? if not, when did he leave it?

A. I think Mr. Geyer and myself were sitting near him, and I understood Mr. Lawless to inquire of us, whether it was necessary for him to remain? and whether it would be a contempt if he should leave the court? He was told no; that it was not necessary for him to remain, "and listen," (perhaps the phrase was) "to such a torrent of abuse;" or something of that kind. Mr. Lawless then left the court.

Q. In your argument, did you illustrate the position which you were maintaining by any reference to the Court of King's Bench in England?

A. It is my impression that I argued somewhat thus: (though I cannot be certain) —If the doctrine be sound that a court may punish, as a contempt, a publication made *after* the cause to which it relates has been decided, then, in England, should any publication be made which controverted or reviled a decree made by the Court of King's Bench a century before, it would be a matter of contempt; although those who made the decree should long before have passed away;—for the court is held to be always in existence; and to reflect on any of its past decisions would be as much an offence, at the end of a century, as at the end of ten days.

Q. Will you state what matters the court declared they had decided on the rule against the printer, and what points were still open to argument on the rule against Mr. Lawless?

A. My impression is (whether I received it from the court, or not, I cannot be positive,) that the points—whether the publication of Mr. Lawless was a misrepresentation or not, whether libellous or not,—whether it was in its terms a contempt or not,—were all excluded from argument, as having been settled: but that the question of jurisdiction was left open. I was going on the ground that even if the article were such, as, if published during the pendency of the cause, would have been a contempt, still it could not be so considered now; as the jurisdiction of the court in that cause had ceased.

Q. Did you go to the court, prepared to argue the question, whether the article was a misrepresentation, or not?

A. I cannot say;—I rather think not.

Q. By Mr. Spencer. You considered yourself as restricted from the course of argument you desired to pursue?

A. Yes.

Q. By Mr. Buchanan. How long was the court in delivering its Opinion respecting the article?

A. A considerable time:—I cannot say exactly:—if it was two hours, or more than two hours, I cannot say:—it was certainly more than one hour.

Q. What was the manner of the Judge?

A. His manner, during the delivery of a considerable portion of the Opinion, was vehement and excited.

Q. How did it compare with his usual manner, before, and since?

A. I thought it unusually excited.

Q. From the language of the Opinion, to whom did you understand the Judge as applying the epithets you have mentioned?

A. To the author of the publication: such was my understanding.

Q. By Mr. Spencer. Did you understand what he said in relation to the Chinese custom, as having the same reference?

A. Yes; I understood the Judge as looking upon the author of the publication as a slanderer, to whom the application of the punishment usual in China would be a proper one.

Q. Were you present when the Judge pronounced sentence on Mr. Lawless?

A. I cannot say.

Q. I will endeavor to bring the fact to your remembrance. Did you hear the Judge say that the offence of Mr. Lawless was aggravated by his refusal to answer interrogatories?

A. I cannot say that I recollect hearing the Judge say that.

Q. You say that Mr. Strother did seem to admit the jurisdiction of the Judge: did he admit it in terms? or did you infer this, from the fact that he made an apology?

A. His observations did go, as I thought, to admit the jurisdiction of the court, expressly, and not by implication merely. Mr. Lawless, I remember, spoke to me and said, "That will not do;" or something of that kind.

[Mr. Buchanan here handed a paper to the witness.]

A. This paper is in my hand writing.

[Mr. Buchanan then read the paper as follows:]

"The United States }
vs. }
 Luke E. Lawless. }

"Be it remembered, that on the day and year aforesaid, the said court called upon the said defendant to know whether, if there were interrogatories filed in this cause he would answer them, which the said defendant declined for the following reasons which he assigned to said court in the words following: First, I refuse to answer the above interrogatories, because this court has no jurisdiction of the offence charged upon me, in manner and form as the said court has proceeded against me.—Second, because the positions ascribed in the article signed 'A Citizen' are true, and fairly inferred, and extracted from the Opinion of this court, in the case of Soulard's widow and heirs *vs.* the United States, as published."

Now please to state to the court what you did, in reference to this paper.

A. From seeing this paper in my hand-writing, I presume that it must have been presented to the court, with a request that it should be signed by the Judge: but my recollection of having so presented it is extremely faint: and my belief that I did so is more based on the fact that I see the paper is in my own hand-writing, than on any distinct or vivid recollection of the presentation of it. I may also have offered it to some of the bystanders to sign: I do not recollect.

Q. Did you ever read the answer of the respondent to the article of impeachment before this court?

A. No: not the whole of it:—I have read some passages of the answer.

Q. You may, perhaps, revive your recollection by a reference to the answer. [He then handed a copy of the answer to the witness.]

Mr. Wirt. This is a novel mode of refreshing the remembrance of a witness;—to show him a paper written so long after the facts on which he is to testify; but, I am directed to say that the respondent makes no objection; and I am sure I have none.

Mr. Storrs. If there is the slightest objection we shall not insist.

A. I have now no doubt that I presented the paper to the court.

Q. By Mr. Storrs. Do you recollect anything being said about this being an aggravation of the contempt?

A. No.

Q. By *Mr. Buchanan.* You said you may have offered this paper for signature to the bystanders, when the court refused to sign it.

A. I have a very vague recollection of having done so. I think it highly probable that I did: and if the court did refuse, I am almost sure that I did.

Q. Is such the law in Missouri?

A. Yes. I think there is such a statute now in force.

Q. By *Mr. Storrs.* Is there such a law in Kentucky?

A. I do not know. But it is not the first time I have done such a thing in Missouri.

Q. By *Mr. Wirt.* What is the date of the statute?

A. It must have been as far back as 1824 or 5, at which time our code was revised.

Q. By *Mr. Meredith.* Are the laws of Kentucky in force in Missouri?

A. No.

Q. By *Mr. Storrs.* Is not the practice, and much of the forms, of your courts in Missouri, derived from those of the States from which the population there emigrated?

A. Something of them, I believe. I think that a good deal of the feeling and spirit of the Kentucky laws are embodied in our statutes.

Q. By *Mr. Wickliffe.* When the Judge alluded to the Chinese practice or law, did he not use language of this import, or near it?

[Here Mr Wirt interposed, and objected to the putting of a leading question to the witness.—After some conversation between the counsel, the question was withdrawn.]

Q. By *Mr. Buchanan.* Did the Judge say what would have been done to Mr. Lawless, if he had been guilty of such a publication in China?

[*Mr. Meredith.* That is as much a leading question as the other.—After some conversation the question was admitted.]

A. I think not. After saying that the article was slanderous, or its author a slanderer, (I do not remember which,) he then stated the law, or custom, in China, by which slanderers were punished.

Cross-examined by Mr. Wirt.

Q. You term this paper a bill of exceptions:—does it contain the usual clause inserted in a bill of exceptions, properly speaking?

A. It does not.

Q. Would you infer, from that paper, in its present form, without the usual concluding clause, that the court was called upon to sign it as a bill of exceptions, or not?

A. It is certainly very informal. I hardly know how I could draw it up in so slovenly a manner. I never drew up a paper in such a manner before. I hardly know what the court could make of such a paper.

Q. Was it tendered for the usual purpose of a bill of exceptions, viz. to carry the cause up to a higher court for revision?

A. It is necessary to state, first, the opinion I entertain on that subject. I have always considered it as doubtful whether a case of this kind could be brought up before the Supreme Court of the United States by a writ of error, or by appeal. I suppose, therefore, that it must have been intended, on my part, or that of Mr. Lawless, to use the signature of the Judge, as evidence before the court above, on which to found a motion to show cause why the rule should not be removed.

Q. Then it is your opinion that the court could not have been required to sign this paper, and seal it, in order to carry the cause to a court above?

A. As to the motive on my own mind, or on that of Col. Lawless, for the presentation of such a paper, I cannot now say: but I speak only of what, it is probable, was my inducement; and therefore I state what had been my habit of thought on this subject.

Q. I have not seen the statute, but according to the English law, the court is required to seal a bill of exceptions, with a view to carry the cause to a higher court ; but this, it appears, was not so tendered.

A. My recollection, as to my motive in offering the paper, is not at all distinct : nor can I recollect whether it was done on my own mere motion, or at the request of Mr. Lawless.

Q. Is there any statute in your State which requires a court to sign and seal a bill of exceptions, for the purpose of an appeal ?

A. Yes. In the Circuit Court I have asked a Judge to sign a bill of exceptions in a case of contempt, and when the individual was about to be punished for the contempt, a writ of error was issued, and the cause reversed in the court above.

Q. What became of the sentence in the mean while ?

A. It was suspended. The case I referred to was that of the State against Strother. The defendant was fined \$100 for a contempt. I got a copy of the record, and asked the Supreme Court for a *supersedeas*, which that court awarded on Mr. Strother's giving the required security. The result was, that the decision made by Judge Carr, in the Circuit Court, was reversed. Such, at least, is my recollection ; but the Judge himself is here as a witness, and can probably give a more correct account.

Q. I understand, then, that the court having pronounced its Opinion that Mr. Lawless had been guilty of a contempt, and having offered him interrogatories, this paper was then read.

A. I presume so.

Q. And the court having refused to sign it, you applied to the by-standers, and asked them to sign it ?

A. That, I think, was also the fact.

Q. Was it read openly ?

A. I presume so. I cannot recollect.

Q. Was the court room full, at the time ?

A. I suppose it was. It had been a good deal crowded during the delivery of the Opinion.

Q. Where was the court sitting, during the first argument ?

A. In the house of Mr. Penrose ; a private dwelling.

Q. Had there not been some previous proceedings, when the court was held in the Baptist meeting-house ?

A. Not that I remember.

Q. *By Mr. Storrs.* Is it not the practice, in the courts of Missouri, during the hurry of a trial, to offer to the court a mere note of the grounds of exception intended to be taken, and to have a regular bill of exceptions signed afterwards ?

A. Yes : and, more than that, it is common for gentlemen of the bar to say to the court "such a point is reserved," and a bill of exceptions shall be agreed upon, and handed to the court.

Q. Do you recollect any case in which such an understanding has been drawn up in writing ?

A. Yes.

Q. *By Mr. Meredith.* Did you ever present such a paper as this to any court to be sealed ?

A. I never drew up such a paper as that, on any other occasion, that I recollect.

Q. *By Mr. Spencer.* Was the paper presented *bona fide* ?

A. It was.

Q. Had you the least intention of committing an act of insubordination in presenting that paper ?

A. Not in the least.

Q. *By the Court.* Whether this paper was read, or not, (which you appear

not to recollect) were the reasons contained in it presented to the court by Mr. Lawless, either verbally, or by his counsel ?

A. I have no recollection that any such thing was said, by Mr. Lawless, or by his counsel, to the court.

Q. Did he decline answering interrogatories ?

A. I cannot say, positively ; it is my impression that he did.

Q. Did he assign any reason for his refusal ?

A. Not that I recollect. It may be that he did : but I have no remembrance of it.

Q. *By Mr. Wirt.* You have spoken of a practice, very common in all our courts ; when there is an intention to except, the counsel announces such intention to the court, and tenders his bill of exceptions afterward : but is not this always accompanied with a declaration of the intention to carry up the cause ?

A. Assuredly ; it is done with the intention of taking the cause up.

Q. *By Mr. Spencer.* Is the party required by the court to avow, whether he tenders his bill of exceptions with the purpose to appeal, or not ?

A. I was never asked by any court to assign reasons.

[Here the examination closed]

HENRY S. GEYER *was called.*

Mr. Buchanan, before proceeding to examine the witness, suggested to the court, that, as the managers of the impeachment considered the testimony of this witness, and of several others who were to follow, as very material to the cause, it was desirable that the members of the court should have before them a copy of the record in Mr. Lawless's case. The record had been printed, and copies were now on the Secretary's table.

The members were accordingly furnished with that document.

Mr. Buchanan then desired the witness to state all that had occurred in his presence in the District Court of the United States for the district of Missouri, during the proceedings against Mr. Foreman and against Mr. Lawless, for an alleged contempt of that court.

Mr. Geyer then proceeded to give the following testimony.

During the session of the District Court for the district of Missouri, held at St. Louis in April, 1826, proceedings were had on rule made against the printer of a newspaper, entitled "The Missouri Advocate," for an alleged contempt, said to have been committed in publishing in that paper a certain article signed "A Citizen." I was engaged in my duties as counsel in the Circuit Court held at the same place in a cause in which Pierre Chouteau was defendant,—when I heard that the argument in the case I have mentioned was going on in the District Court. I did not go there immediately ; but, as soon as my duties permitted, I went to the room in which the District Court was held. It was in a dwelling house, occupied by a Mr. Penrose, in the town of St. Louis. When I entered the room, Mr. Lawless was engaged in addressing the court in an argument, the object of which appeared to be, to demonstrate the truth of the allegations in the article signed "A Citizen." I cannot say how long he had been speaking before I came ; but, while I was there, I did not hear him advert, (so far as I recollect,) to any other points of argument. He appeared to me, to be embarrassed between the consciousness of authorship and the character of counsel, which he appeared anxious to maintain. I did not know, certainly, that he was the author ; I had believed him to be ; and it seemed to me that his language betrayed him ; at least he was evidently so considered by the Judge. During the course of his argument, the Judge frequently interrupted him ; employing expressions like these ;—"but, sir, in your strictures, *you say* so and so : " pointing out at the same time a difference which he supposed to exist between the doctrines of the Opinion and the statements in the publication. These interruptions were frequent, and they appeared to embarrass Mr. Lawless very much.

He concluded his argument (as it seemed to me) without having gone through with the analysis he had undertaken. I inferred this, from the point at which he left off, as well as from the manner in which he dropped the papers he had in his hand. Soon after he had concluded, I asked and obtained leave to address the court in the case; disavowing, at the same time, any intention to undertake a justification of the article, as true, because I had not, at that time, compared it with the Judge's Opinion. The part I took was voluntary, without any suggestion, either from Mr. Lawless, or from any other person. My efforts were directed to defend the article against the idea of its being a contempt of court, however great might be its misrepresentation of the Opinion, or however libellous the matter it contained. The ground I took, was, that the publication, not having reference to a cause then pending before the court, could not be construed into a contempt, or punished as such. I insisted that the published opinion of a judge is at all times a fair subject for animadversion or criticism, and that if the article signed "A Citizen" was of such a nature as to amount to a libel, it could only be punished in the ordinary form by indictment. I adverted, in the course of my remarks, to the constitutional guarantees of the freedom of the press, the freedom of speech, and the trial by jury; and endeavored to impress the Judge with the danger of exercising by implication a power not strictly necessary, and which seemed to be so directly against the letter of the constitution. I was heard patiently, and treated respectfully, by the court. I do not now remember having been interrupted during the whole course of my argument, which took up a considerable time. If I was, it was not in such a manner as to cause me to remember it. After I had concluded, I almost immediately left the court room, to attend to my duties in the Circuit Court then sitting; and (I think) did not again appear there, until Mr. Lawless was brought up before the Judge, under the rule made against him. I then accompanied him to the court, as one of his counsel. Mr. Magenis, I believe, was also along with us—and perhaps Col. Strother; but I am not certain. On the second day, I think it must have been, (for the case as I remember occupied two days) when I entered the court room I found it much crowded. The case seemed to have attracted a number of people. The room in which the court sat, was full, and there were many persons in an adjoining room occupied by a private family; in the latter I remained most of the time while Mr. Magenis was offering his remarks before the court. I cannot state the course of argument taken by that gentleman:—I do not now remember it. I think he opened the argument; but my recollection of the precise order of the facts in this case is very indistinct. When I rose to address the court, I avowed it to be my intention, with the permission of the Judge, to argue again the question I had discussed before. I felt myself then much better prepared to do so, than on the first occasion, and I entertained a hope that the Judge might be induced to change his opinion. But, in consequence of an intimation from the Judge, that the question as to a contempt was a decided point, and that he did not wish it re-argued, I turned my attention to another point, arising out of the phraseology of the rule, which, according to my recollection, required Mr. Lawless to show cause why he should not be punished for a contempt of court;—and, among other things, why he should not be suspended from practice as attorney and counsellor for a certain time. My object now was, to show, that if Mr. Lawless was punishable at all, he should be punished in the same way as any other individual not a member of the bar, committing a like offence; and that what he had done ought not to be treated as a professional offence. I contended that the appropriate punishment for a contempt was fine or imprisonment, or both. Whereas the rule indicated a punishment for a professional misdemeanor, with which Mr. Lawless was not charged, and which so far as I know, it had never been pretended he had committed. Col. Strother also addressed the court; but it was thought that in doing so, he took grounds on which Mr. Lawless did not intend to rely, or rather made observations which he did not ap-

prove, and he was accordingly stopped by some one of us in the course of his remarks. After the argument was concluded, Judge Peck commenced to deliver his Opinion. He was then in very feeble health, and his eyes, I think, were bound up, or covered with goggles:—at all events, he could not see to read. He therefore requested Mr. Bates, the District Attorney, to read the article signed “A Citizen,” paragraph by paragraph; and he made his comments at great length upon each, as he went on. The words he used I cannot remember with precision. I thought his language harsh and at times abusive. He treated the publication as a false and malicious libel, and, (as I understood him,) spoke of its author as a libeller and calumniator. I cannot point the court particularly to any of his remarks, except on two occasions;—the one was, when he commented upon the first paragraph in the article, and in particular upon these words; “I observe that although the Judge has thought proper to decide against the claim, he leaves the ground of his decree open for further discussion.” He considered this paragraph as intended to be a sneer at himself;—he said that “*Judge Peck*” and “*the Judge*” had been mentioned (I think) three times in that paragraph. In another part of his observation, while endeavoring to show that such offences were condemned and punished in all countries, he adverted to a law or custom existing, as he said, in China; where, he said, such a calumniator would have his house blackened, as a fit emblem of his heart. These were the words, according to my recollection of them. It may be, however, that I have slightly varied them, and that the Judge said, that such a calumny, if committed in China, would be punished by having the house of its author blackened as a fit emblem of his heart. I cannot, I think, be mistaken in their general import. I do not undertake to say that I use the precise language employed by the Judge. As I remarked on another occasion,* his expression made a strong impression upon my mind. The fact was new to me, and I thought it a strange sort of precedent for the course which seemed about to be adopted. I do not now remember whether Mr. Lawless was in the room at the time this remark was made. He had inquired of me, (at what particular point of time I do not remember) whether I thought he should commit a contempt by leaving the court before the Judge had concluded. I replied, “certainly not: you are not in custody, and, I suppose, are not obliged to stay and hear yourself abused.” Before the Judge had concluded his remarks, I went into the street and thence into the adjoining room. I do not think I heard the whole of the Judge’s remarks. I left the house at or about the time he concluded, and I was not present there afterwards. I know nothing more of what happened in relation to the case, until Mr. Lawless was brought into the Circuit Court, on the return of a writ of *habeas corpus*.

Examined by Mr. Buchanan.

Q. At the time you entered the court room, and found Mr. Lawless arguing the case of the rule against Foreman, when, as you have said, the Judge frequently interrupted him,—do you recollect what expressions were then used by the Judge?

A. I think that the Judge, in repeated instances, said, “You, sir, in your strictures said so and so, which is false:” and then adverted to some clause of the Opinion different from that on which Mr. Lawless was arguing.

Q. What was the conduct of Mr. Lawless towards the court, during these proceedings against the printer?

A. He appeared much subdued; more humble than I had ever seen him. It seemed, from his manner, that he gave the matter up in despair, when he left the court. The contrast in the manner and appearance of the two gentlemen was the first thing that attracted my attention, when I entered the court. The Judge was more warm, and Mr. Lawless more humble, than I had ever before witnessed. Mr. Lawless was evidently embarrassed, either by the con-

* Mr. Geyer was examined, last year, before the Judiciary Committee of the House of Representatives.

sciousness of authorship, to which I have alluded, or by the frequent interruptions of the Judge, I cannot say which: perhaps both. I had no doubt that he was the author, and the Judge, throughout, treated him as such.

Q. What was his conduct on the argument of the rule against himself? Was it respectful, or otherwise?

A. I do not know that he opened his lips, or once left his seat. I cannot recollect that I once turned my eyes upon him.

Q. How long had he sat and listened to the Judge's remarks before you advised him to leave the court?

A. I did not *advise* him to leave the court. I merely answered, in reply to his question, that I did not think his doing so would be a contempt of court. I suppose the Judge had been speaking for three quarters of an hour, or perhaps an hour. It is difficult to measure the time with accuracy.

Q. How long, in all, did it take the Judge to deliver his Opinion?

A. I said, upon a former occasion, that it occupied about two hours and a half. It may be that I overrated the time.

Q. Did the Judge state why he objected to the article for referring to him by the name of "Judge Peck?"

A. I understood him to look upon the passage as meant to be a sneer upon him individually, and as furnishing evidence that it grew out of personal hostility.

Q. Did he state what words, in his opinion, ought to have been used?

A. Not that I remember. He used the term "court" several times. He seemed to understand the clause as a sneer at himself, and as evidence of the spirit in which the article was written, which, he said, it was manifest was intended to bring him into ridicule, and not, as we termed it, an assignment of errors in the Opinion. It is proper that I should state that the Opinion was published, as I understood, at the request of the members of the bar. I know that I intimated such a wish, whether in writing or not, I cannot now say; but I know that such was the general wish of the bar.

Q. Do you recollect whether in your argument you referred to the constitution of the State of Missouri?

A. I adverted to parts of it, particularly to several clauses in what we call the bill of rights.

Q. Do you remember whether the Judge made any remarks at this point of your argument?

A. Yes. I referred to a clause in our constitution, which, I contended, contemplated that all criminal prosecutions should be by indictment: the Judge then made a remark, (perhaps inadvertently) the import of which I understood to be, that the clause referred to was in the *State* constitution and might or would be applicable in the *State* courts:—to which I replied, rather sharply perhaps, Yes, sir, and it extends its protection over all citizens of Missouri, in all courts within her limits. This clause and others were referred to for the purpose of showing that the constitution not only contemplated freedom of discussion, by allowing the truth to be given in evidence in prosecutions for libels, but forbade any other mode of prosecution except by indictment, and secured to the accused a trial of the facts by jury. And I endeavored to show the danger of a precedent which would allow a judge to sit in his own cause, and punish a libel against himself in a form of proceeding which did not admit the truth to be given in evidence.

Q. By Mr. Storrs. Do you know whether any written opinion was delivered by the Judge, at the time he pronounced his decree in Souldard's case?

A. I was not then present in court.

Q. Did you ever hear of any such opinion having been delivered at that time?

A. No.

Q. When did you first hear that any opinion in writing had been prepared by the Judge? How long after the decree?

A. I do not remember. It cannot have been very long. I remember that in one of the first conversations I had with members of the bar in respect to that decision, I was told that the Judge had an *amanuensis*, who had been engaged to assist him, either in drawing up his Opinion, or in making out a copy of it. I do not know which. Knowing Judge Peck's habits, I did not doubt that his Opinion, if any had been delivered, would be reduced to writing for his own guidance in future decisions.

Q. *By Judge Spencer.* You were not present when the sentence was passed on Mr. Lawless?

A. No. I was then engaged in a cause in the Circuit Court.

Q. *By Mr. Buchanan.* What induced you to volunteer your services in the first argument in the case of the rule against Foreman?

A. One reason was this. There were several persons in Missouri who advocated the opinions expressed by Mr. Jefferson in his letter to Kercheval, in relation to the tenure of office of the judges. I entertained different opinions. On this occasion I was taunted, by Mr. Penrose, with a reference to the disposition manifested, as he said, by Judge Peck, to punish, as proving the propriety of limiting the tenure of office: and I was anxious to prevent, if I could, a course of proceeding which, I feared, could be seized upon to excite farther prejudice, and increase the clamor which had been raised. The feeling to which I allude broke out, afterwards, in a proposition to amend the constitution of Missouri, by limiting the term of service of the judges. When I first went into the court, I was prompted by curiosity; and intended to be only a looker on; and when I afterwards volunteered to argue the cause, I did not feel myself very well prepared to do so.

Q. *By Mr. Storrs.* How long have you been a counsellor at law?

A. I have been in regular practice for fifteen years; but I was admitted earlier,—I believe in 1810. I had been in the army since my admission.

Q. *By Mr. Buchanan.* Have you ever been Speaker of the House of Representatives of the State of Missouri?

A. Yes. From 1821 to 1826; since which time I have not been in the legislature.

Cross-examined by Mr. Meredith.

Q. You said, I think, that Mr. Lawless did not request you to appear for him in the argument of the rule against Foreman?

A. I did say so. Mr. Lawless left the court in a great hurry, and from my acquaintance with his habits, I rather think that he did not even see me, though I was very near him.

Q. Was the printer himself present?

A. I do not remember.

Q. You say that Col. Strother was interrupted in the course of his argument by Mr. Lawless, or by some of you?

A. I was sitting (I think) next to Col. Strother, and Mr. Lawless next to me. My present impression is that I interrupted Mr. Strother, as I think at Mr. Lawless' request. I think it must have been so. It was not at my own motion, I am sure.

Q. What ground of argument was Mr. Strother taking, when you interrupted him?

A. He was taking none, as I thought. He seemed disposed to apologize for Mr. Lawless. I considered him as making rather an apology, than an argument. It was on that account that he was interrupted.

Q. This was in the case of the rule against Lawless?

A. Yes.

Q. How often did you argue in the case of the rule against Foreman?

A. Not more than once.

Q. Where was the court held on that occasion ?

A. In the house of Mr Penrose.

Q. Did you make no argument in this case when the court was held in the Baptist church ?

A. It may have been that I argued there on some other question. I am very certain that I did not argue that question there, at that term.

Q. Did you at any other term ?

A. No ; I do not think I did. I may have argued some similar questions ; for I have been engaged in other cases of this kind.

Q. Before this same court ?—*A.* No.

Q. In a case of contempt ?—*A.* Yes.

Q. In what case ?

A. In the case of a rule made against the printer of a paper, called the Enquirer, printed at St. Louis, whose name was Ford.

Q. In what court ?

A. In the State Circuit Court of St. Louis county. Ford had printed an article which reflected on an opinion delivered by Judge Tucker, as to the constitutionality of our law-office law.

Q. Was that a case of attachment for contempt ?

A. It was a rule made against the printer.

Q. Of the same paper in which the article signed "A Citizen" appeared ?

A. It was, I believe, the same printing establishment. Ford was the predecessor of Foreman. The charge was a misrepresentation of the opinion, as I understood it.

Q. When did this take place ?

A. Late in 1821, or early in 1822.

Q. At what place did you argue that cause ?

A. At a house belonging to Mr. Giddings, on Market Street, in St. Louis. The counsel did not go far into the argument, because Mr. Ford, the defendant, was very impatient to deliver a speech which he had written for the occasion ; and as he persisted in it we left him to his fate.

Q. Was this case after the ratification of the constitution of Missouri ?

A. Yes. It arose out of the first decision under the act of June, 1821.

Q. When was the constitution adopted ?

A. In 1820. The Legislature of Missouri acceded to the condition on which the State was admitted into the Union, in June, 1821.

Q. What became of the case ?

A. I do not remember, particularly ; but I think Ford purged himself of the contempt.

Q. You abandoned him, then, because he wished to make a speech for himself ?

A. Yes. He pulled the speech out of his pocket, and seemed bent on making a display. The whole was a ludicrous affair. I went out of the court house, after hearing part. I was not able, very well, to observe order.

Q. Had he previously submitted the speech to you ?

A. No. But from what I knew of the man and heard him say, I thought he would do himself no good.

Q. By *Mr. Buchanan*. Has that case been reported ?

A. No. It was in the Circuit Court, whose decisions are not reported. I speak from memory. It was a rule for a contempt, in an alleged misrepresentation of the Opinion of the Court. The misrepresentation was insisted on by the court, but I do not remember the extent of the doctrine laid down.

Q. This was in the Circuit Court of the State ?—*A.* Yes.

Q. Do you know of any similar case in the Supreme Court ?

A. Yes. There was one which arose out of the case of *Bellesime* against

McCoy. This was in 1822 or 1823. It was after the organization of the State Courts under the constitution.

Q. What was the nature of the case ?

A. It came up on a writ of error from the Circuit Court of St. Louis county, where judgment had been given for McCoy. The judgment was affirmed by the court above. Mr. Lawless was counsel for Bellesime. He had applied for a re-hearing ; and on the very day that the publication took place, a re-hearing had been granted. The publication contained a statement of facts, together with the decision of the court. The statement did not correspond with that in the bill of exceptions, on which the cause was removed to the Supreme Court. When the rule was made on the printer the cause had been reinstated ; and the question which came up, was, whether it was a published misrepresentation in relation to a cause pending ? The court went distinctly on the ground that it was. It is proper here to state that the bill of exceptions was a very meagre one, and did not contain, by any means, so many facts as the publication of the case in the paper. I state the facts of the case as they were represented and understood to be, and not on my own knowledge, as I understood them.

Q. It was a misrepresentation then of the cause, not of the Opinion ?

A. Yes. The facts in the paper differed from those in the bill of exceptions ; but the Opinion also was represented as erroneous, and the publication contained an appeal to the Legislature to amend the law, the operation of which, as held by the court, was complained of.

Q. What became of the proceeding against the printer ?

A. He gave up Mr. Lawless as the author ; or Mr. Lawless answered as being the author ; I do not distinctly remember which. My attention was confined to what related to the proceedings against Mr. Lawless chiefly. I do not know whether the court stated what would have been done if the cause had not been pending ; as it was, the rule was made absolute on Mr. Lawless, and he purged himself of the contempt, in answer, on oath, to interrogatories in some form.

Q. After you had been engaged in the argument in behalf of Foreman, had you not a personal conversation with him ?

A. I cannot say : it is probable I had.

Q. Did not Mr. Foreman manifest great anxiety to be permitted to disclose the name of the author of the article signed " A Citizen ? "

A. I do not remember that I heard him say anything on that subject.

Q. Had you any conversation with Foreman in the presence of Mr. Lawless ? or had they any conversation in your presence on that subject ?

A. No. I may have conversed with Mr. Foreman ; but if I did, I have no recollection of what passed.

Q. Do you know where the District Court held the commencement of its sessions in that term ?

A. No. I suppose at the house of Mr. Penrose. I do not know that it sat at any other place.

Q. You said that you accompanied Mr. Lawless to court, as his counsel.

A. Yes. I met him on the way from the Circuit Court to the District Court, when he made the request.

Q. Was the request then made for the first time ?

A. I think so. I cannot remember distinctly. He may have made it before.

Q. Do you remember on what day of the week the argument took place ?

A. No. My recollection of the facts is very indistinct ; many of them I have probably forgotten. I could not state how many days the argument occupied, but for the record.

Q. When you spoke of the court as having made use of harsh language, did you refer to the terms " false and malicious ? "

A. I think those terms were used.

Q. Were they used by the Judge in reference to the publication, or were they addressed to Mr. Lawless personally ?

A. I do not think they were addressed to him personally. The Judge did not name him. It is possible I may have confounded his calling the publication a calumny, with his calling its author a calumniator. The Judge often spoke of the publication as a libel.

Q. Did he address himself, personally, to Mr. Lawless? or were these words employed in the Judge's comments on the publication?

A. In his comments on the publication, when he was arguing to show that it was a gross libel.

Q. You say that the Judge, addressing himself to Mr. Lawless, often used the expressions, "You say so and so?"

A. Yes.

Q. Are you certain that Mr. Lawless had not himself first assumed the authorship, and had used the expression "I say" so and so?

A. I do not remember that he assumed the authorship, in terms; but I think none could hear him and avoid the inference that he was the author.

Q. I wish a direct answer whether you recollect, or not, that Mr. Lawless himself used the words "I said, in my strictures?"

A. I think he did use language of that import, but I cannot be certain as to the words, because I felt so sure that he was the author; and he exhibited to all the bystanders such evidences of being the author, that his using the expression may not have made any particular impression on me. I now think, however, that on one or two occasions he spoke in the first person, and afterwards endeavored to correct himself, and that this embarrassment of his was a source of some amusement to the bystanders.

Q. Was there not much excitement, both at the bar, and among the audience, during the arguments on both rules?

A. Yes, there was; particularly on the second day, the crowd was great.

Q. Were you counsel for any of the landclaimants?

A. Yes, for a few of them.

Q. Was it on that account that you requested the Judge to publish his Opinion?

A. Yes. I do not know that I made the request directly to the Judge, but I expressed such a wish, and it was the general wish of the bar. The effect of the decision upon other claims made it a matter of interest to know what was the prospect of their being confirmed.

Q. When the Opinion, at length, was published, did you consider it as anonymous?

A. No. I read and treated it as the opinion of the court. I drew my own conclusions from it, and I thereupon determined to withdraw the cases of my clients.

Q. By Mr. Wirt. Do you recollect whether you employed any popular topics of argument? And if you did, whether they were much insisted on?

Q. Yes. I invoked the aid of every article in our Bill of Rights, which would bear on the subject. I spoke of the alarming consequences likely to follow the precedent which would now be set, if this publisher should be punished. Perhaps my address might be considered by some as declamation; but I thought it was argument.

Q. Did you descant much on the liberty of speech, the trial by jury, and all these things?

A. Yes; I thought them about to be violated.

Q. Did not the Judge begin with these topics, before he went into the examination of the published article?

A. I think he did; but not on the same day. I think it was during the discussion on the other rule against the printer.

Q. Did he then answer the representations of that publication, article by article?

A. Yes.

Q. Was it in this part of his remarks that he used the words deemed by you offensive?

A. Yes. Mr. Bates read the paragraphs. The Judge then commented on them, referred to the Opinion, and remarked on their tendency. I think this was on the second day. It was on the first day that he spoke in relation to the Bill of Rights, and in reply to the argument, employed for the purpose of showing that to extend the power of the court beyond the limits of strict necessity would be a violation of the constitution.

Q. Did you hear the opinion of the Judge, in the case of the rule against the printer?

A. Not the whole of it.

Q. Was it confined to the legal objections adduced against the rule?

A. It was, so far as I heard it.

Q. Was that opinion delivered immediately on the close of the argument? or did the court take time?

A. I do not recollect. I rather think that time was taken. I am not certain.

Q. How long did the argument in the printer's case continue?

A. Mr. Lawless was speaking when I entered. I suppose it occupied about two hours and a half after that.

Q. Did the argument in the printer's case extend through two days?

A. I do not remember; I was in the court only at intervals, and was not there until some time after the commencement of the proceeding.

Q. Was the case of Chouteau then going on in the Circuit Court?

A. I think it was, but I am not certain.

Q. Were you counsel in that case?

A. Yes. It was the first in order of many cases, in which very important principles were involved. I believe I did not argue the cause to the jury. I argued questions of law, upon instructions moved for.

Q. Who were associated with you as counsel.

A. Mr. Cozens, and Mr. Lawless.

Q. Was there any argument before the jury?

A. There was some. When the *habeas corpus* was applied for, on behalf of Mr. Lawless, Mr. Gamble was engaged in his argument in conclusion, for the plaintiff, as I think; and I believe that the jury had retired, before the return of that writ, and the appearance of Mr. Lawless.

Q. How many counsel were there on the other side?

A. Two. Mr. Gamble and Mr. McGirk. They both addressed the jury; but we did not consider the argument before the jury as very important, because there was not much dispute as to the principal facts of the case.

Q. Who argued the case with you?

A. I am not certain whether it was Mr. Cozens or Mr. Lawless. I mean on the argument of the questions of law. I did not think it important that more than one should address the jury. By the course of practice of the court, two of the counsel for the defendant must have followed each other, if all had addressed the jury.

Q. Did you begin the cause by asking instructions from the court?

A. Yes, after the close of the evidence; but the court held up its instructions till the cause should be argued before the jury. The Judge hesitated about the positions we assumed. The cause rested mainly upon facts in the history of Louisiana, connected with the destruction of the Natchez.

Q. You considered, then, the argument on the instructions, as deciding all that was important in the cause?

A. In my opinion the argument before the jury was of little importance. I thought the instructions, if given, would be decisive of the cause. The only disputed fact which could be at all important in any event, was, whether the ancestor of the plaintiff was a negro or a Natchez woman. We contended that if

she was a Natchez, taken in war, and reduced to slavery by the French, as alleged, then her descendants, having been born and held in slavery in Louisiana while occupied by the French, were not entitled to their freedom,—and to this effect we asked instructions.

Q. Had the argument on the instructions been concluded?—*A.* Yes.

Q. Was Mr. Lawless there?

A. Yes. I think he aided me, but I have no distinct recollection on the subject. It may have been during the argument of the question of law that he was called out of court on the attachment.

Q. Have you a perfect recollection, as to the language employed by Judge Peek in his remarks on the published article?

A. No. Not as to the precise words. What was said in relation to the Chinese custom made a strong impression on me.

Q. Has there not been a great deal of conversation between yourself and Mr. Lawless, and others on this subject generally, since that time?

A. There was, immediately after.

Q. Have not those conversations been repeated down to the present time?

A. No. When the Judiciary Committee asked that they might be discharged from the further consideration of Mr. Lawless' petition, and that he have leave to withdraw his petition and documents, I considered the matter as at an end. I had been warned by Mr. Lawless to hold myself in readiness for a summons; but we had ceased to converse much about the matter, until recently, when I learned that the witnesses were to be summoned to this place. Since then I have had much conversation with Col. Lawless, and others, on the subject.

Q. How long is it since the case occurred?

A. In April, 1826.

Q. That is four years and a half: amidst all these conversations, through such a period of time, can you fully rely on your memory?

A. No, I cannot; especially as to particular words; nor can I be at all positive as to the order of events. I remember such things as struck me with force at the time, and scarce anything else distinctly.

[Here the cross-examination closed.]

Q. By Mr. Buchanan. I wish to bring back to your recollection some of the circumstances of the case of *Bellisime vs. McCoy*. You say that there was a petition to the Supreme Court for a re-hearing, after that court had affirmed the judgment of the court below?

A. Yes, and the re-hearing was granted.

Q. The publication, then, was made whilst the decree of the Supreme Court, affirming the judgment below, was yet standing?

A. I do not know the fact, of my own knowledge, but I think it must have been after the grant of the re-hearing.

Q. You say that Mr. Lawless purged himself of the contempt. In so doing did he not swear that when he wrote the article he was ignorant that the re-hearing had been granted?

A. Yes. In the same newspaper which contained the publication then complained of, there appeared an article to this effect: "We stop the press to announce that a re-hearing has been granted in this case." This fact was urged by Mr. Lawless in his defence.

Q. Did you not say that Mr. Lawless appealed to the Legislature for its interference?

A. Yes; in the publication.

Q. Did the Legislature change the law?

A. In 1824 there was a general revision of the laws. I was one of the revisers, and reported a bill which afterwards passed into law, by which the evil of which Mr. Lawless complained was remedied.

Q. You have informed the court what was the manner of the Judge, when Mr. Lawless was arguing in behalf of the printer. What was his manner after-

wards, when he was delivering his Opinion on the rule against Mr. Lawless himself?

A. It was unusually vehement; to a degree amounting to passion, as it appeared to me, though I may have been mistaken. The Judge is ordinarily very mild in his manner of delivering his opinions.

Q. Have you ever seen it stated since in any publication that such a law as the Judge referred to does exist in China?

A. No.

Q. You say that from the first, Judge Peck treated Mr. Lawless as the author of the article signed "A Citizen," and that Mr. Lawless acted as if he was the author. Whilst Mr. Lawless was addressing the court what did he say to the Judge, as to his intention to treat the court with disrespect or otherwise, in publishing the article signed "A Citizen"?

A. He endeavored to prove, from the article itself, that no disrespect could have been intended. He expressed, emphatically, the absence of all intention to commit a contempt. He showed a familiarity with the article, and with the intentions of the author, which plainly showed that that author was himself. I do not say that he at any time used the expression "I did not mean so and so;" but he declared that there was no intention in the author to condemn the court, and that no such intention was manifested by the article. Whenever he used an expression, as though he were himself the author, he afterwards endeavored to correct himself, by adding "as is manifest from the language employed," or something to that effect, thus endeavoring to keep up the character of counsel.

Q. You have said that his manner was unusually subdued. What do you mean by that expression?

A. Mr. Lawless is usually rather excitable and impatient of interruption; but, on this occasion, he was very patient, under all the interruptions that took place. This was one of the first things that struck me on entering the court.

Q. Did Mr. Lawless leave the court, before, or after, the Judge made the reference to the Chinese custom of blackening the house of a slanderer?

A. I do not remember.

Q. By Mr. *Spencer*. In the case of *McCoy*, you say that the bill of exceptions was very meagre, and that the statement of facts published in the newspaper was much more ample. Was it ever pretended that the facts stated in the latter, had not occurred?

A. Not that I know of.

Q. The misrepresentation, then, consisted in the amplification of facts which were not in the bill of exceptions?

A. Yes. I understood him as embodying in the publication all that he considered himself as having proved in court; but all of the same facts were not contained in his bill of exceptions.

Q. When he wrote his publication, the cause, as he supposed, had been finally disposed of, and he did not know that it had been reinstated?

A. Yes; that was my understanding of the matter.

Q. Was Mr. Lawless leading counsel in *Chouteau's* cause?

A. I do not know which of the other gentlemen concerned was the leading counsel, so called. I was employed as auxiliary.

Q. Was he not interrupted by the service of the attachment from Judge Peck, during the trial of that cause?

A. Yes: it must have been while the trial was going on, but I do not know at what stage of it. I cannot say whether he had argued the cause or not.

Q. By Mr. *Meredith*. You say that the cause of *Bellisime* and *McCoy* had been reinstated without the knowledge of Mr. Lawless, before his publication appeared?

A. No; I did not say so. I do not know certainly what Mr. Lawless knew on the matter.

Q. By Mr. Spencer. You said, I think, that the article contained a note, declaring that the cause had been reinstated?

A. That was not in the article, but it was in the same newspaper; and my impression is that it was inserted there by Mr. Lawless. My understanding of the matter was that the account of the cause had been written after the affirmation of the judgment; that it was in type, and probably the paper about to be put to press, when the re-hearing was granted; and that Col. Lawless caused a notice of that fact to be inserted (as I have stated) in the same paper.

Q. By Mr. Meredith. Was Mr. Lawless' motion for a re-hearing pending when he made that publication?

A. I suppose it must have been pending. I do not know certainly when the article was written.

Q. Mr. Lawless was not the only counsel for Bellissime?

A. I think he was.

Q. By Mr. Wirt. You said that Mr. Lawless' purgation from the contempt consisted merely of his statement on oath that he did not know, when he wrote the article, that the cause was then pending?

A. I did not say that it consisted *merely* of that statement, but that that was one of the matters it contained.

Q. Was not the question put to him, whether he did or did not intend a contempt? and did he not disavow such an intention?

A. I am unable to distinguish, between his speech on that occasion, and his answer to interrogatories. In his speech he made many disavowals.

Q. Cannot you say whether one of the interrogatories was, whether he intended any contempt?

A. I do not know; but the record will show. I distinctly remember that he made a disclaimer of all purpose of contempt, but whether in answer to an interrogatory or only in his speech I am unable to state.

Q. The publication, then, was made, after his motion for a re-hearing, and before the fate of that motion was known?

A. I understood that it had been prepared for publication, pending the motion; but I am not certain.

Q. By Mr. Meredith. In Mr. Lawless' argument before Judge Peck, on the rule in the case of the printer, did he make any disclaimer of contempt?

A. No other than I have already stated.

Q. Did he make any on the rule against himself?

A. I think it was understood between him and his counsel, that no apology or disclaimer was to be made; but that the defence was to be put upon the question of law, and Mr. Strother was stopped because he used the language of apology.

Q. Is there any rule in the District Court of Missouri as to the number of counsel?

A. Yes. I believe two only are allowed to speak in civil cases on the same side.

Q. By Mr. Wirt. In the case of the printer were the disclaimers of Mr. Lawless made while he was arguing from the face of the paper?

A. Yes. Sometimes he said, that there was no intention in the author to commit a contempt, speaking as though he were the author; then he would change his terms, and endeavor to re-establish the distinction between the characters of author and counsel.

Q. But when he was brought upon the rule against himself, he made no disclaimer of contempt?

A. Not that I remember.

Q. By Mr. Storrs. Did not Mr. Magenis, in his argument, press to the court what have been called by the respondent's counsel, the popular topics, concerning the liberty of the press, the liberty of speech, and the trial by jury?

A. I do not remember. While he was speaking, my attention was at times distracted by conversation.

Q. Did the Judge answer the arguments on these topics, before he went into an examination of the article?

A. I cannot remember whether he said anything on that subject, at that time.

Q. Did he enter into any formal refutation of them?

[Here Mr. Wirt inquired of the managers, whether their questions related to the popular themes of argument?]

Mr. Storrs. Yes. Those themes are popular, as we hope, and more shall be heard of them bye and bye.

Mr. Wirt. They have heretofore been so designated in this examination, and therefore I used the expression.

Q. By Mr. Wirt. Had the Judge disposed of these topics in the argument in the case of the printer?

A. Yes: such is my impression.

Q. By the Court. Was it understood by Mr. Lawless and his counsel that he should make no disclaimer of an intention to commit a contempt upon the court, but should stand upon the law?

A. There was no express agreement, that I remember: but I concluded such to be the intention of Mr. Lawless from the tenor of the conversation at the time he suggested the course of defence: and my impression is confirmed by the fact of the interruption of Col. Strother. From what I understood as the wish of Mr. Lawless, I should have considered myself as precluded from making any apology whatever, had I felt a disposition to do so; but I thought it was not a proper case for an apology.

[Here the cross-examination ended.]

The court then adjourned until tomorrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Wednesday, December 29.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and Mr. Meredith, one of his counsel, also attended.

On the opening of the court Mr. Meredith rose, and in apology for the absence of Mr. Wirt, the senior counsel for the respondent, stated that that gentleman had suddenly been called away, in consequence of the sickness of a member of his family.* Mr. Meredith expressing the painful sense he felt of the responsibility thus unexpectedly cast upon him, proposed in behalf of the respondent, that as the testimony in support of the impeachment was now, probably, near its close, the remaining witnesses on the part of the United States should be examined, and that then a short postponement should take place, in order to allow Mr. Wirt an opportunity to resume his place in the cause: he thought that an adjournment until Monday would be sufficient.

Mr. Buchanan, in behalf of the managers, expressed their willingness to yield, with perfect deference, to any course the Senate might adopt.

Mr. Holmes, thereupon, moved that the court, when it adjourned to-day, should adjourn to meet on Monday next. But in consequence of a suggestion from Mr. Spencer, that it was possible the examination of the remaining witnesses might consume a longer time than the residue of the present sitting, the motion was waived for the present.

* His daughter died the same night.

CHARLES S. HEMPSTEAD *was then called and sworn.*

Q. By Mr. Buchanan. Please to proceed and relate to the court whether you were present in the District Court of Missouri during the proceedings against Mr. Foreman, on the rule for a contempt, and state what took place.

A. I was present in the District Court for Missouri sitting as a Land Court, when an argument was had on a rule made against Stephen W. Foreman for an alleged contempt of court, in publishing, in a paper edited by him, a certain article signed "A Citizen." I recollect hearing the argument of counsel, on that occasion, and, so far as I remember, they have been correctly stated to this court, by Mr. Geyer. I think Foreman was discharged from the rule; probably because he purged himself of the alleged contempt. Mr. Lawless either was given up by the printer, or acknowledged himself as the author. A rule was then made against him to show cause why he should not be punished for a contempt, in writing that article, and causing it to be published. I was present during the argument in his case also; but who were his counsel I do not distinctly recollect. I think however, they were Mr. Geyer and Mr. Mage-nis. I cannot, now, repeat all their arguments; but the substance of them was, that the court had no jurisdiction in the case, inasmuch as the article signed "A Citizen" referred to an opinion of the court, in a cause not then pending; and I understood the counsel to rest their cause on that ground. They insisted that the cause having passed from the court, it was not competent for the court to punish, as for a contempt, any strictures on the Opinion which had been delivered. I was present during most of the proceedings against Mr. Lawless. I was in court when Judge Peck delivered his Opinion on the rule against him; and, according to my recollection at this time, the Judge called upon Mr. Bates, then United States District Attorney, to read the article. He then discussed the doctrines which had been adduced by counsel, and spoke at length on the law of contempts, generally. What were the arguments employed, I do not recollect: but he came to the result, that the case before the court was contemplated by that law, as he understood it; and that the author was punishable under it. In giving the reasons for this conclusion, he stated that the intention of the author evidently was, to misrepresent the Opinion delivered by the court, in the case of Soulard; and not only that, but to bring the court into disrespect, to shake the public confidence in its decisions, and to create a belief among the land claimants that they were not to expect justice from that court. He spoke at some length—appearing at times much excited, often vehement in his manner, and violent in his gesticulation. As he was proceeding to discuss the article, paragraph by paragraph, he mentioned, in the course of his remarks, the punishment inflicted upon a calumniator in China, as has been stated by other witnesses. I cannot recollect his precise words; but the substance was, that a convicted calumniator in China had his house blacked, to indicate the depravity of his heart, and as a warning to others: and I think he added, (though I may be mistaken) that if the author of the publication in question had resided in China, such would have been his punishment. I cannot state whether I was in court, at the time of the final sentence of Mr. Lawless. I do not now recollect.

Q. By Mr. Buchanan. Do you recollect the terms used by the Judge in delivering his Opinion? and were they applicable to the article itself, or to the author of the article?

A. I recollect that the Judge made use of the terms "false," "calumniator," and "slanderer;" and my understanding was, that he applied them to the author of the piece signed "A Citizen."

Q. What was the manner of the Judge, on that occasion, compared with his usual manner on the bench?

A. It was extraordinary, vehement, and very much excited. His usual manner is marked with great patience, mildness and good temper.

Q. By Mr. Wickliffe. Were you present when the Opinion was originally delivered by Judge Peck in the case of Soulard ?

A. Yes.

Q. There was no written Opinion read on that occasion ?

A. Not that I recollect of ; the Opinion, I feel confident, was delivered verbally. My reason for thinking so is, that I took notes of that Opinion, myself, at the time.

Q. By Mr. Buchanan. Have you got those notes ?

A. Not here. They are in Missouri.

Q. Do you recollect, distinctly, whether the Judge read his Opinion, or delivered it orally ?

A. My impression is, that he delivered it orally. He could not, indeed, have read it himself, from the state of his eyes at that time.

Q. By Mr. Spencer. Did any other person read it for him ?

A. I think not. I am strongly impressed with the belief that he delivered it verbally. I am almost positive that he did.

Q. By Mr. Buchanan. When was it delivered ?

A. Some time in 1825. I think it must have been in that year, for the proceedings against Mr. Lawless were in the spring of 1826.

Q. The decree was entered in December, 1824, and one of the witnesses stated that its entry had been postponed for the accommodation of Mr. Lawless. How long before its entry was the Opinion delivered ?

A. I do not recollect.

Q. By Mr. Wickliffe. Did you read the Opinion of Judge Peck, as it was published in St. Louis ?

A. Yes, soon after it was published, but not since.

Q. Was it not a considerable amplification of the Opinion as delivered orally ?

A. It strikes me that it was. The Opinion is given more at length, but it is substantially the same. It is some years since I read it, and I did not compare the printed Opinion with my notes of that which was delivered. I cannot say if there was any discrepancy, but I certainly think that the original Opinion was amplified.

Q. By Mr. Spencer. Were you present when Mr. Lawless made his argument for Foreman ?

A. Yes.

Q. Did he on that occasion disclaim the intention of misrepresenting the Opinion ?

A. I do not remember.

Q. How long was the Judge occupied in delivering his Opinion against Mr. Lawless ?

A. I think from one to two hours and a half. Certainly more than an hour, and I think not less than two hours. I know that he took up a good deal of time.

Q. Do you remember the exact expressions, and whether the language of the Judge was not calculated to harrow up the feelings of Mr. Lawless ?

A. I thought so. Many of his expressions were certainly calculated to harrow up the feelings of any one who was the subject of them.

[*Mr. Meredith.* We object to that question—it is not legal.]

Mr. Spencer. Had the objection been made sooner, I should not have pressed the question.]

Q. By Mr. Buchanan. What was the manner and the conduct of Mr. Lawless, while the Judge was delivering his commentaries on the article ?

A. I observed nothing extraordinary. He was quiescent, and seemed very patient. There was nothing that caused me particularly to observe him, unless it was that he was more quiet than I had presumed he would have been, knowing the man as I do.

Cross-examined by Mr. Meredith.

Q. I understood you to say that you were present during the argument of the rule against Foreman. Were you present at the commencement of that argument?

A. I cannot say. I was not present in the Baptist church, but was present when the court was held at the house of Mr. Penrose.

Q. Were you in the court at the commencement of the argument?

A. I think I was, but I cannot be positive.

Q. Have you no recollection of any argument in the Baptist church.

A. I have not. I do not think I was in court while it was held in the Baptist church.

Q. It did sit there, then, at that term?

A. I do not know. I was so told, but I am not certain of the fact.

Q. Do you recollect on what day of the week you were first present?—A. No.

Q. How long did the argument continue?

A. It appears to me that the argument, on the rule against Foreman, occupied one day, and that on the rule against Mr. Lawless, another. The whole proceedings occupied two days, if not three.

Q. How many counsel were heard in the argument for Foreman?

A. I am not certain. My impression, when before examined, was, that there had been three; but I have since been informed that I was mistaken as to Mr. Strother. Mr. Geyer and Mr. Lawless spoke, and perhaps Mr. Magenis, but I am not positive as to the last.

Q. You referred to the testimony of other witnesses for the argument employed. What is your own recollection of the course of argument, on the rule against Foreman?

A. The argument, I think, was substantially the same in both cases.

Q. You stated that, in delivering his Opinion in the case of Lawless, the Judge's manner was vehement, and that he was violent in gesticulation. To what kind of gesticulation did you refer?

A. To gesticulation with his hands.

Q. Is it not his usual judicial manner to use much action?

A. It is not. When at the bar he did, but not upon the bench.

Q. Does he not employ gesticulation, to some degree, on the bench?

A. Yes.

Q. You were struck, then, with the vehemence of his gesticulation?

A. I was.

Q. So much so, that you remember it ever since?

A. Yes. I had reason to recollect it. His usual manner on the bench is marked by great patience. The Judge is a person who presides, in general, with a great deal of *good disposition*; and it struck me as singular that he should be so much excited, should use so much gesticulation, and employ such language as he did.

Q. In your examination before a committee of the House of Representatives did you state that?

A. I cannot say.

Q. Do you distinctly recollect the language of the Judge? and did you suppose that it was addressed to the author of the publication?

A. I have stated the terms he used, and that he applied them, either to the author of the piece, or to Mr. Lawless. I do not know whether he applied them to Mr. Lawless, personally, or to the author of the article.

Q. You stated that the Judge employed the terms, "false," "slanderer," "calumniator;" are you sure that he did not use the words, "slandrous" and "calumnious?"

A. I may be mistaken, but such is not my recollection.

Q. The words "slanderer," "calumniator," could not have been applied to

the publication; they must have referred to the author. If he had meant the article, he would have employed the term "slanderous." Are you sure he said slanderer?

A. Yes; and I considered the term as applicable to the author of the piece.

Q. You stated that the Opinion, as published, was much amplified. Do you mean that the reasoning was extended?

A. As I observed before, I have not compared the Opinion with my notes, and it is some years since I read it, which was when it first appeared. I have not, I think, read it since. It seems to me it was somewhat amplified.

Q. Do you mean that any new doctrine was advanced?

A. No. But the Opinion, as published, appears longer than when delivered orally.

Q. How long was it in the delivery? I mean the original Opinion?

A. I do not recollect.

Q. How many hours?—*A.* I do not recollect.

Q. How long do you suppose the published Opinion would occupy in the reading?

A. I cannot say, exactly. I suppose more than an hour: perhaps an hour and a half.

Q. Do you recollect what particular parts are amplified?—*A.* I do not.

Q. Were the Opinions substantially alike?

A. That is my recollection of them.

Q. Were you present when Mr. Foreman appeared in court?—*A.* Yes.

Q. Were interrogatories tendered to him?—*A.* I do not remember.

Q. You say that Mr. Foreman purged himself of the contempt: was it by declaring that he had no intention to commit a contempt?

A. My recollection is that he did.

Q. Was the declaration on oath?—*A.* I do not remember.

Q. Was Mr. Lawless present when Foreman was brought up on the attachment?

A. I cannot say.

Q. Do you recollect any communication from Mr. Bates to the court, on the part of Foreman?

A. I do not.

Q. You remember no communication, then, from Mr. Bates, Mr. Foreman, or any other person, as to Mr. Foreman's readiness to purge himself of the contempt?

A. I do not.

Q. Were you in court when the rule was made absolute against Foreman?

A. I do not recollect.

Q. Did you hear any opinion delivered by the Judge on that rule?

A. I did not, that I now remember.

Q. Have you a distinct recollection, as to the arrangement of the several parts of the Opinion delivered by the Judge in the case of Mr. Lawless?

A. I think I have.

Q. What was it?

A. He commenced, I think, with reviewing the arguments which had been offered by counsel on the question of jurisdiction, and the law of contempts; stating what had been the decisions as to that law, both in England, and the United States. Whether he then called upon Mr. Bates to read the article, I cannot be positive. He then applied the law to the case before the court, and his conclusion was, that the author of the publication was punishable, as for a contempt. He spoke at some length, while discussing the laws, and he then went into an examination of the article signed "A Citizen," and reviewed it throughout, paragraph by paragraph, with a view to show where it had misrepresented the Opinion, and where the author was guilty of a contempt.

Q. Were those the only topics he discussed?

A. There were none others, that I recollect.

Q. At what stage of the Opinion, I mean, during the delivery of which of its two branches, were the expressions you have quoted employed by the Judge?

A. I think, in his review of the article.

Q. Then all the offensive epithets were used in his review of the article?

A. Yes, as I now recollect.

Q. Do you recollect that the Judge addressed Mr. Lawless personally?

A. I do not.

Q. Was Mr. Lawless present?

A. He was, during the delivery of a part of the Opinion; but he left the court before it was concluded.

Q. At what stage of its delivery?—A. I cannot say.

Q. Had the Judge disposed of the first branch of the subject?

A. I cannot say.

Q. During what stage of the delivery was his allusion made to the Chinese punishment of a slanderer?

A. I have already stated that it was during the discussion of the article.

Q. Was Mr. Lawless present at that time?—A. I cannot say.

Q. During what stage of the Opinion was it, that the Judge commented on the probable effect of that publication on the land claims then pending?

A. I cannot say.

Q. Were you counsel for any of the land claimants?

A. I was, for some of them.

Q. In how many causes?—A. In thirty or forty.

Q. Had you any personal interest in those claims? I mean distinct interests of a professional kind?

A. Yes, I had, in some of them, an interest by inheritance.

Q. To what amount?—A. I cannot state, precisely, at this moment.

Q. Were you an owner of this interest at that time?

A. I was; but with a number of other heirs.

Q. You say that the deportment of Mr. Lawless was unusually quiet?

A. Unusually so, for him.

Q. What is his usual deportment to courts?

[Mr. Buchanan, on the part of the managers, objected to the question; observing that they did not at present wish to enter into a discussion of this subject, unless it should be the pleasure of the Senate. Mr. Meredith replied that he should not press the inquiry at present.]

Q. How many petitions for claims were filed by you?

A. About thirty or forty.

Q. Did you draw them up yourself?—A. Yes.

Q. Did you embody the concessions to which they related, in those petitions?

A. They were either embodied in the petition, or they were appended to it, and referred to.

Q. When they were appended, as documents, were the copies so appended true copies of the concessions?

A. Yes.

Q. By Mr. McDuffie. Will you state to the court whether, when you spoke of the excitement manifested by the Judge, you meant the excitement of debate, or the excitement of passion and anger?

A. I thought that, at times, he was somewhat in a passion; (*but this was only at certain times, not universally.*)

[Here the cross-examination closed. Mr. Buchanan, on behalf of the managers, then gave in evidence:—]

1. The certificate of the naturalization of Luke E. Lawless.

2. The protest of Charles Dehault Delassus against certain regulations of the intendant Morales.

3. The proceedings of the Supreme Court of the State of Missouri for a con-

tempt, in consequence of a newspaper publication mis-stating the opinion of the court in the case of Alexander Bellissime *vs.* James McCoy.

4. The Opinions of the Circuit Court of the county of St. Louis in Missouri in the cases of Chateau's heirs, and of Joseph Wherry and others *vs.* the United States.

Mr. Meredith, in behalf of the respondent, gave in evidence the publication in the Missouri Advocate by Luke E. Lawless signed "A Citizen."

Mr. Wickliffe, on behalf of the managers, gave in evidence the Explanatory Remarks submitted by Judge Peck to the House of Representatives.

EDWARD CHARLESS *called and sworn.*

The witness verified the following documents, printed by him in his newspaper at St. Louis; viz. the Opinion of Judge Peck in the case of Soulard's heirs.

An Opinion delivered by Judge Peck in Mackay Wherry's case.

Q. By Mr. Meredith. This paper (handing the witness a newspaper) contains a publication purporting to be a commentary on the opinion of the court in the case of Chateau's heirs; was it published by you?

A. Yes.

Q. Was this article handed you for publication by Col. Lawless?

A. I think it was published at his request.

[The witness was the nexamed as to what he had witnessed of the proceedings against Mr. Lawless: but it appeared that he had only been casually in court, for about five minutes, and could not distinctly recollect anything that had passed.]

WHARTON RECTOR, *called and sworn.*

Q. By Mr. Buchanan. Please to state to the court whether you were present during any of the proceedings in the case of Mr. Lawless, and if so, what took place?

A. I was in court but for a very short time. I accidentally happened in, and don't know that I have anything to state; but I will answer any questions that may be put.

Q. What did you hear the Judge say?

A. The Judge used the words "calumniator," "slanderer," "false," and so on. There was a great crowd, and I was not very near the Judge. When Mr. Lawless went to jail, I went with him, and was locked up with him in the jail.

Q. What was the manner of the Judge while delivering his Opinion?

A. He appeared to be in a pretty bad humor, I thought. He seemed in a very bad humor.

Q. How long was Mr. Lawless in jail?

A. I can't say, exactly. He was put in jail in the afternoon, and I staid with him till he was taken out, on a writ of *habeas corpus*, which was about dark, or after dark.

Q. How long were you in court, before Judge Peck closed his remarks?

A. I do not recollect.

Cross-examined by Mr. Meredith.

Q. How did the Judge apply the words which you say you heard him use?

A. It appeared to me, that if I had been in Mr. Lawless' place, I should have understood the words as applied to myself, when he said "slanderer," "caluminator," and so on.

Q. Was he talking of the publication signed "A Citizen"?

A. Yes; I think he was.

Q. What did he say of it?

A. I do not recollect. I was there so short a time that I know very little of what happened.

Q. How long was the Judge speaking?—*A.* I cannot say.

Q. Half an hour?

A. I was not in the house so long. I was there only for a few minutes: Perhaps ten minutes. I may have been in more than once.

Q. Were you there when the Judge concluded?

A. I was at the door, but not in the court room.

Q. Did you remain in the neighborhood of the court house, during that day?

A. No. I was in all parts of the town, attending to my own business. I was near the court house once or twice.

Q. Was there much excitement among the bystanders, when the people collected about the court house?

A. I thought so; a good deal.

Q. Did that excitement continue the whole day?

A. Yes, it did, among those that I was with; but I was in no large crowds.

Q. Was the excitement directed against the Judge?

A. There was a considerable split, I thought; though I was in the jail the most of the time.

Q. Did this excitement appear in the court?

A. I told you, that I was near the door. I heard nothing said about it in the court; but among the people outside, some said that the Judge was doing wrong. There were many that said so.

Q. Did any say he was doing right?—*A.* I do n't think I heard one.

Q. I thought you said there seemed to be "a split" among the people?

A. Yes. But there was none said he was doing right; some might have thought so; and I rather think there were some; but they did not say so.

Q. Did Mr. Lawless appear much excited, when he went to jail?

A. He appeared a little so. He said very little. He was n't more excited than any other person would have been. Being locked up in jail, I should think, would excite any man.

Q. Then he was much excited?—*A.* He did not tell me much about it.

Q. What happened when you got to the jail?

A. We walked in, and were asked to sit down. There were two or three chairs there; and then we were locked up.

Q. In what room were you asked to sit down?

A. I am not acquainted with the rooms in the jail. I do n't know their numbers, nor their names. There is a kind of cellar under the jail. We did n't go into the cellar.

Q. Was it in a room on the first floor?

A. Do you mean the first floor above the ground?

Q. Yes.

A. I think it was.

Q. Who was it that offered you chairs?

A. I believe it was the deputy marshal. He said, "Here are seats, gentlemen. You must make yourselves as comfortable as you can." He then turned the key upon us, and went off.

Q. Who else was with Mr. Lawless?—*A.* Mr. Souldard.

Q. Was the jailer in the room with you?

A. I do not know the jailer. I believe it was the deputy marshal.

Q. Where were the chairs procured?—*A.* I do not know.

Q. Were they in the room when you went in?

A. I think they were; though I am not sure. I can't say whether they were chairs: they might have been stools. Very like they were stools.

Q. How long were you in that room?—*A.* An hour and a half.

Q. Were you all that time in the room you first went into?

A. No. When we first went in, we went into the office of the Marshal, and from that we went into another room. I came out into the office afterward. Whether Mr. Lawless did, or not, I can't say.

Q. Were you in the jail when Mr. Lawless drew up his petition for a writ of *habeas corpus*?

A. No. I do n't think I was.

Q. Had you any conversation with Mr. Lawless on that day?

A. I do not recollect. I do n't think I had.

Q. Have you been long acquainted with Judge Peck?

A. I knew him in 1817. I have been absent since then.

Q. Have your relations towards each other been amicable, or the reverse?

A. For several years we were friendly. Since then there has been a small coolness between us.

Q. You say a small coolness. I ask, have you not felt great hostility to Judge Peck, for several years past?

A. I do n't know. We were once very friendly.

Q. Are you not now personally hostile to him?

A. I do not like the gentleman very well, myself.

[Here the examination of the witness closed, and the managers of the impeachment rested the cause on the part of the United States.]

The court then adjourned till Monday next at 12 o'clock.]

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Monday, January 3, 1831.

The court having been opened by proclamation, on motion of Mr. Tazewell, *Resolved*, That when the court adjourns, it will adjourn to meet on Wednesday next, at 12 o'clock.

Ordered, That the Secretary notify the House of Representatives accordingly. The Court then adjourned.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Wednesday, January 5.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel also attended.

Mr. MEREDITH addressed the Court as follows :—

Mr. Meredith, in stating the defence of the respondent, began by observing, that the honorable manager who had opened the impeachment, very properly adverted to the importance of the proceeding, both to the respondent and to the country. To the respondent personally, the case, he remarked, was undoubtedly one of the deepest interest in its character and its consequences. He stands, said the counsel, before this tribunal, charged by the representatives of the nation, with an arbitrary, oppressive, usurped act of judicial power, in utter disregard of his official oath, in violation of public justice, and in contempt of those great constitutional privileges, which are at once the boast and security of the American people. If the charge shall be sustained, he will be doomed not only to the scorn and reproach of all good men, but to the grievous penalties with which the constitution of his country follows conviction. He *must* be removed from the high and honorable station which he now occupies, and *may* be sentenced, in the discretion of his judges, to what has been no less truly than forcibly described, as “a perpetual ostracism from the confidence, and esteem, and honors and emoluments of his country.” Considerations such as these, although they are merely personal to the respondent, would of themselves challenge for this cause, the most patient and serious examination. But there are others of more general and far greater moment;—considerations which

deeply concern all, who believe that the firm and independent administration of the laws, is the surest safeguard of their liberties, and who have heretofore looked with confidence, in all time of danger, to that fortress, in which the constitution has planted the judicial power of this government. It is not my purpose, Mr. President, to press these considerations now;—but if the doctrine intimated in the opening, are those on which this impeachment is hereafter to be supported, questions must arise, which will mark this case with a deep and enduring importance. I forbear however to anticipate them, and confining myself to the prescribed limits of my present duty, I shall aim at nothing more than a concise statement of the general grounds of the defence, and of the evidence that will be offered in its support;—and for the purpose of pointing this statement to the questions which arise in the cause, I will take the liberty very briefly to advert to the questions themselves.

The transaction which has given rise to this proceeding, may be stated in a very few words. The respondent, as a Judge of the District Court of the United States for the district of Missouri, having pronounced an Opinion in a cause of great importance, and of general concernment to the people of that State, was induced, at the suggestion and request of the bar, to publish it in one of the newspapers of St. Louis. One of the counsel in that cause, not only professionally but personally interested in the decision, and concerned in like manner in a number of other pending cases of a similar character, and involving precisely the same principles, undertook to publish *anonymously* in another newspaper, not a reasoned criticism of the Opinion, but what he chose to term a “bare enumeration of *some* of its *principal* errors,” in eighteen specified instances of “*assumptions* as well of fact, as of doctrine.”

The respondent, regarding this publication as a misrepresentation of very mischievous tendency, proceeded against its author by attachment as for a contempt, and after a full and patient investigation, and a peremptory refusal on his part to disavow any intentional disrespect, the court sentenced him to a day’s imprisonment, and suspended him from practice for eighteen months.

This act of judicial authority, is charged by the article of impeachment as a high misdemeanor;—as a usurpation of judicial power, with an intention wrongfully and unjustly to oppress and injure the party against whom it was exerted,—to the great disparagement of public justice, and to the subversion of the liberties of the people of the United States.

In answer to this charge, the respondent avers, that the publication was designed and fitted to impair the general confidence in the intelligence and integrity of the court, and to disturb the course of public justice, by prejudicing the public mind with regard to suits then pending for decisions:—that he was therefore justified by the constitution and laws of the land in treating it as a contempt, and that in so doing, he was actuated by no evil or malicious intention, but solely by a sense of what he deemed an imperative duty.

The replication on the part of the United States, insists notwithstanding the answer, on the truth of the charge; and the issue being thus made up, the questions it presents are,

1st. Was a contempt committed?

2d. If so, had the court legal warrant to punish it, as it was punished?

And 3d. If not, was the respondent actuated by a sense of official obligation, or by the evil and malicious intention with which he is charged?

By an act of Congress passed in May, 1824, the District Court of the United States for the State of Missouri was vested with a jurisdiction over all claims to lands in that State under French or Spanish grants. This jurisdiction covered all unconfirmed claims, whether surveyed or unsurveyed, amounting to millions of acres, and held by a very great number of individual claimants. In looking back to the legislation of Congress upon this subject, the respondent, upon whom this jurisdiction was cast, found that very soon after the possession of Louisiana was delivered under the Treaty of Cession be-

tween France and the United States, special officers had been appointed, to adjudicate upon all claims to lands in that country under grants of either of its former proprietors. In 1805, these officers had been superseded by Boards of Commissioners, who were authorized, subject to the revision and approval of Congress, to ascertain the rights of all claimants, who should, before the 1st of March, 1806, file with the proper offices, notice of their claims;—in default of which, they were to be forever barred. This period he found, however, had been extended from time to time by successive acts, to the year 1814. In examining the provisions of these laws, it was impossible not to observe, that although Congress had manifested the most liberal disposition towards fair and honest claimants, they were fully apprized that there were others of a different description, who required the careful watch and guard of the agents of the government. It was seen, that in the act of 1805, the Commissioners were required to put to the strictest proof, all claims that they might suspect to be antedated and fraudulent; and that not choosing to rely altogether upon the circumspection of the Commissioners, agents had been appointed in behalf of the United States, whose especial duty it was made, to oppose before the several Boards, all such claims as they should deem false and fraudulent. The same apprehension and the same caution were displayed in the provisions of the act of 1824, by which the *legality* of the grants, and the *authority* of the officers by whom they had been made were emphatically noted, and the court was required, in all cases, to refer in its decree, to the treaty, law or ordinance under which the claim should be confirmed.

These apprehensions of meditated frauds upon the government were not confined to the Houses of Congress. Those who had turned their attention to the subject, and had investigated the character of these titles, were prepared to see numerous claims of this description pressed with boldness for confirmation, upon this new tribunal.

The respondent, thus warned by the public as well as the legislative voice, entered upon the discharge of his new and arduous duties;—arduous from the number and immense magnitude of the claims,—from the new and unexplored region of foreign law into which they were to lead him;—and above all, arduous and perilous too, at least to his judicial repose, from the powerful array of suspected claimants.

The first case submitted to the court, was that of Antoine Soulard, who claimed 10,000 arpents of land under an alleged concession in 1796 from Don Zenon Trudeau, Lieutenant Governor of Upper Louisiana. This was a *selected* case; not standing first on the docket, as Mr. Lawless in his testimony mistakenly supposed, but actually the last of the causes on the trial list. It was well chosen as a *test cause*:—the concession was alleged to be lost;—the claim had never been presented for confirmation to either of the former tribunals;—the grant was stated to have been made in reward for public services;—no establishment or cultivation of the land was pretended, nor, though the concessionary was himself the surveyor, had there been any location or survey until the latter end of February, 1804,—several months after the Treaty of Cession was publicly known, and but a few days before the possession of Upper Louisiana was actually delivered to the authorities of the United States. The case indeed presented almost every question that could arise under any concession. That it was considered therefore as a test cause, might be very reasonably presumed from its peculiar character, if indeed it had not been conclusively shown by the fact stated by Mr. Lawless in his examination,—that after its decision, nearly all the pending cases were withdrawn, and those claimants who had not filed their petitions, forbore to do so.

The cause was repeatedly and most elaborately argued at the bar, and all who felt an interest in the great questions which it involved, waited anxiously for the decision. With that decision, this honorable Court is acquainted. It is not my purpose now, to review its reasonings or its conclusions; but it may

be proper to observe, that although it mainly rested upon a want of authority in the Lieutenant Governor to make such a concession, there were circumstances connected with the case, which could not fail to excite strong suspicion in the mind of the respondent. The account given by Soulard of the loss of the papers;—the unsatisfactory excuse for not having applied to the Commissioners or mentioned this concession, when he was asking for the confirmation of others;—the frequent opportunities which he must have had, from his official station, to obtain a confirmation either from Trudeau, or the Intendant Morales;—the fact that though himself the surveyor of Upper Louisiana, he had neglected to survey his own concession, until only a few days before the country actually passed by delivery to the United States, and that when he did make the survey, he must have known that he had no legal authority to do so,—these were all circumstances fitted to excite a strong suspicion, notwithstanding the testimony in the cause, which it was seen, was the testimony of witnesses, directly interested to support and establish the claim;—all of them being claimants, and Delassus the chief among them, having actually a claim then pending and standing on the trial list immediately before that of Soulard, for 30,000 arpents of land.

It required no very prophetic spirit to foretel, the dissatisfaction which this decision produced among the claimants. It soon manifested itself in various ways; and the publication of "A Citizen" was only one of many attacks which discontent and disappointment aimed at the reputation and existence of the court. In this publication the respondent saw a gross misrepresentation of his Opinion,—a perversion of all its principles and conclusions, calculated to provoke public ridicule and contempt,—to excite the resentment of the claimants,—to prejudice the public mind in favor of the claims, and to bring the court into such utter disregard, as not merely to lessen its authority, but to break it down by the force of public opinion. Was he justified in these impressions? With regard to the alleged misrepresentation, we might confidently rely upon the result of a candid comparison between the publication and Opinion. But we rest not upon it alone. We shall show by intelligent and most respectable witnesses, who are familiar with the whole doctrine of the Opinion, that the respondent was by no means singular in regarding this publication as a misrepresentation,—a gross and palpable misrepresentation,—for we shall prove that *they* so considered it. And with regard to the effect which it was calculated to produce, the same witnesses will tell you, that if believed to be a veritable statement of the conclusions to which the court had come, those conclusions were so absurd and preposterous, that no rational mind could account for them on other ground than judicial corruption,—for no ignorance this side of idiocy, could have fallen into such egregious error. We shall prove not only the effect which this publication was so well fitted to produce, but the effect, which, as a matter of fact within their own knowledge, it did produce, upon the claimants:—that it destroyed their respect and confidence in the court, and converted their disappointment into a deep feeling of resentment. We shall show that these effects were not confined to the land claimants of Missouri, but that this publication, with others of the same character, which we will cause to be laid before you, planted distrust and dissatisfaction among the people at large, as evinced by memorials to Congress to deprive the District Court of its entire jurisdiction over land causes, and to vest it in another tribunal.

If this honorable Court shall upon this evidence believe that the respondent was justified, as the event proves that he was justified, in these apprehensions of the effects of the publication;—if he saw, or conscientiously believed that he saw, the designs of the author to be to produce these effects, what course, let me ask, ought he to have pursued? There was but one course, and painful as that was, every principle of duty, every obligation that rested on him to guard the sacred trust which his country had committed to his charge, compelled him to adopt it. He believed upon the authority of immemorial precedent, that he had the power to punish what he thus considered a gross attack upon the dig-

nity and authority of the court ; a power not founded on precedent alone, but absolutely necessary to the safety and liberties of the people, which are always best secured by a firm and independent administration of justice :—a power inherent in all courts of judicature, essential to their very existence, and which, though often exerted, and sometimes questioned, has been left untouched in every political struggle, and unfettered in every constitution that has been established in our country :—a power that in due time we shall be prepared to show, not alone by English decisions, nor even as to them, upon the arbitrary principles of monarchical government, but by a long and unbroken series of American decisions, by the opinions of the purest patriots and soundest lawyers that have adorned and enlightened our courts, has been maintained and vindicated upon every occasion that demanded its exercise.

This power, Mr. President, thus claimed and exerted by State judicatures, belongs no less rightfully to the courts of the United States ;—not by the provisions of any statute,—not by the principles of the common law, but by those of that universal law, by which in the very institution of courts of justice, everywhere, a power to preserve their authority,—to protect themselves from insult,—in a word, a power to promote the ends and objects of their creation, is necessarily implied. We shall show repeated recognitions of this principle in the highest court of our country, and a frequent exercise of their power, both in the Circuit and District Courts, in cases of much more questionable contempts, than that which is the subject of your present consideration. We say therefore, sir, that conscientiously believing the design and effect of the publication to be such as I have represented it ;—that confirmed in this belief, by the peremptory refusal of Mr. Lawless to disavow the intention with which the proceeding charged him, and that looking to the peculiar situation of the court with reference to this very important portion of its jurisdiction, the respondent was warranted, by the law of the land, and by every consideration of duty, in treating the publication as a contempt, and punishing its author.

But were it not so, is it possible for any candid and unprejudiced man to impute to the respondent the personal malicious intention, which is charged in the article of impeachment, and which must be believed before he can be convicted? What motive can ingenuity itself assign for the imputed intention to injure and oppress Luke Edward Lawless? He has told you that there was no previous misunderstanding between the respondent and himself, but that the relations subsisting between them, though not intimate were perfectly amicable. May such intention be presumed? are the respondent's natural temper and judicial deportment, arbitrary and tyrannical? However fancy may have been indulged, we shall show that as a judge, he is uniformly indulgent, patient, respectful and enduring; in his private character, mild, conciliating and equitable.

Is such intention to be inferred from the transaction itself? We shall exhibit his conduct throughout the whole proceeding, not as it has been exhibited to you, through the discolored medium of passion and resentment,—by witnesses confessedly hostile in their feelings, or who were present only at intervals,—but as seen by calm, attentive, intelligent and disinterested observers, who will testify that his manner was not more vehement than it always is, when his mind is deeply exercised ;—that he expressed nothing more than the indignation which every judge ought to feel when he sees the majesty of the laws contemned and defied ;—and that the language which he used was justly descriptive of the offence, and not a jot harsher than that of the mildest and wisest of the great examples which he followed.

We shall show, Mr. President, that in punishing this contempt, instead of being prompted by personal motives, he looked beyond Mr. Lawless, to the host of claimants by whom he was surrounded. . And that you may the better comprehend the peculiar situation of the court with respect to them, we shall feel ourselves obliged to open a source of evidence, that we trust may lead to discoveries of some importance to this government. I have already spoken of the

warning given by Congress to the delegated agents of the government, of the apprehended existence of fraudulent claims. That in the mass of these claims, a large proportion were unquestionably founded upon *bona fide* concessions of Spanish Lieutenant Governors, is undoubtedly certain. Their authority to grant them is another question. But that many of them,—claims to an enormous amount,—were, in the language of Congress, antedated and fraudulent, is no longer the subject of suspicion or conjecture. It will be remembered that the treaty of St. Ildefonso, by which Louisiana was retroceded by Spain to France was in 1800, but that Spain continued in possession of the country, that treaty remaining secret, up to the time of its delivery to the United States. It is shown by one of the documents accompanying the answer, that in December, 1802, the intendant Morales addressed a letter to Delassus the Lieutenant Governor of Upper Louisiana, apprizing him that the tribunal for granting lands in the province was closed, and commanding him to issue no more concessions till further orders. This instruction was never afterwards countermanded. It will be shown that Delassus regarded this order as suspending his power to issue concessions, and as suspending in like manner all surveys, which were, according to the practice, a part of the evidence that the applicant was obliged to present to the intendant, when he asked for his grant. It will be shown that on the 18th of May, 1803, Delassus communicated this order of the intendant to Soulard, the surveyor of Upper Louisiana, and that there was an actual suspension of surveys up to October or November, 1803. As soon however as the treaty of cession was known at St. Louis, it will be proved, that the surveys recommenced, and were prosecuted with incredible rapidity. In the short space of four months, that is to say from November, 1803, to March, 1804, when the possession of the country was actually delivered to the United States, the surveys alleged to have been made, fall little short of the quantity surveyed in the eight preceding years;—the difference being between 366-949 and 350-683 acres. We shall show that concessions to an immense amount were actually granted by Delassus not only after the suspension of his authority by the order of the intendant, but after he was apprized of the treaty, and down to the very period of delivering possession of the country; and that for the purpose of concealing these frauds the concessions were antedated.

We shall show that while during the first thirty years of the Spanish government, there was not a single grant exceeding a league square, nor a single concession for public services, and that the whole amount of grants during that period, excluding those under 300 arpents, did not much exceed 50,000 arpents, those made in the last few years of that government amounted to millions of acres;—that there were two grants alone to a single individual for 1,048,000 arpents, and many to a very large amount for pretended public services. But I forbear at this time to specify the particular cases of fraud, which it is our purpose to offer in evidence, in order to show the peculiar situation of the court, and the necessity of guarding its authority more watchfully, than under ordinary circumstances might have been necessary.

I have therefore very briefly stated the grounds of the defence, and the evidence by which it will be sustained. Deeming it proper to reserve all argument, until that evidence is heard, I shall now proceed, with the permission of the court, to call and examine the witnesses.

At the request of Mr. Meredith, the oath prescribed by the fifteenth rule was administered to

ROBERT WASH.

[Mr. Meredith here stated to the court, that the course pursued by the counsel for the defence, in examining the witnesses, would be governed by a desire, first, to present to the court an unbroken view of the immediate proceedings on the rules for an attachment on which the impeachment was founded. They should, therefore, in the first place, examine all their witnesses with a view to

that object, saving to themselves the privilege of calling the witnesses again, and examining them in relation to other matters.]

Q. Were you present at the proceedings on an attachment against Mr. Lawless for a contempt? and if you were, state what took place as particularly as you can?

A. From the length of the proceedings themselves, as well as from the length of time which has elapsed since they took place, it will be impossible for me to present a minute and connected relation of all that happened: but I will endeavor to state what is my recollection of the principal facts. I was present, I think, during the whole transaction. As I was passing along the street in the morning, having no knowledge of anything particular that was about to take place in the District Court, I was told, by some one who met me, that Judge Peck was about to "haul Mr. Foreman over the coals;" on hearing which I concluded that the proceeding must refer to a publication which had appeared in Mr. Foreman's paper under the signature of "A Citizen." I accordingly entered the court room, and found Mr. Lawless just commencing his argument. In the course of it he took several positions, which he argued at length. He contended that the article signed "A Citizen" presented no misrepresentation of the Opinion delivered by Judge Peck in the case of Soulard's heirs, but a true analysis or condensation of the Opinion: that the publication was not in its terms or character contemptuous, or libellous;—and that, if it were, it was punishable only by indictment. These are the only positions taken by Mr. Lawless which I remember. The argument upon them was of great length, and extended through the greater part of two days. In the range which he took he embraced almost everything as it seemed to me either immediately or remotely connected with the subject. As he was proceeding to show that the article did not misrepresent the Opinion, he took up the Opinion of the Court, and referred rather to it, than to the article signed "A Citizen." He read a paragraph in the Opinion, and then compared it with the part of the article, referring to the sections of the latter, not in the order in which they stood, but only according to that of the paragraphs in the Opinion to which they referred; by which process it happened that some portions of the article were omitted. His attention was drawn to these by the Judge. The remarks of Mr. Lawless seemed to me to invite and give rise to a sort of colloquy between himself and the Judge, the one stating the part to which he referred, and the other pointing out some other part, which repelled his argument. Mr. Lawless would first read a paragraph in the Opinion, and would then add expressions like these: "this is what the Judge said; now here *I say* so and so:" inadvertently betraying himself to be the author of the piece, in so plain a manner, that no person who heard him could entertain the least doubt of it; inasmuch that it frequently excited a smile amongst those who were present; and I saw the Judge himself smile more than once while Mr. Lawless seemed struggling to separate the character of the advocate from that of Mr. Lawless as author of the piece signed "A Citizen." He would say, "this clearly maintains what I say," when comparing the Opinion with the article. I thought that he was much embarrassed, by an effort to keep the two characters distinct, in which he had inadvertently presented himself. This was apparent throughout the whole examination of the piece. The Judge frequently adverted to passages in the article which Mr. Lawless had passed over, and would use expressions of this kind—"in this *you* are mistaken;"—"this has no authority;"—"this not only does not present the Opinion of the Court, but is against that Opinion,—directly in the face of it;"—"it is not true;"—"it is false." I cannot relate the points in which the Judge and Mr. Lawless were at issue, as the discussion was protracted and very tedious. Mr. Lawless went into other points of argument, and endeavored to show that the article was respectful in its terms, that it was not libellous, and implied no contempt of court; and that, if it were a contempt, the court had no jurisdiction which would enable it to punish in the summary way now threat-

ened. The argument, as I have stated, was extended through several days. Much of what I should term declamation, was indulged in ; not so much, however, by Mr. Lawless, as by the gentlemen who acted as his counsel. Mr. Lawless himself was more embarrassed than I had ever before witnessed : he argued with less spirit, and in a manner less warm and impassioned than I ever observed on any previous occasion.

Q. By Mr. Meredith. Who was it that concluded the argument on the rule against the printer?

A. Capt. Geyer.—During the continuance of these proceedings, the court adjourned to a different place from that in which it sat when the argument commenced. I attended, steadily, throughout the whole. I think it was on the second day, the court adjourned to a private dwelling, occupied by Mr. Penrose. The argument commenced in a large building known as the baptist church, in which the courts usually held their meetings during the summer. Mr. Lawless was followed by Mr. Geyer.—But the transaction occupied so much time, that there is some confusion in my mind, as to that point. If I had been asked the question, as isolated, and unconnected with other recollections, whether Mr. Geyer argued the case in the baptist church, I should have said that he did ; but when I recollect that Mr. Lawless argued both in the church and at Mr. Penrose's, I do not see how it is possible that Mr. Geyer should have engaged in the argument at the church, as I recollect no interlude in the argument of Mr. Lawless. Mr. Geyer spoke on the evening of the second day, insisting very much on the same points as Mr. Lawless, but adding also others, on which he dwelt with great zeal and earnestness, viz. the liberty of the press,—the liberty of speech,—the trial by jury,—the rights of a citizen,—the genius of our government,—the constitution of Missouri, particularly the bill of rights, all which he insisted would be violated, if the court should proceed to inflict the summary punishment threatened by the rule. He argued to show that the court had jurisdiction only of contempt committed in relation to a cause pending ; and that Mr. Lawless could only be punished as any other private citizen would be punished for the same offence. These points were dwelt on particularly by Mr. Geyer, and with more warmth than by Mr. Lawless. Throughout the whole of these proceedings the printer was present in court. He seemed to be very restless, and it was stated by persons about the court that he was anxious to surrender the author. On the third day he gave up Mr. Lawless as the author of the piece, and purged himself by disclaiming on oath all intention of committing a contempt. The rule then went immediately against Mr. Lawless, and I remained in court till it was returned. When he came into court, he seemed much excited, and asked the indulgence of the court for a postponement ; alleging that he was engaged as counsel in a cause then proceeding in the Circuit Court. As he was going on to urge this request, the court stopped him, and remarked that it would grant the indulgence asked for ; and it accordingly adjourned till the evening. In the evening Mr. Lawless appeared, accompanied by two or three gentlemen as his counsel.

Mr. Magenis commenced the argument, taking some of the same grounds that had been occupied by Mr. Geyer on the rule against the printer, and arguing with as much force as he could. He presented no new view of the subject, as it seemed to me, but reiterated the arguments employed by Mr. Geyer. After he had closed, Mr. Geyer argued the cause, again, at considerable length, observing that he now felt better prepared than on the last occasion. He went more at large into the subject, and proceeded in a more logical manner, stating the points he intended to make, and arguing them with much force and warmth.

Mr. Strother then rose ; but, after making a few remarks, he was touched by some one, (Mr. Lawless, I think, or else Mr. Geyer ; but I rather think Mr. Lawless,) upon which he leaned down his head, and after whispering together a short time, Col. Strother pitched the book out of his hand, and observed to the court that he had nothing more to say. This was about the middle of the day,

or rather later. The Judge delivered his Opinion at very great length indeed. He commenced by stating what he considered to be the settled law in relation to contempts. He referred to authorities, and dwelt upon the reason of the law, as well as the law itself; proceeding to show that an individual was as much liable to punishment for a consequential contempt, as for a contempt committed in the presence of the court. He then went on to show, from the tendency of the publication in question, that it amounted to a consequential contempt; being a gross misrepresentation of the Opinion of the Court, and calculated to destroy all confidence in its integrity and intelligence. Previous to this point of his argument, the Judge had worn goggles, in consequence of the weakness of his eyes; but he now pulled them off, and bound up his eyes; requesting Mr. Bates, the District Attorney, to read the article signed "A Citizen," paragraph by paragraph. As each paragraph was read, the Judge proceeded to deliver his comments upon it; showing it, according to his view, to be a total perversion and misrepresentation of the doctrines laid down in the Opinion. This process consumed from an hour to two hours. He then took up what he considered and treated as the popular arguments of Mr. Lawless' counsel, and endeavored to show that each point assumed was, in fact, an argument in his own favor; that so far from the liberty of the citizen being assailed, by punishing a contempt of court, if the judiciary of the country was ever broken down, there would soon be no liberty left to contend about. The Judge took great pains, and went over the whole ground. The delivery of his Opinion being concluded, the rule was made peremptory, and Mr. Lawless was sent for. It was then nearly dark:—the sun could not have been down, but it was dusky in the chamber where the court was held. When Mr. Lawless entered, he was told by the Judge, with a good deal of formality, as it appeared to me, that he had a right to have interrogatories propounded to him, by his answers to which he might purge himself of the contempts; and he was told that the interrogatories would be submitted to him, not for the purpose of fixing the contempt, but to enable him to free himself from the charge. He was then asked whether he would answer interrogatories if they were propounded to him? He answered promptly, that he should not. He spoke with much warmth, and earnestness, and in a manner which I deemed contemptuous to the court.

[*By the Managers.* Please to give us your facts only.]

I had not intended to volunteer an opinion.

[*By Mr. Spencer.* Give the words employed, as nearly as you can recollect.]

Mr. Lawless said that the court need not propound any interrogatories, for he would not answer them, if they were propounded. Mr. Lawless was a great deal agitated, and read a paper to the court, which he desired might be entered upon the record. I cannot say whether he called it a bill of exceptions, or what name he gave it. The Judge answered, that it could not be put on the record, and that if it were, it would answer no purpose; or something of that kind. On which Mr. Lawless remarked that it was of no great consequence,—and then threw the paper down, and seated himself. Mr. Magenis then took up the paper, and asked the Judge whether, if it should be signed by the bystanders, he would permit it to go on the record? The Judge appeared to me to hesitate, and seemed for some time at a loss what to make of the application, and then replied that it would answer no purpose, and could not go on the record in that shape either. An order of commitment was then given to the deputy marshal, who took Mr. Lawless to jail. I know nothing further of the transaction.

Q. By Mr. Mercedith. Do you recollect what was the argument of Mr. Strother, when he was interrupted in the manner you have described?

A. Not with any precision. He seemed to be conceding the fact of misrepresentation, and preparing to offer an apology.

Q. Will you state how long you have been acquainted with Judge Peck?

A. I have been intimately acquainted with him for twelve years.

Q. Have you often seen him on the bench?—*A.* Frequently.

Q. What is his usual judicial manner ?

A. I have ever considered him a very mild and patient Judge—particularly patient. He pays the greatest attention to the arguments of counsel, however protracted, and exhibits the most enduring patience on the bench.

Q. What is his usual manner, in the delivery of his opinions ?

A. It is very mild, and unimpassioned, except when he is very much interested :—whenever his mind becomes much engrossed, whether on the bench, or off of it, his manner becomes earnest, and impassioned :—his ordinary manner is rather phlegmatic.

Q. When the Judge was delivering his Opinion in the case of Mr. Lawless, did you see any difference in his manner from what it usually is, when his mind is much engrossed ?

A. I observed nothing more than what I considered perfectly natural under the circumstances. I have often seen him as much excited.

Q. Did you see anything in his manner which betokened passion or rage ?

A. I saw nothing of that kind : his manner was impassioned, but only because his mind was filled with the subject. His earnestness of manner was only that which seemed to grow out of the nature of the subject on which he was speaking.

Q. What is his temper when off the bench, as a man ?

A. It is particularly amiable. I know few men who have the reputation of being more so, either off the bench or on it.

Q. Did you observe, while the Judge was delivering his Opinion, that he used much gesticulation ?

A. A great deal of it.—He was frequently very earnest ;—often gesticulating with his left hand ; which is his manner when his mind is much engaged.

Q. Is this the case in private conversation ?

A. Always, when he is much excited. I have observed him at debating societies, at the bar, and on the bench. Whenever his mind is much filled with a subject, he employs his left hand.

Q. *By Mr. Wirt.* The earnestness he now showed was of the same kind ?

A. Precisely so.

Q. *By Mr. Meredith.* You did not perceive any marks of passion in his manner ?

A. I was not struck with any. But my partiality and friendship for Judge Peck, both as a man and as a Judge, may, perhaps, have blinded me.

Q. In analyzing the publication, did he speak of its character ?

A. Frequently.

Q. In what terms ?

A. In strong terms. He used the words “ false ” and “ malicious.” He frequently used expressions of this kind :—“ That is wholly unfounded : ” “ This is clearly false, and without foundation, except in the malice of the writer.”

Q. Did he address Mr. Lawless by name, or by gestures ?

A. He did not address him by name ; and his gestures were directed to a different part of the room from that in which Mr. Lawless sat. Remarks like those I have described occurred throughout the whole course of the analysis of the publication.

Q. *By Mr. Wirt.* You are a lawyer, and a judge, and are acquainted with the terms which, in the books, are settled as being libellous :—did he use these terms, or any beyond them ?

[This question was objected to by the managers, as a leading question. The proper inquiry would be “ what terms did the Judge employ ? ” After an explanation, it was agreed that the question should be put in the latter form.]

Q. What terms did the Judge employ ?

A. I do not recollect that he employed any unusual terms. He described the publication as a malicious attempt to bring the court into contempt. He employed the words “ false,” “ wilful,” “ malicious misrepresentation.”

Q. But always applied them to the publication ?

A. He used them only with reference to the publication, as I understood them.

Q. *By Mr. Meredith.* Do you recollect his making any allusion to a custom in China,—and how it was applied?

A. I remember the allusion well, and I think I remember the manner in which it was introduced : but as the fact has been represented differently by others, I feel somewhat shaken as to the accuracy of my recollection. Judge Peck, with a good deal of parade, as I thought, spoke of this argument which had been employed by the counsel of Mr. Lawless, viz. that the publication was harmless, since it would have to be passed upon by the public, who, having the Opinion and the commentary both before them, could look at both, and see, for themselves, whether the criticism was merited, or not. Those who compared the two would see whether there was any misrepresentation, or not. In reply to this argument, the Judge remarked, that the Opinion was in one paper and the strictures in another ; that one would be read by one class of readers, and the other by a different class ; that one might go into one quarter of the world, and the other into a totally different quarter ; that the two might never be seen together ; or if they were, that many persons would read the one and not the other ; one would travel on the wings of the wind, while the other went halting along, and that if the argument was a sound one, there would be no sense in that law or custom of China by which a calumniator was doomed to have his house blackened. The idea struck me at the time as new.

Q. Do you recollect at what time of day it was that Mr. Lawless asked the indulgence of the court for a postponement?

A. I think it was in the forenoon, on the return of the rule.

Q. You say that Mr. Lawless was going on to urge reasons in support of his request, when the court stopped him, by granting it at once ?

A. Yes.

Q. He then left the court ?

A. I think he did, and that the court adjourned till evening.

Q. To what time in the evening?

A. I cannot recollect ; and my persuasion that it was adjourned till evening, and not till next morning, is more an inference from the extent of the argument afterwards, than the effect of any distinct recollection.

Q. Have you a clear recollection of what passed in respect to the interrogatories? Was the offer of interrogatories made by the Judge to Mr. Lawless? or did not Mr. Lawless anticipate that offer, by declaring that if interrogatories were tendered he would not answer them?

[This question was objected to by the managers as a leading question. The witness had already said that the Judge did make the offer of interrogatories.]

A. My recollection is, that the Judge informed Mr. Lawless that he had a right to purge himself from the contempt, and that the interrogatories would be offered for that purpose, and not with a view to fix the contempt. I am certain that no interrogatories were tendered.

Q. Was the court room much crowded during these proceedings?

A. It was, during the proceedings generally.

Q. Were there many round the court house outside?

A. I cannot say, as I do not think that I left the court room during the argument.

Q. *By the Court.* Have you any knowledge of a case in Missouri, except the case of Luke E. Lawless, where a citizen of the State has been fined and imprisoned, or otherwise punished in a summary way, for publishing in the newspapers, any review or criticism, of the opinions of courts of justice, in causes which had been finally decided?

A. I have no direct information on that subject. I know there are cases to which I suppose the question refers, but I know them only from the record, and the information of gentlemen concerned.

Q. By Mr. Meredith. Do you recollect an attachment being issued by one of the courts of Missouri, against Mr. Lawless, in the case of *Bellesime vs. McCoy*?

A. That is one of the causes which I supposed to be referred to in the question. I was not then in court; and what I know about it is only from the record, and the information of others.

Q. During the whole course of the proceeding against the printer, was there not much excitement among the members of the bar, particularly those engaged in the argument?

A. Strong feeling was indulged in, but I am not aware that it was confined to members of the bar. Much interest was felt in the proceeding, and the room where the court sat was crowded.

Q. Was not the argument of the counsel of an impassioned kind?

A. It was very impassioned.

[The managers objected to this question, and the counsel stated that it had been asked through inadvertence.]

Q. By Mr. Wirt. I understand you that it was in answer to an argument at the bar, that Judge Peck introduced his reference to the Chinese mode of punishing a calumniator?

A. Such is my recollection.

Q. The frame of the Judge's argument was, that * * *

[Here the managers interposed, and objected to the form of the question, and insisted that the witness ought only to be asked "what the argument was?"] This being agreed to, the witness replied as follows:]

Q. What was the Judge's argument?

A. The Judge, in answering the argument of counsel, that the publication was harmless, since the poison would carry its antidote with it, went into a refutation, and said, that the one publication might travel on the wings of the wind, and the other go halting along; and concluded with remarking, that if the argument was a sound one, there would be no propriety in the law or custom of China which directed that the house of a calumniator should be blackened. The remark was introduced without any personal reference whatever.

Cross-examined by Mr. Buchanan.

Q. You stated that when Mr. Lawless was before the court endeavoring to prove that the article signed "A Citizen" was not a misrepresentation of the Opinion of the Court, he was interrupted by Judge Peck;—were not these interruptions frequent?

A. They were frequent.

Q. Instead of the Judge waiting, and hearing the argument of the counsel, did he not frequently enter into argument with Mr. Lawless, at the bar?

A. You misapprehend the meaning I intended to convey. I said that the manner of Mr. Lawless seemed to invite a colloquy with the Judge. He would read a clause of the Opinion, and then ask, Is it not clear that I am justified in this specification of the article, putting his argument into a shape which seemed intended to call out an answer from the Judge.

Q. You say, then, that it is your opinion, if a lawyer when arguing before a court, puts a question * * *

[Here the counsel for the respondent interposed.—We thought that the managers wanted no opinions.]

Q. You say, then, that while Mr. Lawless was going on, arguing from one part of the publication, the Judge would stop him, and point to other parts which he had omitted?

A. That was the manner of proceeding.

Q. And these interruptions were frequent?—*A.* Frequent.

Q. Did not the Judge frequently use these expressions, "This is false;"—"This is a misrepresentation?"

A. These words were used, but I cannot say how they were made to apply. The Judge would say, "you have no warrant for this;" "that is a clear misrepresentation;" "this has nothing to stand upon;" "instead of representing the Opinion, it is directly against the Opinion."

Q. And this, while Mr. Lawless was proceeding with his argument?

A. It was as I have already represented. I do not know that Mr. Lawless was ever interrupted in the course of a sentence. It was rather a sort of side-bar argument.

Q. You say that Mr. Lawless was embarrassed by endeavoring to sustain the character of counsel, as distinct from that of author. Did not Mr. Lawless make it a distinct point of his argument that the publication was respectful in its character, and implied no contempt?

A. I so understood him. He argued to show that it was neither contemptuous, nor libellous.

Q. How long was the Judge occupied in delivering his Opinion, after the argument was closed, in the case of the rule against Mr. Lawless?

A. I should say from two to three hours. It was very long. He delivered no opinion on the argument of the rule against the printer.

Q. By the Court. You said the *manner* of Mr. Lawless, at the time of his appearance on the attachment, was *contemptuous*: do you mean to say that he was then guilty of a legal contempt? And if so, state particularly in what that contempt consisted?

A. I did not mean to say that he did, at that moment, what would subject him, of itself, to punishment for a contempt; but his manner was warm, and he spoke with a tone and a countenance which showed much passion.

Q. By Mr. Spencer. Repeat his words.

A. He said that he should not answer interrogatories if they were propounded. They need not be propounded, for he would not answer them.

Q. What was his manner, in saying this?

A. Do you wish me to imitate his manner?

Q. Yes. Show the manner in which he spoke.

A. I do not know that I could represent it, even were it respectful to the court to do so. His manner was that of a man in a passion, and each one can judge for himself what that would be.

Q. By the Court. Did Mr. Lawless complain of interruptions by the bench, while arguing against the rule on Foreman?

A. I have no recollection of any such complaint.

Q. By Mr. Buchanan. Did not the Judge repeatedly make use of the terms "libellous," "malicious," "false," "calumnious," and "misrepresentation?"

A. Most, if not all, of those terms were used. I cannot say whether all of them were repeated more than once. I think some of them, very probably, were.

Q. What was the manner of Mr. Lawless, while the Judge was delivering his Opinion?

A. It was altogether respectful, as far as I saw: but he remained only a short time in court. While he remained there, I saw nothing remarkable in him, one way or other. He did not appear to be much moved, though I thought I saw an expression of interest in his face.

Q. Did he speak one word?—*A.* Not to my knowledge.

Q. When Mr. Lawless said that he would not answer interrogatories, had not the Judge just finished the delivery of his Opinion?

A. He had completed the delivery of his Opinion, and Mr. Lawless had been sent for into court.

Q. Did not the Judge tell him that "he might, if he pleased, now swear that he had had none of the intentions which had been attributed to him?"

A. I have no recollection of any expressions of that kind. Interrogatories were distinctly offered, but what was to be their terms or tenor was not stated.

Q. You have said that you were induced, by what you have heard here, to

doubt the accuracy of your recollection, as to the application made by Judge Peck of the Chinese custom. What have you heard here?

A. I have heard men of great integrity and respectability, say, that they understood the Judge as having used that illustration with a personal application to Mr Lawless. And they are men who, I am sure, would not knowingly state anything that is untrue.

Q. Could you perceive how this reference to the Chinese custom tended to illustrate the Opinion?

A. It seemed to me rather a flourish. I spoke of it at the time as being, in my judgment, somewhat forced. It has been always so remarked on, as far as I have mentioned it. I saw no direct application that it had to the Opinion.

Q. *By Mr. Storrs.* How long had Mr. Lawless proceeded in his argument before the court, till he betrayed himself as the author of the publication?

A. Not far. He soon uncovered himself.

Q. The Judge you say smiled?—*A.* Yes.

Q. Was it after this, that the Judge said "This is false"?

A. Clearly. It was early in the cause that he betrayed himself as the author.

Q. Was the use of the terms you have mentioned after the Judge had smiled in the manner you described?

A. Yes, Sir, certainly.

Q. You have said that the counsel for Mr. Lawless used some declamation. Can you inform the court what it was?

A. I have endeavored already to state the topics.

Q. Which part of their argument is it that you refer to?

A. That in which they dwelt on the liberty of the press, the liberty of speech, the trial by jury, the general rights of a citizen, and the constitutional guaranties: all these were invoked and repeated over and over again with great warmth.

Q. You say that the manner of the counsel was impassioned. Do you mean to say they were in a passion?

A. Not at all, but that they were much warmed and animated by the subject.

Q. Yes, and sincere. They appeared to be sincere—did they not?

A. I saw no reason to doubt it.

Q. Did you see any rudeness shown to the court by the persons in the room?

A. Nothing of the kind.

Q. Did you hear any improper words among the bystanders?

A. Not a syllable within the court.

Q. Any on the part of the bar?—*A.* Nothing of the kind.

Q. What, then, was the excitement of which you speak?

A. That which grows out of the discussion of an interesting subject; when the people press round, with eagerness, to hear what is said by the lawyers and the judge.

Q. Was there any other excitement than this?—*A.* None other.

Q. What books did the Judge cite in the course of his Opinion?

A. Several. I do not distinctly remember them all. I remember he cited Blackstone, and Johnson, and Dallas.

Q. Did he send for any books into court?—*A.* I do not recollect that he did.

Q. Did he examine any books in the court?—*A.* Not that I remember.

Q. Were the Laws of the United States there?—*A.* I cannot say.

Q. Do you mean that he referred only to the books, or did he cite particular passages?

A. I think he named passages and pages.

Q. Did you ever see the manner and gesture of the Judge, when on the bench, as impassioned as on this occasion?

A. I think not, on the bench.

Q. I understood you to say that he spoke of the malice of the writer of the article?

A. The terms "false," "malicious," "misrepresentation," were used in reference to the publication.

Q. You said that the Judge, on one occasion, made use of this expression—"This has no foundation but in the malice of the writer."

A. I think he did.

Q. You say that the Judge, with "some parade," noticed certain arguments of counsel. What did you mean by "some parade."

A. That he used more words than were needed ; that he travelled out of his way to collect what are sometimes termed—flowers of rhetoric.

Q. Did he interrupt Mr. Lawless after something he had said with these words, "which is false"?

A. I have no recollection of that.

Q. *By Mr. Spencer.* To whom did you understand the terms you have mentioned the Judge as using, to apply ?

A. I never doubted their application.

Q. Were they applied by the Judge to the writer, or not ?

A. They had no personal application.

Q. Had not Mr. Lawless been previously proved to be the writer ?

A. He had been given up by Mr. Foreman as such.

Q. Were not the terms then applied to Mr. Lawless as the writer of the article ?

A. There was nothing personal in the form of the remarks, but all the terms that were used I applied to the author, and I was sure that Mr. Lawless had written the article.

Q. Was Mr. Geyer restricted, in any part of his arguments, from touching on certain points ?

A. Not that I recollect.

Q. Did not the Judge say that the question, whether the article was libellous or not, was not then open to argument ?

A. I have no recollection of any such thing.

Q. After Mr. Lawless declined to answer interrogatories, did you hear the Judge remark that the refusal was a new substantive contempt ? or that it aggravated the contempt already committed ?

A. No. I do not recollect any such remark.

Q. Do you not think it probable that if the Judge had made such a remark, it would have struck you with force ?

A. Very probably ;—but I have no recollection of any such expression.

Q. *By Mr. Wirt.* You have been asked about the Judge's smiling at the embarrassment of Mr. Lawless : was that smile confined to the Judge ? or was it general ?

A. It pervaded the court, generally.

Q. Were the topics of the liberty of the press, the liberty of speech, the trial by jury, &c. presented in the frame of a regular argument, or were they often repeated, and much dwelt upon ?

A. In Mr. Geyer's last argument they were treated methodically ; but they had been repeated by the other counsel over and over again, in every possible aspect, as it seemed to me.

Q. *By Mr. Meredith.* Do you recollect, after the Opinion of the Court was delivered in the case of Mr. Lawless, whether there was not a recess of the court ?

A. I cannot state :—it was pretty late in the evening when Mr. Lawless was brought into court.

Q. Do you not recollect the length of the interval between the conclusion of the Opinion and the appearance of Mr. Lawless ?

A. I do not :—but the Circuit and District Court were near each other, and the interval could not have been very great.

Q. *By Mr. Spencer.* Was there any interval between the conclusion of the

arguments of counsel, and the delivery of the Opinion of the Judge ? or did the Judge proceed immediately ?

A. My impression is that the argument was concluded in the morning, and that the Opinion was delivered in the afternoon. I think there must have been a recess after the argument was concluded.

Q. Have you been long in habits of intimacy and friendship with Judge Peck ?

A. For more than twelve years, in close friendship and intimacy.

Q. *By Mr. Buchanan.* At the time Mr. Strother took his seat, as you have stated, did not the Judge immediately commence the delivery of his Opinion ?

A. I cannot state whether immediately, or not. It was late in the evening when he concluded, and I believe he commenced as soon as the court opened after the recess.

Q. Your impression, you say, is, that immediately after Col. Strother took his seat, the court adjourned ?

A. That is not what I said ; but that is the conclusion to which I now come.

Q. Then you have no Opinion, strictly, on the subject ?

A. None from recollection :—it is rather inference.

Q. Did you not remain in court till Mr. Lawless was brought in ?—*A.* Yes.

Q. How long was it before he appeared ? was it fifteen minutes ?

A. It was not long :—it may have been five, ten, or fifteen minutes.

Q. What are the usual hours of session in the District Court ?

A. I cannot state—our courts generally meet at nine, and adjourn from 12 to half past 2 :—they then sit, usually, till candlelight.

Q. Of what court are you a judge ?—*A.* Of the Supreme Court of Missouri.

Q. Were you, at that time ?—*A.* I was.

Q. How long have you been judge of that court ?

A. Since the spring or summer of 1825.

Q. *By the Court.* When Col. Lawless read the paper, which has been called a bill of exceptions, was it pronounced by the Judge, or supposed by you, to be intended as a new contempt ?

A. I never regarded it in that light, nor was anything said by the court that I remember which induced me to believe that the court so regarded it.

[Here the cross-examination closed.]

The Court then adjourned to 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES *vs.* JAMES H. PECK.

Thursday, January 6.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel, also attended.

Mr. Meredith stated that the counsel for the defence had just been informed, that one of the witnesses who remained to be examined was very anxious to be discharged, on account of the state of his family. Out of consideration for these circumstances, they were willing, so far as respected the witness, to waive the course which they had prescribed to themselves, and to go through with his testimony at this time.

JOHN K. WALKER *was then called and sworn.*

Q. *By Mr. Meredith.* Were you present, during any part of the proceedings on the two rules made on Mr. Foreman and Mr. Lawless, for a contempt of court ?

A. I was in the court house, several times, during the discussion on the rule against Mr. Foreman the printer: but during only a short space at any one time. I was in the court house three or four times during the proceedings against Mr. Lawless, but in that case also it was only during a short time at

once. I have a very indistinct recollection of what was said. I was in the court house or near the door, while the Judge was delivering his Opinion. I was two or three times there, but cannot give any connected relation of what passed.

Q. Are you the Sheriff of St. Louis County? and were you so at that time?

A. Yes.

Q. Have you been acquainted, for a considerable time, with Judge Peck, as a Judge?

A. I have known him ever since he has been on the bench, and I knew him before; ever since the year 1818. I have frequently seen him on the bench.

Q. Did you see anything in the manner or deportment of the Judge, while delivering his Opinion in the case of Mr. Lawless that was different from his usual manner?

A. The Judge's manner of arguing, both at the bar, and on the bench, is always earnest; but I thought it more so, then, than I had ever observed before.

Q. Did you see anything in his manner that looked like passion?

[The form of this question being objected to by the managers, it was waived; and the following question was asked:]

Q. What was the manner of the Judge?

A. He showed more excitement than I had ever before seen in him, when on the bench. There was one other occasion, on which I saw him excited a good deal, but not so much as at this time. I do not recollect what was the cause, but it was when the court sat in the baptist church; I heard it remarked, at the time, that the Judge seemed to be somewhat excited.

Q. His usual manner, you say, is warm and vehement?

A. I think so. That was his manner at the bar. I frequently heard him while he was at the bar.

Q. Was there anything more to be observed, on this occasion, than greater earnestness?

[This was objected to as a leading question, and waived.]

Q. Were you present while the Judge was commenting on the article signed "A Citizen?"

A. For a very short time, if at all, and not more than five minutes at any one time.

Q. After the commitment of Mr. Lawless did you see him in prison? and in what room was he confined?

A. I was not in the jail when Mr. Lawless was brought there, but I met Mr. Simonds, who is the deputy marshal, and is also my deputy, when he was taking Mr. Lawless to jail. I went to the jail twenty minutes after, and found Mr. Lawless in my office, which is kept in the jail: such, at least, is my impression. If I did not find him there, I immediately led him into the office; but I think I found him in the office, writing.

Q. How long was this after you left the court house?

A. A short time. As I was going to the court house, I met Mr. Simonds, and I think I returned to the jail in about twenty minutes.

Q. In what room was Mr. Lawless confined?

A. In the room which adjoins my office.

Q. Is that room used for the confinement of debtors, or of criminals?

A. We ordinarily keep debtors in that room; but it has sometimes happened that criminals have been confined there. It is, ordinarily, considered as the debtors' room.

Q. Is that the only room employed for the confinement of debtors?

A. There is no particular room appropriated by any rule for that purpose; but this room is the most comfortable, and the least safe.

Q. What grade of criminals are ever confined there?

A. Those convicted of small crimes, such as petit larceny: though there was one case, in which a man convicted of murder was confined there, for three or

four days, during the day-time ;—at night he was removed to the cells. This happened a short time before Mr. Lawless was committed. There are five rooms in the jail, three below, and two above ; and of the rooms above, that into which Mr. Lawless was put is the least secure.

Q. Were there any criminals in the room at the time?

A. No. Nor had there been, for some time before ; I do not know how long.

Q. This room, then, and the other above, are appropriated to debtors?

A. There are three rooms intended for the confinement of criminals, and they are under ground ; the other two are usually employed for the confinement of debtors ; especially this one, as being near my office, and less secure than the others. When it is necessary to confine criminals up stairs, they are generally put into the other room.

Q. You never mingle debtors and criminals in the same apartment ?

A. That is forbidden by our law, and is never done when it can be avoided. We are not however always able to avoid it.

Q. Was any particular order given by the Judge as to where Mr. Lawless was to be confined ?

A. Not any. [*Judge Spencer.* It is not pretended.]

Q. Have you had any conversation with Mr. Lawless, since then, as to the proceedings in his case ? if you have, state it.

A. I heard him mention the subject, at the time, and on one occasion, I remember, he mentioned to me that if Judge Peck would pledge himself to meet him, and give him a chance at him so, as soon as he recovered his eye-sight, he would let him off from going to Washington city.

Q. What did he say as to the impeachment against Judge Peck ?

A. This conversation took place before the impeachment. It was subsequent to the presentation of Mr. Lawless's first memorial to the House of Representatives, and when leave had been given to withdraw his petition. I think that he stated why the memorial had not been acted upon, saying that it was in consequence of the want of time, or the short session, or something of that kind : I do not distinctly recollect the particulars.

Q. Did he say anything farther about the prosecution ?

A. He said what I have already stated, that "if Judge Peck would pledge himself to meet him, he would let him off from going to Washington." To this I replied that I did not suppose the Judge would do this : on which Mr. Lawless said, "By God, then, I will have him before the Senate." I think those are the very words he used, though I cannot be perfectly sure.

Q. While these proceedings were going on, were there many persons about the court house ?

A. A great many.

Q. Was there much excitement among them ?

A. They seemed a good deal interested—they were engaged in discussing the matter, especially round about the door.

Q. When you were obeying the writ of *habeas corpus*, and taking Mr. Lawless from jail to the Circuit Court, was not the excitement such as to lead you to take measures of precaution ? and if so, what were they ?

A. The writ was returned some time between sundown and dark ;—there were a good many people round the court house ; and I did then, (what I do frequently,) put my pistols in my pocket. But there was no occasion to use them, or anything like it.

Q. Is it your general habit, when serving processes, to arm yourself ?

A. I do it frequently ; not generally though. I think I did it at that time from a remark made by Mr. Simonds, the deputy sheriff.

[The managers objected to the witness' stating any conversation of Mr. Simonds.]

Q. Had Mr. Simonds carried Mr. Lawless to jail ?

A. Yes ; he was deputy marshal as well as deputy sheriff.

Cross-questioned by Mr. Storrs.

Q. How long have you been sheriff of St. Louis County ?

A. I was elected in 1822, and went out in 1826.

Q. Are debtors bailable in Missouri?

A. Yes—for the bounds.

Q. Do you admit those to bail who are imprisoned for contempt?

A. I do not know that I have ever had any cases of that kind. I do not recollect that in the time of my predecessor, he had a member of the bar committed for contempt by a justice of the peace. I was then deputy sheriff.

Q. Did you consider Mr. Lawless as committed to your charge as a criminal? or as a debtor?

A. I considered that it was my duty to keep Mr. Lawless—I suppose he may have been committed as a criminal :—he certainly was not as a debtor.

Q. Are commitments for contempt in Missouri considered as criminal commitments?

[The counsel for the defence objected to this question. The sheriff might not be examined as to what was the law.]

Q. Did you keep Mr. Lawless as a criminal? or as a debtor?

A. I thought it my duty to keep him, and I thought that if I put him in my office, it would be satisfying my duty.

Q. Were you ordered to keep him in close confinement?

A. I was not. I was ordered to keep him.

Q. Would you have admitted him to the bounds?

A. I would not.

Q. You are the sheriff. How did you think the prisoner was to be kept? As a criminal?

[Here the counsel for the defence interposed, and the question was waived. Mr. Storrs however insisting that it was a proper one.]

Q. Is it your usual practice to keep criminals confined in the rooms below?

A. If they are committed for serious offences. They are sometimes kept there for petty larceny, when the jail is crowded.

Q. Do you keep criminals in the upper rooms?—A. Occasionally.

Q. Did you see anything in the bystanders during the proceedings against Mr. Lawless which indicated any intention of rudeness towards the court?

A. I do not think I did.

Q. When you were carrying the *habeas corpus* into effect, did you see anything among the people collected which indicated any purpose of disrespect to the court, or its officers?

A. No.

Q. What persons were present when Mr. Lawless spoke about the Judge giving him a meeting?

A. None but ourselves.

Q. Are you an intimate friend of Lawless?—A. No.

Q. Are you in habits of particular confidence and friendship with him?—A. No.

Q. Where did that conversation take place?

A. In Mr. Lawless' garden, when I went there to collect taxes.

Q. You say that Mr. Lawless said, "If the Judge would meet him and give him a chance at him so, he would let him off from going to Washington city; but, if not, by God, he would have him before the Senate?" Will you swear that these were the very words?

A. I am very certain they were.

Q. When did you speak of this?

A. I do n't recollect exactly: I have spoken of it frequently.

Q. To whom?

A. I do n't remember all the persons. I mentioned it to Mr. Gamble, shortly

after. I cannot say exactly to whom else. I mentioned it to General Ashley, at the post office. It was generally mentioned when this impeachment was talked of.

Q. How long after the conversation took place?—*A.* I cannot say.

Q. On the same day?—*A.* I do not know that it was.

Q. What circumstance is it which induces you to believe that it was fifteen or twenty minutes from the time you met Mr. Lawless going to jail till you afterwards saw him there?

A. I recollect, I was going down the street when I met him, and I returned to the jail shortly after.

Q. Do you remember any circumstances that happened in the mean while?

A. I do not.

Q. Did you serve any process in the mean while?

A. I do not think I did:—I am not certain.

Q. Are you very certain as to the time?

A. It did not seem to me more than twenty minutes. That is my impression.

Q. Did you see Judge Peck after you met Mr. Lawless, and before you returned to the jail?

A. I do not think I did.

Q. *By Mr. Buchanan.* Was this conversation with Mr. Lawless after the short session of Congress?

A. It was in 1828 or 1829. I rather think 1829. I think I called on Mr. Lawless to collect the taxes of 1828.

Q. Has the room in which Mr. Lawless was confined ever been employed for the confinement of female felons?

A. There have been some in that room, I believe, since I have been out of office; but not while I had charge of the jail.

Q. When I put the last question, you were about to state something.

A. In the conversation with Mr. Lawless, he was speaking about the hardship of his suspension. He was showing me his improvements, and said that, but for this, he might have made others: that it had interfered very much with his business.

THE HON. SPENCER PETTIS, *called and sworn.*

Q. *By Mr. Meredith.* Were you present during the proceedings on the rule against Foreman, the printer, and on those which subsequently took place on the rule against Mr. Lawless? If you were, state everything that took place.

A. I was present at the time the court delivered its Opinion in the case of Souldard's heirs, *on* or about the 1st of December, 1825. The Judge entered at considerable length into a statement of the reasons for the decree, and occupied from one and a half, to two hours, in doing so. Several members of the bar were present, and I think I saw one taking notes. I understood it to be the wish of the members, generally, that the Judge should publish his Opinion. I heard nothing more on the subject until March, 1826, when I saw the Opinion published in the Missouri Republican. I read it, and a few days after saw an article signed "A Citizen," containing strictures on the Opinion. I read that also. I heard little said about it, though I had, myself, some conversation on the subject. I knew nothing of any intention in the court to take notice of the article until the morning of the day on which the land court was held. I was not present when the first step was taken, but was informed that the court was about to proceed against Foreman. I went to the court house, and when I entered, Mr. Lawless was arguing on the rule against Foreman. The court then sat in the baptist church. Mr. Lawless spoke at great length. The grounds which he took I do not distinctly remember; but his great object seemed to be to show that the article in question did not misrepresent the Opinion of the Court. That was the burden of his argument. There was nothing in the discussion which

struck me forcibly, except the fact, that the court and Mr. Lawless both seemed perfectly to understand who was the author of the article. Mr. Lawless frequently observed "In my strictures *I say so and so.*" While the Judge in directing Mr. Lawless' attention to particular clauses of the article would reply, "*But you say so and so.*" It was a matter of considerable amusement to the bar; but I do not remember which of them it was, the Judge or Mr. Lawless, that first made the suggestion: both, however, made remarks which plainly showed that they knew who the author was. Mr. Lawless also spoke, I think, on the general doctrine of contempts. After he had finished, Mr. Geyer made an argument at the same place. I distinctly recollect that they both argued at the church. Mr. Geyer, I think, said nothing on the question of misrepresentation; but took the general ground, that, whether the article did, or did not, misrepresent the Opinion, it was not a contempt, and could not be punished as such. He drew to his aid the constitution of Missouri; particularly those parts of it referring to the liberty of speech, the liberty of the press, and the right of trial by jury. I was not in the court house all the time while the argument was going on in the case of Foreman. The Circuit Court was then in session, and I was backwards and forwards first at one court and then at the other. (The places where the two courts sat were not more than two hundred yards apart.) I do not remember the argument of Mr. Geyer and Mr. Lawless, when the court was afterwards removed to Mr. Penrose's; but I think they both argued in much the same manner as they had done before. I have not a very distinct recollection of the argument. I was in the court house when it was concluded, and I do not remember that anything was said by the court on any opinion delivered at length in the rule against Foreman. My understanding was, (though I do not know how I got it) that Mr. Foreman supposed the Judge was about to make the rule absolute against him, and he gave up Mr. Lawless as the author. When the rule was made against Mr. Lawless, the subject seemed to acquire more interest. I was present when the argument on this latter rule was commenced, and, I think, at every subsequent stage of the proceeding. My impression is, that two days, or parts of days, were occupied in the argument on the first rule; and parts of two days in that on the second rule. When Mr. Lawless appeared before the court, on the rule against himself, it was in the early part of the day. I do not remember what was said about allowing him time, but I think the argument commenced in the afternoon, (it is the custom of the courts to have an adjournment for dinner, and sit a second time.) This was on the third day, counting from the beginning of the proceedings against Foreman. Mr. Magenis, I think, opened the argument for Mr. Lawless. Something was said by the Judge about Mr. Magenis not being permitted to argue the question of misrepresentation, and he then went on and argued the questions of contempt, of the jurisdiction of the court, and its power to punish. Mr. Geyer followed, and took the same grounds, insisting that it was not a contempt to be punished by the court; and bringing to his aid the constitution of Missouri. I remember distinctly, that the argument of Mr. Geyer was more inflammatory, and declamatory too, than his first argument. There was a good deal of excitement, and he seemed to have caught it. Both he, and Mr. Magenis, argued the doctrine of contempts, and protested against the power of the court to proceed in that way. They both argued that as the cause in which the Opinion of the Court, commented on by Mr. Lawless, was delivered, was not pending at the time of the publication, there was no contempt, which the court could punish as such. Mr. Strother then spoke for a short time, but was soon stopped by Mr. Lawless or his counsel. I thought the reason was—

[Here the managers interposed, and objected to hearing the thoughts and opinions of the witness.]

Mr. Strother alluded to the authority of the Supreme Court of the United States, and cited the case of Burr, *ex parte*, 9 Wheaton. The Judge said that he could furnish him with the book. Mr. Strother was citing this case to show

that the court had no power to suspend, as I understood it. Some conversation then took place between him and Mr. Lawless, and he stopped.

Q. By Mr. Spencer. Did he rely on that case?

A. He mentioned it, with a view, I think, to show that the court had no right to suspend. The Judge said that he had the book, and I think it was sent for, and brought into court; but nothing more was said about it. On the second day of the argument on the last rule, the Judge commenced delivering his Opinion.

Q. By Mr. Wickliffe. When Mr. Strother stopped, what happened next?

A. I think there was no adjournment, between the conclusion of the argument and the delivery of the Opinion; if there was, I have forgotten it. The Judge commenced by disclaiming all personal feeling with regard to the case before him. He spoke of the law of contempts, and seemed fully satisfied that the power to punish them was possessed by the court. He then answered the arguments of counsel, very much at length; and after some time, requested that some gentleman would read for him the article signed "A Citizen," (his eyes being bandaged at the time.) No one volunteered to comply with this request, and he then called upon Mr. Bates; observing, that as he was the attorney for the government, he supposed he had a right to call upon him to read the article. Mr. Bates, accordingly, read it, paragraph by paragraph. The Judge took up the article, and examined it; referring, as he went on, to those parts of the Opinion on which he relied to show that the representation in the article was not correct. The Judge commenced in a very mild way, but became excited as he went on, and much animated; and appeared, at times, to be indignant at the conduct of Mr. Lawless. He compared the Opinion with the publication, saying, "this specification is false," and then referred to the Opinion to prove what he had said. I may not remember the exact words, but he used the term "false," and would sometimes say "this is a calumny on the Opinion," "this says so and so," "but here is what is said by the court:" he might have used the terms "calumnious," "slandrous," and I think he did. In this manner he went through the publication, pointing out the misrepresentations. When he had gotten through, he adverted to the general doctrine of contempts, the necessity, and the reason there was, why the court should possess this power; advertng particularly to the case in hand;—the great amount of claims; and number of claimants; the suits which were yet to be brought; and the necessity that the intelligence and respectability of the tribunal should not be abused and destroyed, in the manner to which the article seemed to tend. He replied, again, to the arguments of counsel. What he said, in reply to that which had been urged from the constitution of Missouri, I cannot recollect distinctly; but I do not remember to have heard him say that that constitution applied to State Courts exclusively. I did not hear him say anything like that. I think I heard something like this—that if the constitution of the State applied to that case, it would equally apply to any contempt that could arise in the presence of the court. He spoke at large on the doctrine of contempts, and the doctrine of libels, declaring the article to be libellous, and contemptuous, both; and insisting that it might be punished as a contempt. He continued to speak for about two hours. I was tired of the subject, and rose from my seat and stood upon the steps, but still within view and hearing of what passed. Toward the close of the Opinion, he alluded to a custom of some foreign country—China, I think, where the houses of calumniators were blackened. My recollection of the manner in which he alluded to that custom is this. The counsel for Mr. Lawless had argued (as the Judge said, and as I remember that they did,) that if the article signed "A Citizen" was a misrepresentation, still as the Opinion had been published as well as the article, both were before the world, and the one would correct the other. The Judge said, No:—the Opinion is in one paper, and the article in another very different one:—the probability is, that few who see the one would see the other:—the slander will go in one direction, and the

Opinion in another. The people cannot, intuitively, know what is slander and what is not:—if they could, there would be no reason in the rule which punished slander as a contempt; or, if it was in this country, as it is in China, where the house of a calumniator is blackened, as a fit emblem of the heart of the inhabitant, there would be no reason in the law which punishes offences of this sort. After the Judge had gone through with the delivery of his Opinion, the rule was made absolute. Mr. Lawless was not then present, he having gone out of court, while the Judge was commenting upon the article. There was, then, I think, an intermission, and Mr. Lawless was not brought in on the attachment until three or four o'clock. I was present when he was brought in. He was told by the court, that he had a right to have interrogatories filed, in order to purge himself of the contempt; and the Judge asked if it was his desire that they should be filed? Mr. Lawless rose—he seemed much excited, and agitated, and replied that he did not wish interrogatories filed, and if they were filed he would not answer them; and he then presented a paper which he took either from his pocket, or perhaps from Mr. Magenis, (I do not recollect which;) it seemed to be a protest against the authority of the court to proceed in that way. The paper was read. I do not remember that either the Judge, or bystanders, were asked to sign it. The Judge almost immediately proceeded to pass sentence, and said something about Mr. Lawless' standing out in his contempt, and making an aggravation of it, in presenting this paper, and in refusing the interrogatories.

Q. By Judge Spencer. Did he say that this was a new and substantive contempt?

A. I do not remember his precise words, whether he said that it was a new contempt or an aggravation of that already committed. I have a very indistinct recollection of the words used; but that is the impression on my mind.

Q. By Judge Spencer. Did he refer to the offering of the paper, or to the refusal to answer interrogatories?

A. I do not remember to which of the two ideas he referred,—perhaps to both. I supposed him to refer to both. I do not know that he referred, in words, to either:—it may have been my own inference that the Judge, in consequence of these last acts of Mr. Lawless, considered the contempt more aggravated, and inflicted upon it a higher punishment than he would otherwise have done. This at least is my best opinion as to what was said;—the sentence was then pronounced; and Mr. Lawless was taken into custody by the marshal. This was about 4 o'clock in the afternoon: the next place I saw him was, in the Circuit Court, about candlelight, he having been discharged on a *habeas corpus* by the Circuit Judge, because the order for commitment had no seal.—(So at least the Judge told me.)

Q. By Mr. Meredith. Do you recollect in the proceedings on the rule against Foreman, that while the colloquy which had been mentioned was going on between the Judge and Mr. Lawless, Mr. Lawless made any complaint of interruption by the court?

A. I do not remember any.

Q. Did you hear of any complaint on the subject of interruption by Mr. Lawless, or by his counsel, in either of the cases?

A. I did not, at the time, hear any complaints from Mr. Lawless, or from any person, on that score.

Q. By Mr. Wirt. Did it strike you as unnatural that such a conversation should occur? or was it invited by the language and manner of Mr. Lawless? [The managers objected to this question, as being a leading question; and after some discussion, the question, in that form, was waived.]

Q. By Mr. Wirt. How did the colloquy arise, and how was it invited by the circumstances of the case?

A. Mr. Lawless was arguing, and laboring to satisfy the Judge that there was no misrepresentation of the Opinion in the article signed "A Citizen;" and,

in order to prove it, he quoted the Opinion, and then compared it with the article, observing "in the article *I say so and so.*" The Judge would then refer to some part of the Opinion, which, as he thought, proved a misrepresentation in the article, and addressing Mr. Lawless would observe, "*you say so and so.*" Mr. Lawless would reply "*I say so and so.*" In that way the colloquy was brought about. Conversations of that kind occurred several times, between the Judge and Mr. Lawless. They appeared to differ from each other as to the meaning of the Opinion, and the meaning of the article: and one would contend for one interpretation, and the other for a different one.

Q. Is it unusual in Missouri for the court to invite the attention of a lawyer to a particular point?

A. On the contrary it is very usual. I have, myself, been frequently so interrupted, and I have seen it happen to other members of the bar. The court would stop the lawyer, and make a suggestion as to some point of law, or some question of fact, in a bill of exceptions, for instance, and in other cases. I have frequently had my argument attempted to be upset by such a suggestion from the court.

Q. Did this, then, seem to be out of the way, and different from what is usual, in your courts?

A. It did not strike me so. As I said before, there was nothing in the argument of the rule against Foreman, which struck me as extraordinary in any respect.

Q. You said that the court, in delivering its Opinion in the case of Mr. Lawless, at first began very mildly, but in the course of a long discussion became earnest and animated. Are you acquainted with the usual manner of Judge Peck?

A. I think so. I have practised before him ever since he has been on the bench.

Q. Does not his manner, usually, become more earnest as he proceeds in the course of an extensive discussion?

[This was objected to as a leading question, and in that form it was waived.]

Q. What is the effect on Judge Peck's manner, when delivering an extended answer to a protracted argument at the bar, (for this argument had occupied two days,) I ask, what is his usual manner in such cases, as he advances?

A. His usual manner, when he says but little, and does not speak at length, is very mild, smooth and easy; but it always occurred to me as a fault in the Judge that, in delivering an opinion at great length, he becomes warm, and gesticulates much. I remember many cases of this kind; and this manner struck me very forcibly; his usual manner is to become much excited, and to use a great deal of gesture.

Q. Have you known the Judge long and well?

A. Ever since I have been in Missouri. I am intimately acquainted with him.

Q. Is his disposition that of an arbitrary and oppressive man?

[*Mr. Buchanan.* We object to that question.]

[*Mr. Wirt.* Do you? Then we must take a question upon it.]

Here a discussion took place between the managers and the counsel—when the form of the question was changed.]

Q. What is the habitual disposition of the Judge, as to mildness and patience, or arbitrary and oppressive propensities?

A. I always viewed him as one among the mildest men I ever knew in my life. He is very patient, in the arguments held before him, and in all that I know of him. He is a man who shows firmness, however, on all occasions. He is very firm but very mild in his disposition. In these remarks I speak of Judge Peck both in his judicial and his private character.

Q. What is his usual deportment on the bench, as to courtesy?

A. It is always respectful; at least I was as much pleased with his conduct

towards members of the bar as in any court before which I ever practised. I speak generally. I do not mean to obtrude my opinion as to this particular case.

Q. Are you aware, or not, of any complaint existing as to his deportment in other cases?

[*Mr. Buchanan.* We have no objection to that question, provided we may go into the inquiry also.]

A. I do not remember any now.

Q. His habitual deportment, you say, is courteous, kind, and patient?

A. I so understand it.

Q. In the delivery of his Opinion, in the case of Mr. Lawless, did you, or did you not, remark an extraordinary departure from his usual mode of speaking in an extended argument?

A. Not in his manner, save that he appeared indignant at the conduct of Mr. Lawless; with this exception I did not see any material difference in his manner. He was in very feeble health, and had been much afflicted for years.

Q. Was the Opinion as printed in the Missouri paper substantially that which you heard from the bench in Soulard's case?

[*Mr. McDuffie.* It is too late to object now; but in such a question you put the answer in the witness's mouth.]

Mr. Wirt. I will put the question in any other form that is more agreeable to you.

Mr. Buchanan. We do not wish you to make it agreeable to us, but to the law.]

Q. Did you hear the Opinion delivered by Judge Peck in Soulard's case?

A. I did.

Q. Had you any previous opportunity of knowing that Opinion before it was delivered?

A. I had this opportunity. I was not personally concerned in any land claims, in which petitions had been filed; but Judge Peck and myself resided in the same building, and he frequently asked me to read or refer to laws and ordinances in relation to those land claims. We conversed fully and freely. I did not know what the Opinion would be. The Judge never told me: yet from the conversation we had, in relation, for instance, to the ordinance of 1754, and the regulations of O'Reilly, and Gayoso and Morales, that I believed * * *

[Here the managers objected to hearing the opinions of the witness, or his conversations with Judge Peck.]

Q. Did you attend to the delivery of the Opinion?

A. I did:—I was present all the time. I listened attentively, as I believe all the bar did; I felt some interest to know what the Opinion would be.

Q. After so hearing the Opinion, you afterwards saw it published, at the request of the bar?

A. I did.

Q. How did the two correspond? or how did they differ?

A. There was no difference in the doctrines advanced; but I made, at the time, this remark,—that the Opinion did not appear so well in print, as when it was delivered.

Q. The general train of reasoning the same?

A. It seemed to be the same. I do not pretend to say that every word of the oral Opinion was printed; but if there was any difference between them, I should think that if printed as it was delivered, the Opinion would have occupied more space than the one printed afterwards.

Cross-examined by Mr. Buchanan.

Q. On the argument against Foreman, at every position taken by Mr. Lawless, and while attempting to support each by a reference to the Opinion, was he not interrupted by the court?

A. I cannot say every one ; but I remember that he was interrupted in several of his positions, in the manner I before described.

Q. In the course of these interruptions, did not the court frequently say, "this is false," "this is malicious?"

A. I do not remember :—I have taxed my memory, but I do not remember this : it might have been so. I have said that I was not in the court room during the whole of that argument.

Q. You did not hear any expression of that kind ?

A. Not that I remember.

Q. In your opinion, it was not remarkable that the Judge should interrupt Mr. Lawless, as he was proceeding, and submit his own opinion and arguments, to show that those of Mr. Lawless were incorrect ?

A. There was nothing in it that appeared remarkable to me.

Q. Would it not have been more accordant with the rules of your courts if the Judge had waited till Mr. Lawless had concluded ?

A. I do not know that there is any express rule on the subject.

Q. Would it not have been more consistent with the practice of your courts ?

A. As I have said, suggestions are frequently made from the bench.

Q. Are not these interruptions to which you refer, confined to legal arguments? Were you ever present when whilst the counsel was arguing a question of fact in his own way, the judge interrupted him, and introduced a reference to other facts, with a view to disprove that from which the counsel was arguing ?

A. I have heard judges stop attorneys, and tell them that the evidence was not as they stated it to the court and jury.

Q. When the question purely of fact is before the court, and an attorney is going on to state one part of the facts of the case, have you ever known a judge turn the attorney to other facts going to destroy those on which he was arguing ?

A. I do not remember any particular instance.

Q. It did not, you say, strike you as remarkable that this sort of colloquy should be going on between Judge and counsel for a long time ?

A. Not particularly.

Q. While it was going on, did the Judge wait till Mr. Lawless had got completely through one position, before he interrupted him ?

A. I cannot say. While Mr. Lawless was going on to argue, the Judge would interrupt him, and say,—“No, the court decided so and so.”

Q. Are you positive that Mr. Geyer argued the case in the baptist church ?

A. That is my recollection, and I never knew there was any difference on that point until the commencement of the present trial.

Q. *By Mr. Wickliffe.* You are as much impressed with that fact as any other ?

A. My impression is such as I have stated, and I think they both argued the question at Mr. Penrose's.

Q. While the Judge was delivering his Opinion in the case of Mr. Lawless, did he not use the words “false,” “scandalous,” “malicious,” “calumnious,” “misrepresentations” ?

A. I heard some of these terms. I have already stated that when the Judge was examining the article and comparing it with the Opinion, he sometimes said, “This specification is false,” or, “this is not true.” At other times, “this is a calumny on the Opinion of the Court,” “this is slanderous.” In speaking of contempts, he used the word “slanderous” and “libellous.” He employed the terms known to the law, and it is possible I may have confounded this portion of his remarks with his examination of the article. He used some of the words which you specified.

Q. Which of them ?

A. He used the words “false,” “calumnious,” and “malicious.” He described the publication as an attempt to bring odium on the court, and to destroy all confidence of the people in its decisions.

Q. Did he not speak of the malice of the author?

A. He spoke of the piece itself, but I could not help, at the same time, thinking of Mr. Lawless.

Q. He spoke of the piece, then, and not of the author?

A. I do not say that. I did not hear the words author or Lawless in connexion with the expressions alluded to, that I remember. He spoke of the article, and said, "This is false," "this is calumnious."

Q. Did you ever see the Judge so much excited before, in any other case?

A. Taking all together, I never saw him exhibit so much indignation as on that occasion. I saw no other difference from his usual manner, when much excited.

Q. *By Mr. Wickliffe.* In what particular case have you ever seen him much excited?

A. I remember laughing, with Mr. Bates, at the excitement displayed by the Judge in the case of *Bryants vs. Dent*. I think I also saw the same fault when the court sat at Jefferson city, in the case of the *United States vs. the Securities of Rector*. I do not remember any other particular case, but it is his general fault.

Q. *By Mr. Storrs.* Have you not taken a very warm and decided part with Judge Peck on this subject?

A. I felt precisely in this way.—When the occurrence took place, * * *

[Here the witness was interrupted by the managers.]

Q. We wish to know what are your feelings now; not what they were formerly.

A. They are the same, now as they ever have been. I have had no feeling on the subject, but this; however the question of law may be decided, I believe that the Judge was not influenced, in what he did, by any malicious motive, or arbitrary disposition.

Q. Are you not now under a warm feeling in favor of the Judge?

[The witness had begun to answer this question when he was again interrupted by the managers.]

Mr. Wirt. We object to this interruption of the witness. He was going on to tell what his feelings are, how they arise, and what they are founded on.

Mr. Buchanan. Mr. Pettis is now on his cross-examination, and he will be examined by us in the same manner as any other witness. We have a right, upon the cross-examination, to ask any question for the purpose of ascertaining whether the mind of the witness is, or is not, under a bias; and we now ask him, whether his feelings are not strongly in favor of the acquittal of the accused? May we not put a distinct question of this kind? and are we not entitled to a categorical answer? Can the witness in answering this question be allowed to deliver his opinion as to the guilt or innocence of the accused? He has been stating, not what are his feelings, but such views of the case, as, in his opinion, justify those feelings. When he was interrupted, he was proceeding to state, that whatever view might be taken as to the legality of the Judge's conduct, the Judge had been influenced by no malice. Now, when we call on a witness to state what his feelings are in relation to the accused, is he to be permitted to deliver his opinion upon the merits of this impeachment to the Senate? (thereby, however, giving the strongest evidence of what his feelings really are) we do not doubt that he is perfectly sincere; but we respectfully insist that we have a right to a categorical answer.

Mr. Wirt. We do not contend that the witness has a right to go into a discussion of the case; but he has a right, as a man, as a man of honor, as a witness on his oath, when a question like this is put to him, to refuse being driven into a categorical answer, intended to exhibit him before this court, and this nation, as acting under a blind bias, for the acquittal of this Judge. I put the question to every member of this court; and I ask him to make the case his own.—If he was asked, Have you not a strong feeling for the accused, and an ardent

desire for his acquittal? whether he would not insist on the liberty to say, I have no feelings in the case, but such as arise from my conviction of his innocence? Is a witness to be compelled to stand before this nation as blindly prejudiced in favor of an accused person, when, as an intelligent and virtuous man, he has no feeling in the matter, but a desire that innocence shall not suffer?

Mr. McDuffie. We do not recognize a right in the respondent's counsel to interfere in our examination.

Mr. Wirt. We do not claim a right to interfere, nor do we object to the question; but we presume that the rules which prevail in all other courts operate here. We have never seen a witness who was not under the protection of the court, and who might not claim that protection, when driven to answer a question in one particular way only, when he is desirous of answering it in a different manner. We do not object to the question; we only wish the witness to be protected.

Mr. Buchanan. The managers can perceive no occasion for being reminded that the witness is under the protection of the court. They have no desire to hurt the feelings of the witness, or to entrap him in his answers; and there was no need to invoke protection in his behalf. The counsel say that we wish him to give a blind answer;—to say nothing but yes or no; and thus to bring himself into contempt before the American people. We have no such desire. No doubt the witness has a right to explain the nature of his feelings; but we beg leave to recall the court to what was the state of the case when the witness was interrupted. He was proceeding to give his views of the whole trial, and of the principles on which the Judge ought to be acquitted. This is not conformable to any law, or any practice. We object to the witness giving his opinion, or trying the respondent, as to his guilt or innocence. He may show that his bias is honest; we have not even insinuated that it is not so; but prejudice has overcome the best of men; and we have a right to know how far a witness is under its influence. [The question being again propounded, the witness replied as follows:]

A. I desire, Sir, to answer the question propounded with the utmost candor and fairness, and freely to state what my feelings in relation to this impeachment are; but, I wish to be permitted to give also the *reasons* by which I am influenced * * * [Here the managers withdrew the question, and it was not further answered.]

Q. By Mr. Storrs. Have you made any publication, lately, on the subject of this impeachment?

A. No.—I have referred to it in a circular which I addressed to my constituents.

Q. How many pieces in the papers have you written besides that?

A. I wrote out a speech which I delivered in the House of Representatives on the general subject. Mr. Stansbury (who is here present) was engaged by me (as I believe he was by other members of the House) to take notes of the speech. He furnished me with the notes which he had taken, but said that he was very much pressed, having many speeches to write out, and would be very glad if I could write out the speech myself. I took his notes accordingly, and from them I wrote out a full copy of my speech, and had it printed in a hand-bill form. A speech delivered on the opposite side, and referring to that which I had delivered, had been printed in a paper in this city, from which I found that it was republished in Missouri. I therefore thought it a duty to myself to have my speech also published.

Q. Have you made any other publication on the subject?

A. I addressed, as I have said, a circular to my constituents, giving the reasons for the views I took; and this I did, because efforts were making at home to destroy me, in consequence of the course I had taken in relation to this impeachment.

Q. Have any publications appeared in the papers on this subject of which you were the author?

A. None to which my name was not signed.

Q. You have not written for the papers on this subject?

A. Not that I remember. I may have forgotten, but I do not think there are any articles of mine.

Q. Will you state this positively?

A. I do not remember any. It is possible, and barely possible, that I may have written in regard to that matter. I cannot swear positively, because I may have forgotten. I am morally certain, however, that no other publications were made by me on this subject.

Q. You have stated that Judge Peck was in ill health;—during how many hours did he sit in court?

A. I do not remember,—this case I think happened in April,—at that season of the year the courts usually sit in the forenoon,—adjourn about 1 o'clock, and sit again in the afternoon.

Q. You have said that the Judge made a very long address;—was he much exhausted?

A. He did appear very much exhausted.

Q. How many hours did he speak in the evening?

A. I cannot say, particularly; the argument commenced in the afternoon, and continued till sunset.

Q. Was there not other business conducted at that District Court also?

A. I have no recollection of any. I think the Judge had some little business before this affair came on.

Q. Was any business left unfinished at that term, in consequence of the Judge's ill health?

A. I do not remember any.

Q. How many of your speeches did you print and circulate?

A. I do not remember exactly.

Q. One thousand? or two thousand?—*A.* I believe one thousand.

Q. Did you send that speech to the press? or did Mr. Stansbury send it?

A. I did. I did prepare another piece in relation to this matter, and I will state why. I found in the St. Louis Beacon of the 14th October last, a violent attack on my speech, and as I thought a gross misrepresentation of what I did say, under the signature of "Luke E. Lawless." I then wrote an article in reply, and sent it to the editor of that paper, who refused to print it, and was kind enough to say, in a note in that paper, that he had examined my communication, and believing that it would lead to a breach of the peace, he had not published it. I have the piece in my possession, and am willing it should be read by the managers, or by this court. I did not know that the piece of Mr. Lawless had been republished; but after I arrived here, several members of Congress told me that they had seen such an article. [Here the managers interposed, and said that they did not desire to hear any of the conversations of the witness with members of Congress.] It was republished in the Telegraph.

Q. In what paper had your speech been published?

A. I took the manuscript of my speech to Duff Green's office, in order to get it printed in pamphlet form; and the foreman said, that he would have it inserted in the Telegraph. I had got back the manuscript of my reply to the article of Mr. Lawless from the printer at St. Louis; and as Mr. Lawless' article had been reprinted in the Telegraph, my intention was, that the reply should also be published there; but not having made the discovery till within a day or two of the sitting of this court, I concluded to dispense with the publication, lest I should be accused of some design to influence the minds of Senators and to affect the cause.

Q. Have you made any other publications respecting Mr. Lawless? What are your present feelings towards him? Are you and he on good terms?

A. We do not speak * * *

[Here the witness was proceeding, when he was stopped by the managers.]

Mr. Storrs. We cannot go into the quarrels between the witness and Mr. Lawless. The rule on this subject is express. The question must be general.

By the President of the Court. Do the counsel for the respondent desire that the witness should proceed?

Mr. Wirt. We wish him to answer, and he has been interrupted. If the honorable managers wish to show any inveterate and deadly hostility in this witness towards Mr. Lawless, the witness, certainly, may be allowed to show that it is not so. We want to show the true nature and dimensions of his feelings towards Mr. Lawless.

By the President of the Court. Do you wish the witness to proceed?

A. We do.

Mr. Buchanan. We understood that the witness was about to state the nature of his difference with Mr. Lawless.

Mr. Pettis. I was going to state the time since which we had ceased to speak. Some days after the delivery of my speech, Mr. Lawless met me, and by his manner gave me to understand that he had no kind feeling towards me.

Mr. Storrs. You said it might have been an inference of your own.

Mr. Pettis. I did intend to state what our intercourse had been, and whether my feelings had been friendly or unfriendly towards Mr. Lawless since I had been in Washington. We were on terms of civility till the time I made my speech in the House of Representatives. I have no prejudice against Mr. Lawless, according to my understanding of that term.

By Mr. Buchanan. I have not seen your speech, and I am sorry I have not; but—

Mr. Pettis. I will show it to you.

Q. Does it not contain this statement, that Mr. Lawless was in the habit of treating courts in a disrespectful manner?

A. I was commenting on the case before the House of Representatives and citing authorities—

Q. I wish a direct answer.

A. I did not say it in that way, and I will explain how I did say it. I commented on this case, and I then referred to another case, the case which occurred in the Supreme Court of the State of Missouri, before which tribunal Mr. Lawless had been brought for a contempt of court, in making a publication relating to a decision of that court, and added "thus we see"—

[*Mr. Wirt.* Is the speech in evidence?

Mr. Buchanan. No; but you may make any use of it that you please.

Here the witness resumed.]

A. I was commenting on the facts in this case, and I made use of these words:—

[Here the witness read an extract from his speech.*]

I beg leave here to state that I am not present as a voluntary witness. I was called here against my will: having expressed to Judge Peck my desire to be excused, if possible.

Q. By Mr. Buchanan. Did you think it a proper act on your part to publish that speech pending this impeachment before the Senate?

A. I would have preferred not to publish it; but the speech of Mr. Elsworth on the other side had been published here and republished in Missouri, and efforts were making to misrepresent what I did say in my speech.

Q. By Mr. Wickliffe. Did you not take the manuscript of your speech to the office of the Telegraph before you saw that of Mr. Elsworth?

* A copy of this extract was promised to the Reporter; but, through inadvertence, it was never furnished.

A. No. I did not know that his speech was republished in Missouri, till my return from the North. I was then the more anxious that mine should be published also, and I urged it accordingly.

Q. *By Mr. Wickliffe.* Have you not, since your return to Missouri, taken a warm part in favor of the Judge?

A. I do not consider it so. I have only justified the cause I pursued in the other House; and that I was induced to do because I considered myself as outrageously misrepresented in the publication of Mr. Lawless.

Q. *By Mr. Storrs.* Did you not, as soon as you ascertained that witnesses were to be examined before a committee of Congress, immediately write a letter to Judge Peck?

A. Yes; and to Mr. Lawless too: and I stated, in both letters, that I did not wish to take a part on either side. I was desirous that this matter should be fairly examined and judged of by members who knew nothing of the parties or of the case. I considered it my duty to let both parties know what was the state of the affair. Mr. Lawless had requested me to present his petition, but I preferred that it should be offered by Mr. McDuffie, who at my solicitation did offer it.

Q. *By Mr. Spencer.* Were you present when the rule was made against Mr. Lawless?

A. I am not certain.

Q. Did Mr. Lawless appear on the day the rule was made against him?

A. Yes. He did appear. The two first days were occupied in the argument on the rule against Foreman. I do not know whether the rule was made against Mr. Lawless on the second day or not.

Q. Did the case of Mr. Lawless take up a part of two days?

A. Yes.

Q. Immediately on the conclusion of the argument, did the Judge proceed to deliver his Opinion?

A. That is my recollection, but I cannot say positively.

Q. Was Mr. Lawless present when the argument was concluded?

A. He left the court when the Judge was about half through with his strictures.

Q. After all Mr. Lawless' counsel had gone through with their arguments for Mr. Lawless, did the Judge immediately proceed to deliver his Opinion?

A. He did.

Q. Was Mr. Lawless then immediately called in?

A. I think not. I think there was a recess at that time.

Q. Were the counsel of Mr. Lawless precluded from arguing any point, on the ground that that point had been decided?

A. I have stated that before. When Mr. Magenis was beginning to speak, something was said by the Judge about not arguing the question of misrepresentation; and he then went on to argue the general question of contempts.

Q. Was the question of misrepresentation argued again?

A. No.

Q. *By Mr. McDuffie.* Do you recollect in the Opinion as orally delivered by Judge Peck, in the case of Soulard, hearing these words:

"The 14th section of Gayoso's regulations, operates directly upon the present claims; it declares, that "the new settler to whom lands have been granted, shall lose them without recovery, if, in the term of one year, he shall not begin to establish himself upon them, or if, in the third year, he shall not have put under labor ten arpents in every hundred."

A. I cannot say that I do, but I remember that the Judge talked about that subject.

Q. Do you recollect hearing these words:

“That the regulations, in which these sections are found, are of a date subsequent to the concession, in this case, forms no reason why they may not impose duties on the claimant, and prescribe forfeitures for a failure to perform those duties. Might not a forfeiture of the present claim have been adjudged under each of these sections? No settlement, no improvement was made, as required by either. This omission, is declared by each of these sections, is to occasion a forfeiture of the claim.”

A. I will not say that the Judge used these very words, but he spoke of that subject.

Q. Do you recollect hearing these words:

“The first section of the regulations last mentioned, after having directed the grants which are to be made on the Mississippi, directs that, *if made at any other place*, the quantity which they shall be judged capable to cultivate, and which shall be deemed necessary for pasturage for his beasts, in proportion according to the number of which the family is composed.”

A. The Judge covered that ground, I think, but I have no particular and distinct recollection of the words he used.

Q. Do you recollect hearing these words:

“Neither would the regulations of Gayoso, or of Morales, have authorized the confirmation of the present claim. They present the same objections to its confirmation that have been already adverted to, as growing out of the regulations of O'Reilly. Each of these regulations contains provisions not to be reconciled with the idea that the present concession could have been confirmed, in conformity with law, had no change of sovereignty taken place. They equally evince an intension to authorize grants, with a view to tillage, and the settlement of the country; and to secure these objects, they required that, in all grants to be made, regard should be had to the family and property of the grantee, to determine the extent of the grant.”

A. I think the Judge took that ground, but I do not say that he used these words.

Q. Do you recollect hearing this sentence: “The regulations of O'Reilly were made for the entire province.”

A. I think he said so. I know that was his doctrine.

Q. Do you recollect hearing these words:

“It would appear that the policy apparent in O'Reilly's regulations did extend itself to the province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid.”

A. He adverted to that doctrine; but I do not say that he used those words.

Q. To come to the point; from what took place can you positively say that any one of these clauses are printed in the precise words in which they were orally delivered?

A. I would not say, or swear, that this is the same Opinion, as to its words, as that which was orally delivered; but if there was any discrepancy, it did not occur to me.

Q. May there not have been in the Opinion various arguments, and those too the very arguments referred to by Mr. Lawless, which you do not remember?

A. There may have been.

[A newspaper was here shown to the witness by Mr. Meredith, containing a printed article signed by Mr. Lawless, for the purpose of having it identified; but objections having been made by the managers to going into the cause of difference between the witness and Mr. Lawless, after some discussion the inquiry was waived.]

Q. By Mr. Wirt. You were asked whether Judge Peck exhibited the same

degree of indignation on any other occasion as he did on this. Have you ever seen him at any other time, when engaged in punishing a contempt of court, committed in a publication against himself?

A. I have not.

Q. *By Mr. McDuffie.* It is not the custom in Missouri, is it, for judges to punish contempts committed against other courts than their own?

A. It is not.

Q. *By Mr. Meredith.* Do you know whether the Opinion of the Court, in Soulard's case, was reduced to writing, in whole, or in part?

A. I cannot say.

Q. Have you not seen sheets containing the notes of that Opinion?

A. I have seen such sheets; but whether before or after the delivery of the Opinion, I cannot say.

Q. Do you know who assisted Judge Peck in writing at that time?

A. Either Mr. Primm, or Mr. McKnight; I believe.

Q. Do you recollect when Mr. Primm left the Judge?

A. I do not remember, whether it was before or after the delivery of the Opinion.

Q. Though you cannot recall the words in the Opinion, yet you recollect the doctrines and the general course of thought; and they do not strike you as being different from the Opinion as delivered?

A. That is my answer.

Q. *By Mr. McDuffie.* On what point did the Judge decide the case of Soulard?

A. I understood it to be this, that the ordinance of 1754 was not in force in Upper Louisiana; and if not, the power to make grants of the description of that in Soulard's case by the Lieutenant Governors did not exist; and he then went on to show that even if that ordinance was in force, it would not authorize such grants. He had before him the manuscript which I have seen referred to in this trial, containing extracts from that ordinance. He then took a view of the regulations of O'Reilly, Gayoso and Morales, and denied that, according to those regulations, the grant to Soulard could be confirmed. The question was, whether the Lieutenant Governor had power to make such grants.

Q. *By Mr. Wickliffe.* Do you recollect what the Judge said in his oral Opinion on this point in the cause, "that the uniform practice of the sub-delegates or Lieutenant Governors of Upper Louisiana from the first establishment of that province to the 16th of March, 1804, is to be disregarded as a proof of law, usage or custom therein"?

A. That practice was adverted to either by the counsel or the court, as affording a presumptive evidence for the grant; and the Judge, I think, said, that though it did raise a presumption in favor of the grant, the presumption was not strong enough to authorize a decision for the claimant. I do not remember the precise words.

Q. Was the practice of the sub-delegates at all adverted to?

A. something was said about it: I think the Judge said that the practice was without any authority of law.

Q. *By Mr. Storrs.* Did the Judge decide that the laws of the Indies applied to Louisiana as a colony while it was in the hands of Spain?

A. I am not certain; but I think he took the ground that they did not.

Q. Did he make a distinction between Louisiana as a province *acquired*, and not a *conquered* province, as the reason why those laws did not apply to it?

A. I cannot distinctly remember.

Q. Did he make it one of the leading propositions in his Opinion?

A. Something was said about it; but I do not remember whether it was made a leading proposition or not.

Q. What did the Judge say about it?

A. I do not remember particularly. While the Opinion was in its delivery, I paid the ordinary degree of attention which is paid to an opinion in which the hearer has no personal and immediate interest. I had no case in court to be affected by it, but I had talked a good deal with the Judge on the general subject, and read for him, as I before stated, many of the laws and ordinances to which he wished to refer.

[Here the examination closed.]

The Court then adjourned till 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Friday, January 7.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

Mr. Meredith asked leave that the Opinion of Judge Peck in the case of the heirs of Chouteau against the United States, and in the case of the heirs of Mackay Wherry against the United States, might be printed for the use of the Senate. These Opinions had been given in evidence by the managers; and as the argument of Mr. Lawless in the case of Soulard's heirs had been printed at the request of the other side, and as neither of the Opinions was as long as that document, it was hoped the request might be complied with.

The managers said that they had no desire for the printing of these Opinions, nor did they consider it at all necessary; since the copy, as printed in the newspaper, might be consulted by any member of the court: but they should not object to it.

The printing was ordered by the Senate.

JOHN B. C. LUCAS *was called and sworn.*

Q. *By Mr. Meredith.* Please to state to the court whether you were present at any of the proceedings in the District Court of Missouri, on the rules against Mr. Foreman and Mr. Lawless, and what took place.

A. I was present at a court, held by Judge Peck, in 1825. I do not recollect whether the first sitting of that court was held in the baptist church, or not; but I do know that at one time the court removed its sitting from the church to a private house, occupied by a Mr. Penrose. I do not know whether it was at the baptist church, or in the house of Mr. Penrose, when Judge Peck first brought into view the strictures published in a newspaper edited by Mr. Foreman, in an article signed "A Citizen." I recollect that the Judge requested Mr. Edward Bates, who was at that time District Attorney of the United States for the district of Missouri, to read that article, and Mr. Bates read it. I have not a very distinct recollection whether Judge Peck remarked on each clause as it was read, or made his remarks upon it after the whole had been read. I remember that he wished to ascertain something about the editor of the paper, whether Mr. Foreman or any one else, that he might proceed against him; and Mr. Lawless stated that Mr. Foreman was the editor. On that statement the Judge directed Mr. Lawless to be sworn, and he was sworn; when he said as before that Mr. Foreman was the editor of that paper. Judge Peck made a rule against Foreman, to show cause why he should not be attached, and so forth, in consequence of the publication. I have a very imperfect recollection of all which took place at that time: but I recollect that I was present again in the court, and I am confident that it was then sitting at the house of Mr. Penrose; when Mr. Foreman appeared on the rule. I cannot relate the particulars, further than that Mr. Foreman, having acknowledged that he was the editor of that

paper, I discovered that after that acknowledgment Mr. Foreman and Mr. Lawless removed a little, and insensibly approached very near to where I stood. I am sure they did not notice me, as I stood in the crowd. They spoke together for some time, in a kind of whisper. I was able to gather about one half of what they said; and I gathered the rest from their gestures. At that moment they appeared under such excitement, that they accompanied all they said with gestures, and very significant gestures too. I could discover, from this pantomime, that Mr. Lawless was intreating Foreman to take the whole responsibility upon himself, and not give up the author; and I discovered, in Mr. Foreman, a constant repetition of a shake of the head, which satisfied me, together with such words as I could hear, that he would not assent. The conversation ended; and, as I had expected that Mr. Foreman would not yield, I was confirmed in that conviction by seeing him come forward in court, and give up Mr. Lawless as the author of the article. I am satisfied that a great many things took place, which I do not now recollect: and when I do not state all that I have heard stated in evidence here, it is not because I do not believe that it is true, but because I am unwilling to speak on the testimony of others. I do not remember hearing Mr. Strother, Mr. Magenis, or Mr. Geyer speak, and I have been amazed to find how my recollection is now failing me. I did not stay long in the court;—whether I was unwell or not, I cannot tell, and I do not know how to account for it, how many things took place of which I have no knowledge. I have laid it on my years. I remember, distinctly, what took place twentyfive years ago, while I cannot remember what happened five or six years since, unless it was very striking. I was again present in the same house, when Mr. Lawless appeared, as I believe, under an attachment. A good deal was said, on his part, and not a little on the part of the Judge. Both spoke with great rapidity, and the matter excited intense interest. It excited an interest in others, which it did not in me: my ideas had been made up long before. I had so little doubt on the subject before the court, that I paid little attention to what was said; I should otherwise have bestowed great attention, with a view to be enabled to form an opinion. I must state, that when the proceeding originated, that is, when the Judge first noticed the paper, he appeared serious, solemn and calm. I must also be permitted to state, that the character of the Judge, so far as I have known him, (and I have had a good opportunity,) is extremely delicate and respectful; he pays the greatest regard to the feelings of the gentlemen of the bar, and of all other persons. He has a peculiarity in his expressions, which I might call *impressiveness*; so that the more a subject becomes interesting, and the more it requires the best exertions of the mind, the more impressiveness and the more earnestness he shows; as if he was himself deeply impressed with the subject; and, as some might term it, the more like the nations of Europe south of England:—I refer not to one part of the continent in particular, but to all I have known of it, south of England. When he passed sentence on Mr. Lawless, there was more intensity, more *expressiveness* (if that term is understood,) and more impressiveness in his manner: and toward the end, when he passed the sentence, there was a degree of warmth; which, however, did not strike me as improper, though it might have so appeared to others. I reflected—

[Here Mr. Buchanan interposed, observing that they did not wish the witness to state his reflections, but only the facts which took place.]

Well Sir, I do not force my reflections on any one. Either the whole of my reflections must be given, or none at all.

[By the President of the Court. The witness will confine himself as much as possible to facts.]

There was a kind of rapidity on both parts, which almost degenerated into a kind of rapid colloquy. This continued, until the Judge delivered his sentence. I then saw Mr. Lawless go out, with the marshal, to jail, in company with two gentlemen. I have nothing more to state.

Cross-examined by Mr. Wickliffe.

Q. Did you not write, and publish in one of the papers of St. Louis, an article combatting the validity of these Spanish grants? and at what time?

A. I do not know whether I published anything in the paper; I did, in a pamphlet.

Q. Was it before, or after, the decision in Soulard's case?

A. It was after.

Q. Try and recollect yourself. Were not several of the points in your publication the subject of investigation in the argument of Soulard's case?

A. I must avow that I published several essays at different times. But I have no recollection of having published anything, on the subject of Spanish claims, in a newspaper. At any rate, I do not recollect writing anything in the papers on Soulard's case.

Q. Did you not, after the question was brought before the District Court, on the Spanish titles, publish anything combatting the validity of those titles?

A. I believe not. I cannot say whether I published anything on that subject before Soulard's case was argued or not; but I am satisfied that after the case had been heard, and before the Judge delivered his Opinion, I published, in a pamphlet, what may be termed the substance of the argument which I had urged before the court in that case: and I will not conceal the fact that I sent a dozen, perhaps two or three dozen, copies, to gentlemen who were in Congress at that time.

Q. You do not recollect publishing anything before the decision in Soulard's case?

A. I have said that I do not.

Q. Let me refer you to this clause in Mr. Lawless' printed argument:

"In a recent publication, signed John B. C. Lucas, which appeared in the Enquirer newspaper of the 30th of August last, the writer appears to be of opinion, &c."

A. Well, Sir, it may be. I told you I had no recollection of publishing anything before the decision of Soulard's case: and I tell you so now.

Q. Were you not personally interested in defeating some of the land claims, in the month of August, 1825?

A. Not in defeating,—for there was nothing to be defeated.

Q. Were you not a defendant in some suit of that kind, and interested in having it adjudicated against by the court?—Perhaps you do not understand my question.

A. I understand the question perfectly, and I do not wish to shun it. I will state the facts of the case, and you may make your own inference, as to my being interested or not. There was no suit against me: it was against the United States. I do not wish to mention names, or to say anything of the character of the claim. I thought it a most extraordinary one, but it was before the court; and as the law of Congress required all claimants to give notice to all persons who might hold any adverse possession, that is, who might be upon any part of the land claimed, I received such notice: and I appeared in court, under the expectation that the case would come forward: though the suit was between the United States and a land claimant, there was a wise provision in the law which made me privy, if not party, to the cause; and I might possibly aid the United States Attorney by such depositions as I could make,—which would redound to the benefit of the United States, as well as to my own. I had the smallest possible interest in the suit; and to show this, I am compelled to enter into some details. The land I was in possession of, and which was in part the subject of suit, I held in pursuance of what is known as the New Madrid Act:—The thing was complete—a *quid pro quo* had been given to the United States. The person under whom I held had given up land in New Madrid, and received other land in place of it; so that I was not a dealer in what are called New

Madrid claims. The land was not in my possession, because I availed myself of that act : It had been bought at a sheriff's sale, and it had therefore ceased to be a New Madrid claim.

Q. Had you a patent for the land?

A. Not at that time. I had a certificate ; but I have received a patent since. I wish to satisfy this court that I had no possible interest in the suit.

Q. *By Mr. Storrs.* Were any proceedings instituted against you, for making any publications while Soulard's case was pending?

A. I had not gone through with the previous question—I am entitled to answer one question at a time, and not to have questions accumulated upon me. The gentlemen want to show that I had an interest : I will show that I had none. I bought the land : my possession was reduced to a right, and I have got the patent. It was provided by the act of Congress that if the United States had disposed of any land held by a Spanish claim, if the holder should have his claim confirmed, he might take the same amount of land in any vacant territory of the United States. Supposing, then, that the claimant in that suit had established his claim, he could not have touched my land, but must have gone somewhere else ; so that, in any event, I was whole, and could suffer nothing.

Q. *By Mr. Buchanan.* I do not put the question from any impertinent curiosity, but I wish you to state to the court what is your age?

A. I will not pretend to say what my age is. I think you know I am old enough to give testimony. I shall state my age if the court decides that I must do so.

By the President of the Court. The witness will answer the question.

A. Well then, I was seventy the 13th of August last past.

Mr. Buchanan. We have done with the witness.

Mr. Lucas. But there was another question put to me by that gentleman. (Mr. Storrs.)

Mr. Storrs. I shall not press it.—I waive the question.

[The witness, after some hesitation, retired.]

WILLIAM C. CARR *called and sworn.*

Q. Please to state to the court, what you know in relation to the proceedings in the District Court of Missouri on the attachment against Mr. Lawless.

A. I was not present during any part of the argument in the case :—when the proceedings against Mr. Lawless took place in the District Court of Missouri, I was a private citizen, not holding any official situation. I happened to ride in, from my farm, into St. Louis ; I think it was after dinner—when I arrived in the street, I perceived much conversation in all directions on the case then going on in the District Court, in which Judge Peck was about to proceed against Mr. Lawless for a contempt. I saw a number of people collected in groups, and as I passed them I could hear that they were all talking in reference to this matter. I entered into one of these groups, and inquired what was the matter? and being informed that proceedings had been instituted in the District Court to punish Mr. Lawless for a contempt, I was asked by several persons if I would not go there. I assented, and went,—in company, as I think, with some other persons. When I arrived at the house of Mr. Penrose, the court was not in session. There was a great crowd about the door, and the general topic of conversation was the proceeding before the Court. A great deal of excitement prevailed. I went into the court room, and the Judge was not there. While I was conversing with Mr. Penrose or some other person, the Judge passed near me, and took his seat upon the bench. A few moments after, he inquired whether Mr. Lawless was present in court? On which, Mr. Lawless arose from his seat at the bar, and answered that he was present. The Judge then remarked to him that the court had found him guilty of making the publi-

cation, or guilty of the charge against him; and that it was his privilege to have interrogatories filed touching the alleged contempt. It was his right. Whether the Judge directly asked Mr. Lawless whether he would have interrogatories filed or not, I will not be positive; but when the proposition was made by the Judge, Mr. Lawless immediately, or very soon after, replied—(and in a manner which I thought somewhat objectionable)—that he neither wished interrogatories filed, nor should he answer them if they were. It was at this moment, I believe, that Mr. Lawless, or perhaps Mr. Magenis, but I rather think it was Mr. Lawless, took from the bar, or from his pocket, a paper, which he held in his hand, and observed to the court that he held in his hand a paper which he wished the Judge to sign, and admit on record; or words to that effect. The paper may have been read, but I do not recollect that it was. After some discussion, the Judge said, that he could not admit it on the record. Some inquiry was then made, by Mr. Lawless or Mr. Magenis, whether the paper could be admitted, if it should be signed by the bystanders? to which the Judge replied, that it could not. The Judge then stated that the court had found him guilty of a contempt, and would proceed to pronounce the punishment. And, after a few prefatory remarks, in which he adverted, I think, to the unpleasant nature of the duty he had to perform, he declared the sentence of the court to be, that Mr. Lawless should be imprisoned for twentyfour hours, and be suspended from practice before that court for eighteen months. Considering this to be the conclusion of the affair, I left the court room, and went out into the yard; where there was a great multitude assembled. Great excitement seemed to prevail,—some condemning, and some approving, the course which the court had pursued. I do not recollect anything further.

Q. By Mr Meredith. Please to state to the court what was the manner of the Judge, on this occasion.

A. I saw nothing remarkable in his manner. His manner on the bench, as far as I know, (but I have not been in his court much, and have never appeared before him I think but once) is very deliberate, and very solemn: and, at the time of the delivery of the sentence, it appeared to me as destitute of passion as could possibly be. I saw no passion, or excitement at that time.

Q. You said that when the Judge tendered interrogatories to Mr. Lawless, there was something in the manner of Mr. Lawless' reply which appeared to you "somewhat objectionable." Will you state what it was?

A. It may be possible that my imagination out-travelled the fact: but, associating in my mind the situation of Mr. Lawless, at that time, and some other things, I did think that his manner was somewhat offensive. It seemed to me as if rather calculated to throw defiance at the court. This, however, was confined entirely to his gesture and manner, his words being such as I have related. His manner was very determined, and he spoke with a somewhat abrupt tone of voice. This, I think, is as high a description as I can give.

Q. Are you well acquainted with Judge Peck?

A. I have been very well acquainted with him ever since he came to Missouri. I was there before him.

Q. What is his general temper and disposition?

A. As I remarked, I have seldom been in his court.

Q. I do not refer to his temper on the bench, but what is his general temper as a man?

A. His general reputation is that of being very mild and gentlemanly;—amiable in his character and disposition, and much beloved by those who are intimate with him—very much.

Cross-examined by Mr. Buchanan.

Q. Mr. Lawless, you say, when he rejected the offer of interrogatories made use of no other language than that which you have repeated.

A. None that I recollect.

Q. Your opinion, then, as to the manner of Mr. Lawless, arose altogether from his gestures, and the tone of his voice?

A. Entirely.

Q. Were not the Judge's eyes bandaged at that time?

A. My impression is that they were. They were either bandaged, or covered with goggles; I do not recollect which.

Q. Did you suppose that his manner was any other than that which is natural to a man convicted of a gross contempt and about to be sentenced?

A. I thought it was.

Q. In what respect?

A. He did not show that submission to the judgment of the court which I thought he should have done, seeing that any other course than that of a decorous and manly submission could not avail him anything at all.

Q. In what manner, and with what tone, would you have thought it perfectly decorous for him to have pronounced the words that he did?

A. It is very difficult for me accurately to distinguish between the manner and emphasis he used, and that which, in my judgment, would have been strictly proper. It may be, as I have already remarked, that my imagination furnished me with this belief, and there may be something about the ordinary manner of Mr. Lawless which might make a different impression upon me, from that which it does on those better acquainted with him.

Q. You spoke of his manner and gestures:—what gesticulations did he make?

A. In order to answer that question, it would be necessary for me to describe the room in which the court sat, and the position of the Judge and Mr. Lawless with regard to each other. Supposing the Judge to be situated as the President of this court now is, and the bar to be where I now stand, Mr. Lawless rose at the bar, and I was standing in such a position that his side was towards me. When the question was put to him,—whether he desired interrogatories to be filed, he wheeled himself partly round, and braced himself back, as if facing the crowd of spectators, and then said that he did not wish interrogatories filed, and that if they were filed he should not answer them. His manner, I thought, abrupt and somewhat offensive, and it seemed as if intended to show the multitude that he was at the defiance of the court.

Q. Then he addressed the multitude, and not the court?

A. I did not say that. But he placed himself in a position partly to face the multitude of people, while his words were addressed to the court.

Q. Did he turn his back on the Judge?

A. No: he turned his side toward him: he used a good deal of gesticulation, but it may not have been more than ordinary.

Q. What gesticulation did he use?

A. I do not know whether you will call it gesticulation;—his manner was that which I have described—he wheeled round, and turned himself towards the multitude, in this manner. [Here the witness turned himself partially round, raised his head and looked around him.]

Q. And that was all?

A. That was all that I recollect. I do not say, or know, what his object or intention was.

Q. *By Mr. Spencer.* After Mr. Lawless had declined the interrogatories and had offered the paper to which you have referred, did, or did not, the Judge say, that he had now committed a new and substantive contempt?

A. I do not recollect any such thing. I have charged my memory, since I found that that was a point of inquiry, and I cannot recollect it. It may be, and I think the fact was so, that as soon as Mr. Lawless said he should not answer interrogatories, some one touched me, and I was engaged in conversation.

Q. Did you hear the Judge say to Mr. Lawless, “you have now aggravated the contempt?”

A. I did not.

Q. By Mr. Wickliffe. Do you recollect having any conversation with Mr. Lawless, on the day after this transaction?

A. It may be; for there was great excitement on the subject, and perhaps I may have conversed with Mr. Lawless, as I did with many other persons. I cannot positively say that I did, or did not, converse with him. It is very possible that I did. The matter was very variously stated to me by those I conversed with.

JESSE G. LINDELL *called and sworn.*

Q. Were you present in the court during the proceedings against Mr. Lawless?

A. I was in court for a short time, during the delivery of the Judge's Opinion. The Judge, I think, was then commenting on a certain article signed "A Citizen." What he said I do not particularly recollect; but I will answer any questions that may be put to me, as far as I am able. Mr. Bates I think was reading the article, and the Judge remarking on it.

Q. What was the Judge's manner?—*A.* It seemed to me to be animated.

Q. Are you acquainted with the Judge's ordinary manner on the bench?

A. I have frequently been in the District Court, having served there as a juror; some times for a week or ten days at a time.

Q. What is his manner, when engaged in the delivery of long opinions?

A. His general manner is very mild; but I have seen him, in some cases, very earnest, and much animated, when delivering an opinion. I remember one case, in particular, of the *United States vs. Brown* and others.

Q. What was the nature of that case? Was it an attachment for a contempt?

A. It was a civil suit, against the Securities of Rector.

Q. Were important questions involved in it? or a large amount of money?

A. The bond, I think, was for \$30,000. As to the law questions, I am not a judge of them.

Q. Was the opinion, in that case, delivered much at length?—*A.* Yes.

Q. Did the manner of the Judge become earnest and animated?

A. Yes; I thought so.

Q. Have you ever seen any passion and anger in his manner?

A. He showed much earnestness. I do not know whether it would be called passion, or not. He was earnest and animated.

Q. Have you known Judge Peck for a length of time?

A. Ever since he has been in Missouri: for ten or twelve years,—probably more.

Q. What is his general character as to temper and disposition?

A. He is very mild and amiable in private life.

Q. How is he on the bench?—*A.* Very mild, so far as I have seen.

Q. Did you say that the Judge's manner, in the case of Mr. Lawless, was not more earnest than in the case of the *United States vs. Brown*?

A. I said that I could not discover any material difference, while I was in court.

ROBERT WASH *called again.*

Q. Will you state to the court whether you were present when Judge Peck delivered his Opinion in Soulard's case?

A. I am unable to state; my belief is that I was not present; but I have been told, since, by others, that I was;—and it is not impossible. I knew the Opinion before it was delivered, and I saw it afterward.

Q. What opportunity had you of seeing this Opinion?

A. I saw it in portions, while it was preparing.—I was in habits of intimacy with Judge Peck; and I visited him often while he was preparing the Opinion. He would, from time to time, show me written sheets.

[Here the managers interposed.]

Mr. Storrs. If the Opinion was written, it can be produced;—if those sheets contained it, or any part of it, they can be shown.

Mr. Meredith. Perhaps the Opinion was written out. I do not know how the fact was. We may be able to show that it has been destroyed, or lost. I have not inquired what the facts are; but evidence has been given of the contents of papers, on the other side, without any difficulty on our part. The objection takes us by surprise.

Mr. Buchanan thought there was no occasion for any expression of surprise.—It was certainly of consequence to know whether the Opinion of the Judge was delivered extempore, or from memoranda prepared beforehand. It was entirely decorous, and need excite no surprise, that, in the conversation across the table, the counsel should be asked whether those memoranda were in their possession or not? If they were, the managers would be glad to see them; if not, or if they had been lost, or destroyed, then they must put up with inferior evidence.]

Q. Did you see the Opinion as published?

A. I have seen it frequently. I read it soon after it was published.

Q. Have you read it more than once?

A. Yes;—three or four times,—that is, I have read parts of it as often as that.

Q. Have you any means of knowing whether the Opinion, as published, is in substance the same as that which was prepared to be delivered from the bench?

[This question was objected to, and the managers required that it should be reduced to writing; which was accordingly done. The question was then offered in the words following:]

Q. Have you any means of knowing whether the Opinion, as published, is the same in its substance and course of reasoning as the Judge had prepared in Soulard's case?

[*Mr. Wirt.* I will state the object which the respondent's counsel have in view, in putting this question:—we have already asked a witness whether the Opinion, as printed, is the same, in its substance, and course of reasoning, with that which was delivered orally? and it was answered, without any objection on the part of the managers. It appears, now, that the witness was intimate with the Judge, and knew, in advance, what the grounds of the Opinion would be. One argument which has been made in this case on the other side is, that the Opinion, as published, is not the same as that delivered from the bench;—that it was to be considered as an anonymous argument, published in the papers, in defence of a decree which had been made in court; and being so, and appearing in a public newspaper, it was such a subject for criticism as it would not have been if it had been the Opinion of the Judge, as delivered from the bench. Our object is, further to confirm the testimony already given, that the Opinion, as published, was in substance the same as that delivered; or, that the prepared Opinion, or the premeditation of the Judge's mind, (whether that premeditation was communicated verbally, in conversation, or was embodied in written notes,) was a means by which the witness was enabled to judge whether the Opinion published was, in its substance and course of reasoning, the same with that delivered. Our object is, to establish the identity of the two. I do not know whether it is the force of the objection, that if the printed Opinion did differ from that delivered, it is on that account any the more liable to animadversion: but, if such should be the opinion of any member of this court, it becomes important to us to rebut that. We do not wish to prove the contents of papers; We do not wish to show the trains of thought which they contained; but we desire to ask this witness, if he had any means which will enable him to say, whether the two Opinions were, in their essence, the same?

Mr. McDuffie. Our object is to save time. The ground of our objection was this, that the witness is called in to show what Opinion the Judge prepared? whereas, the question to be settled is, what Opinion did the Judge deliver? But we are willing that the witness should go on.]

A. I do not know that I distinctly understand the language of the question when it refers to the means I had. I can state what I know, and how and why I know it. I was intimate with the Judge. I knew, from conversations with him, what were his general views. He exhibited to me a number of sheets, which I read. I do not know whether these are now in existence, nor do I know whether they contained the grounds of the Opinion only, or the Opinion as it was delivered. All I know of that is from conversations with the Judge.

Q. Did the Opinion, as published, correspond with the principles which the Judge announced to you in conversation?

[This was objected to, as a leading question. After some conversation, the form of the question was changed.]

Q. From the means you had of knowing the Judge's views, how far does, or does not, the published Opinion correspond with them?

A. His general principles, as I understood them, before the Opinion was delivered, are disposed of, in the published Opinion, very much as I knew that they would be; but, in so long an Opinion, there may be some principles embodied which had not been committed to paper, or mentioned in conversation. But the leading principles are such as the Judge had settled, and such as were contained in the written sheets which he submitted to me.

Q. Are you acquainted with the probable number of persons interested in the land claims of Missouri?

A. Not exactly. The body of claimants was considerable; I have seen long lists of unconfirmed claims.

Q. You say that you read the Opinion after it was published. Did you read it before the article signed "A Citizen" appeared?

A. Yes, I read it immediately.

Q. When you read the strictures in that article, did they strike you as misrepresenting the Opinion of the Judge in a manner calculated to awaken the contempt and excite the disrespect of the land claimants?

[This question was objected to by the managers, who required that it should be reduced to writing, which was accordingly done; Mr. Wirt observing that he had anticipated an objection to it, and the question was presented in the words following:

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

Mr. Storrs. As the counsel for the defendant had anticipated objection to this question, he must have been aware of the principles on which it would be founded. These indeed are so obvious that he could not in common candor have failed to confess the anticipation. The question which has been proposed is this: [Here Mr. S. read the question as above;]—that is, in other words, "on comparing the whole evidence exhibited in this trial and on comparing the Opinion with the strictures upon it, what judgment should this court pronounce upon the facts." The question for the court to settle is this. Did the strictures misrepresent the Opinion? That is a question which must be decided on facts. The witness is now asked his conclusion, but is that an evidence of fact? We thought that this was to be a trial of fact, and that as to the conclusions from the facts it was the court that was to make them. This witness might as well be asked what is his inference from any other part of the testimony. Why not? Why not as well ask him, Do you think that Mr. Lawless in his testimony, has spoken the truth? as ask him, Is it your opinion that Mr. Lawless in his printed article has misrepresented the Opinion of the Court. That is a matter of which this court are to judge. If questions of this kind are to be admitted, this will become a trial not of Judge Peck, but of the opinions of the witnesses; and where is this to lead? The next question in natural order will be, In what particulars is the article a misrepresentation? If this question is competent, that is; then we

must go into a comparison of the article and the Opinion, paragraph by paragraph, (we have seen something already, of a process of this kind,) then we are to examine the witness as to his knowledge of facts, and the extent of his legal information; and when we have done all this, we shall just have commenced, so far as one witness is concerned; then we may be called to go through with forty others; after that we may call forty or one hundred more to deliver their opinions on the other side.—We may include the whole House of Representatives.—We may then proceed to the spectators, and after we have emptied the galleries we may then go into the street. Is the witness called to testify to any fact from which the court can form an opinion? None. Where is this to end? What satisfactory result can be arrived at from such a course? If the respondent is to have a witness argue the point on one side, the managers will demand the same privilege on the other—then the counsel must be heard—then the managers, and then we shall have got round exactly to the point from which we started, viz. what is the opinion of the court?—that is the question—that is the true question.

It is true that Mr. Lawless was asked questions somewhat of this kind; but it was on the cross-examination, when the counsel for the respondent went into an elaborate examination, in order to show whether he was sincere in the representation he made, or whether it was made against light and knowledge, and his own convictions. The respondent put that examination on the ground that he should be able to show from Mr. Lawless' own answer, that there was no semblance of excuse, even according to his own showing, for the positions he had taken in the article—that he had not even sincerity to shield him. On this ground the court permitted the examination to be gone into, although the managers, as was their duty, protested against it. But this is a very different question—it might perhaps have been proper to ask whether Mr. Lawless could show any plausibility in his representations as a proof that he might have been sincere in making them; and the respondent undertook to show that this could not have been the case, but that Mr. Lawless must have had some other motive. But now the counsel call other witnesses, not with that view, but to find out whether, in their judgment, there was anything that might justify Mr. Lawless in writing that article. The difference between the two cases need not be pointed out—it is seen by intuition—the circumstances are not the same,—the reasons are not the same—the object is not the same—the conclusion is not the same. Every principle on which the counsel contended that such an examination was necessary in the case of Mr. Lawless fails here. This in our apprehension is a good objection to the question.

Mr. Spencer. It would seem to me that the question proposed by the respondent's counsel is not highly complimentary to the intelligence of this court: it seems to imply that the court is incapable of discriminating between the strictures of Mr. Lawless and the Opinion of the Judge, and of determining whether the one is or is not a misrepresentation of the other: when I should suppose that this can be determined only by a comparison of the article with the Opinion, a comparison which every member of the court must at last make for himself, unless I have completely forgotten and unlearned all the law that I ever knew. It is not competent to ask the opinion of a witness as to any matter unless it is a question belonging to his own trade or profession, as when a surgeon is asked to say whether in his opinion a certain wound might or might not produce death; and even here it is allowed purely on the ground of necessity. It is not possible that the rest of the community should be as competent to form an opinion on such a subject as one who has devoted his whole life to the study and practice of anatomy and surgery. But can this case possibly be put upon that ground? Will gentlemen pretend on that principle that Judge Wash is more competent to form an opinion whether one paper misrepresents another. Is any professional knowledge here required? surely not. A simple collation must be sufficient to show whether there is a material misrepresentation or not.

I should like to hear the distinction which the counsel will take on a rule of evidence so plain and so well established.

It appears to me that this is a decisive objection.

Mr. Meredith observed, that notwithstanding the objections which had been urged, he still thought that the question proposed to be asked of the witness was a proper one. A main inquiry in this case is, whether the publication which was treated by the respondent as a contempt, was or was not a misrepresentation of the Opinion of the Court in the case of *Soulard*. This inquiry then obviously demands a comparison of the publication with the Opinion, and it is as obvious, that such a comparison cannot be made, without a previous acquaintance with the peculiar doctrines and principles involved in the case, and a knowledge of the Spanish laws and ordinances, from which they chiefly arise. Presuming, as we think we may with the most perfect respect presume, that the members of this honorable Court, called for the first time to the consideration of such a subject, are not prepared to make a satisfactory comparison for themselves, we offer the result of a comparison made by others, under circumstances entitling it, as we think, to respect and confidence.

The question we propose to ask of the witness now before the court is, whether when he first read the publication of *Mr. Lawless*, he considered it as a fair statement, or as a misrepresentation of the Opinion. Of whom is this inquiry to be made? Of one, enjoying peculiar means of information;—familiar with the whole ground of the controversy between the heirs of *Soulard* and the United States,—with the doctrines of the Opinion, and the course of reasoning by which they are established, and with the Spanish ordinances and regulations on which the decision ultimately rests. Does not the reason then of the rule of evidence adverted to by the honorable manager who has just addressed the court, forcibly apply to this case? Does it not in principle extend to all cases, in which, from the peculiarity of the questions they involve, the tribunal whose province it is to decide, cannot be presumed to possess the requisite knowledge to enable it to form a correct judgment, unassisted by the opinions and conclusions of others? The rule is founded in necessity, and applies to every case in which the necessity exists. If it does not exist in this case, I am willing to admit, that upon this ground, at least, the question is an improper one. If the court have all the information necessary for the comparison; if they are familiar with the peculiar nature of the controversy; if they have had time and opportunity carefully to examine these foreign laws and ordinances in all their bearings upon the questions decided; if they have mastered the reasonings and conclusions of the Opinion;—if in one word they require no further aid, then indeed the rule adverted to can have no application. But if, on the contrary, they believe that they have not the necessary materials for a just comparison, it follows, looking to the reason on which this rule of evidence is founded, that the question proposed to the witness, is proper and admissible.

But again, another great question in this cause, is the intention which actuated the respondent, throughout the transaction that has given rise to this impeachment. If this honorable Court shall ever believe, that the publication contains a fair statement of the doctrines and conclusions of the Opinion, this question of intention is still open, and becomes a very important one. May not the respondent have erred in judgment only, and not in motive? It will be contended, however,—it has indeed already been contended in the opening, that malice is in this case a necessary inference. It may again be asserted, as it has been asserted, that to all minds but the mind of the respondent, the publication must be considered fair, candid and accurate; that he stands alone in the estimate which he formed of it, and that nothing but malignity itself, could have tortured such a publication into an intentional misrepresentation of the Opinion. Now we desire to meet this argument by proof; to array facts against hypotheses, and to beat down this inference of malice, by showing, as we are prepared to show, that the respondent was by no means singular in his opinion of the nature and ten-

dency of the publication, because not only this witness, but several others equally respectable and intelligent, equally acquainted with all the facts of the case, and competent in all respects to form a correct judgment, came to the same conclusion, and believed, and do now believe, that the publication of Mr. Lawless is a gross and intentional misrepresentation.

Again, the question proceeds a step further: it proposes to inquire of the witness, what effect the publication of Mr. Lawless was calculated to produce on the people of Missouri, and especially upon the land claimants. Now I would respectfully ask the members of this court, whether they are in a situation to judge for themselves of the impression which such a publication would make? Are they so intimately and thoroughly acquainted with the habits, feelings and views of the people of Missouri,—with the intelligence and course of thinking of the land claimants as a body, as to render the question unnecessary or improper? The respondent avers that this was a designed misrepresentation;—that its purpose and object were to inflame and irritate the public mind, and more especially the claimants against the court;—to bring it into ridicule, contempt and abhorrence, and ultimately to break it down, or at least to prevent the continuance of its powers beyond the period limited by the act of Congress. Now this averment is the proper subject of proof; it bears upon the question of intention, and, established by proof, frees the case from the uncertainty of inference. Is it not proper? Is it not necessary? It is not the evidence of opinion but of fact; for I am instructed to say, that we shall show not only the impression which the publication was naturally fitted to produce, but the impression which it did actually produce, upon the public mind. For these reasons I consider the question a proper one.

Mr. Wirt. I should not trouble the court with any additional remarks, if it did not strike me that there was a hazard that a principle familiar to us all, should, in the hurry of the moment, be applied to this case, to which I think it wholly inapplicable. We place the question on two distinct grounds, but before I proceed to discuss these, let me first be permitted to make one or two general remarks on the law of evidence, particularly as it applies to an impeachment. In the well-known case of Warren Hastings, which occupied England so long, a most able and masterly protest was entered by Mr. Burke and the managers on the part of the House of Commons against the application of the rigid rules of evidence which governed the practice of courts of law. It was contended before that tribunal, that instead of the strict and iron rules of a law court, the field was broad and liberal, and to be controlled by no rule but the *Lex et consuetudo Parliamenti*. The protest is extended, very learned, and rests on numerous authorities; and if this court could have an opportunity to review it, they would not feel the least hesitation as to the fact that they are not to be trammelled and hemmed in by the rigid rules of evidence. I find that in the remarks of the Federalist respecting the High Court of Impeachment erected by the constitution of this country, the writer lays it down as a conceded point, that the strictness which prevails in the ordinary criminal courts does not apply here, nor is it required that the article of impeachment should be drawn up with all the rigid precision of an indictment. The proceedings in this highest court are to be more liberal and free, and nearer substantially to the course pursued by courts conversant with the civil than the common law. Mr. Rawle has the same idea. And the question would be, if the original view could now be before this court, whether this tribunal, which is not an appellate court on all questions of law, and is not therefore conversant with the strict rules of law, but whose whole jurisdiction has respect to impeachments alone, should or should not open itself to all lights which can be brought to bear on this decision, and whether more injustice would not accrue from narrowing the apertures through which light is to be received, than from opening them in all directions from whence a single ray can touch them. But I waive this.

We affirm that there are no rules of evidence which bind even courts of law

themselves in all cases. The affairs of human society are perpetually undergoing new modifications; and in the progress of human things, questions are continually presenting themselves in new lights, and men are from necessity driven to resort to first principles and natural reflections instead of abiding by rules which relate to a different state of things. A conviction of this truth induced Lord Mansfield to say, We will not take our rules of proceeding from Siderfin and Keble, but we will make new rules, and apply principles already established, to new cases. When a new emergency arises, we are not to bring it to the bed of Procrustes, or pare it down to antiquated rules which have become inveterate in the courts of law. But admitting that the laws of evidence were to be inflexibly applied, is it only in regard to the mechanical or liberal arts that the opinion of a witness may be asked? How is the whole body of foreign law proven? the law of France—the laws of Spain—the unwritten usage of foreign countries? Is it not to be proved by the opinion of enlightened men, intimately conversant with those laws, and who have made them the subject of laborious study? Are they not admitted to prove them, not as principles of law, but as matters of fact? *Cuique in sua arte credendum est.* The shipwright is permitted to be heard in matters of naval architecture—the surgeon is permitted to speak on questions of anatomy—and on the same principle, the man acquainted with foreign law is permitted to testify in cases where a knowledge of that law is indispensable. On what law did the decision rest, in Soulard's case? on the laws of America? on the written laws of Spain? Was there no discussion as to Spanish usage and the unwritten law of the Provinces? Were not the grounds on which that decision rests compounded of written regulations, royal orders, and the usages of the Spanish authorities? And is it disrespectful to say that this court may receive light from the opinion of one who has made those laws his study? If the question to be decided, depended on a knowledge of the law of Persia, or the law of China, would you consider yourselves in as favorable circumstances to form a judgment concerning it as a professional man long and intimately acquainted with the laws of Persia or of China? I apprehend not. The question we propound does not go to the naked inquiry whether the article of Mr. Lawless misrepresents the Judge—it looks to the bearing of that Opinion beyond its actual limits, and as combined with usages and the existing state of society, which vindicates it from the imputation of being in the slightest degree disrespectful to this court. But it goes beyond this—it takes for granted a difficulty which is not imaginary—a difficulty which I have myself felt, and to overcome which, I have been obliged to make the laws, ordinances, and customs, which prevailed in Louisiana a subject of laborious study. I was unable to grapple with the Soulard case, till after a long and patient study of those laws;—and the Supreme Court of the United States, to whom the cause went by appeal, acknowledged themselves to be baffled by the same want of knowledge in relation to the Spanish law, and confessed their incapacity to form a right decision without the aid of new and farther lights. This court does not possess the same advantages for a decision as that did. Its members cannot rise to advise; they are obliged to decide rapidly and on the spot. I ask if they feel as though they were able to embrace the whole subject embraced in this cause: I ask whether no fair and candid light may be thrown upon it by the views of one intimately conversant with that portion of it with which they are of necessity less acquainted.

But the question goes further: it asks whether the misrepresentation was of a nature to affect the people of Missouri, and to awaken their indignation against this Judge? Are you masters of the temper of the people of Missouri? of their tone and character and views? are they not as far removed from you as to any local question as would be the people of Persia or of China? the question appeals to the operation of this publication on the people of Missouri. The Judge was punishing a contempt committed in the midst of a very peculiar community, a community generally acquainted with the subjects to which the publication of

Mr. Lawless and the Opinion of the Court had reference, and the question asks, Was the tone and temper and character of that people such that a statement like that contained in the article was likely to awaken resentment? You are not to ask what would be its effect on yourselves, on your own enlightened minds, but What was likely to be its effect on the people among whom it was thrown? would it not awaken their contempt? Would it not shake their confidence in the court, and induce them rather to fly from it as weak or corrupt, than to look to it for the pure administration of justice? As a new question, having an application to local feelings, local prejudices, local professions, we wish to ask this gentleman to state his impressions as one who knows the people of that part of the country. We insist that it is a proper question and a necessary question, because it is a question as to what would be the effect of such an article there, on the spot; because the question is new, because the law is new, and the opinion of one familiar with it is a better opinion, and because the feelings and opinions of the people of Missouri can only be rightly judged of by one of the people of Missouri. This is our first ground of argument.

But we take another ground, and one which appears to my mind perfectly unanswerable. We cannot anticipate what this court may decide, but we put it to the court whether in investigating the intention of the party, this question may not have an important bearing? No proof of that intention is adverted to in the article of impeachment. That article says that the Judge was actuated by an intention wrongfully and unjustly to oppress and injure Mr. Lawless. There is no positive proof as to that intention: there is no proof of any previous hostility towards Mr. Lawless on the part of the Judge, but the intention is left to be inferred by putting together this and that patch. What was the grand point assumed and pressed with great ardor by the eloquent managers? It was this, not only that the article contained no misrepresentation of the Judge's Opinion, but that no one but a man infatuated by malignity, could possibly think it so, and the argument is that the common sense of Judge Peck was enervated and obscured by his malice. If this court can come to the conclusion that the article signed "A Citizen" contains no misrepresentation; and if it can then go one step farther, and hold that its fairness is so palpable that malice only could distort it and see it writhe, there may be some proof of the Judge's guilt. But if it can be shown on his behalf that intelligent and dispassionate observers on the spot, having no personal interest in the case, did of themselves regard it not only as a misrepresentation, but as a misrepresentation of alarming aspect and of fearful consequences; if we can bring before you one, two, three, four, half a dozen such individuals, who held, separately, the same opinion, then what becomes of the argument that the Judge must have been infatuated by malignity? We meet the patched up inference of the other side by showing that enlightened men besides the Judge thought the article a dangerous one; and if so, might not candor allow that the Judge himself might think so to? As bearing on the question of intention, (the great and vital question in this cause,) when the argument is that the Judge's mind was obscured by malignity, surely the proof that others thought as he thought, and those, men well calculated to judge, effectually removes the ground of the impeachment, so far as it charges malice on the accused.

An honorable manager remarked, that I had admitted an anticipation that this question would be objected to. It is proper therefore to state, that that remark was founded on a deposition from Missouri, which had been submitted to them, and from which they proposed to expunge all that part which this question goes to cover; and the understanding between us was, that a question like that now proposed should be submitted to this court. It was from this circumstance only that I was led to anticipate the objection which has been raised, and not from any inherent sense of the impropriety of the question.

Mr. Buchanan. The counsel for the respondent, in arguing the present question, have clothed it with so much matter foreign to its nature, that it will be necessary for the managers to strip it of some of the splendid attire with which

it has been adorned. What is the naked question now before the court? The respondent has been arraigned before this tribunal, for having violated the laws of the country with a criminal intention;—for having illegally and oppressively imprisoned and suspended Mr. Lawless, under the color that he had been guilty of a contempt of court.

The respondent's counsel contend that the publication of which Mr. Lawless is the author was a contempt of court which he had a right to punish; because it was a libel on the court, and contained a gross misrepresentation of its Opinion. What then is submitted to you to decide, composing as you do, the highest court of the nation, and, in my opinion, the highest tribunal in the world, not excepting the High Court of Peers in Great Britain? You are asked to receive the mere opinion of a gentleman from Missouri for the purpose of guiding your judgment, not upon any question involving a knowledge of any particular art or science in which he professes to be an expert, but simply upon the question, whether the publication now before you is a libel or not,—whether it is a misrepresentation or not. If a court ought to be capable of deciding any question, and of drawing an inference from any fact, it is whether a given paper contains a libel. This is a mere question of law, the determination of which belongs exclusively to the court. So clear has the general proposition been considered, that in England, until the passage of Mr. Fox's celebrated bill, the courts, even in criminal cases, decreed to juries the right of participating in the decision of the question. They decided all questions of libel, as they did the interpretation of written instruments which were exclusively within their province.

And now this court is called upon to take the opinion of Judge Wash, whether a certain article published in one newspaper is or is not a misrepresentation of an Opinion published in another newspaper; whilst both these documents are in their possession. Nay more;—you are not only asked to receive his opinion on the question of misrepresentation; but it is also proposed to submit to his judgment to decide what would be the effect of this publication on the people of Missouri. This tribunal, representing as it does each State in the Union, and embracing within its view the whole Union, is to be enlightened by the opinion of the judge, upon the avowed principle that its members are ignorant of and cannot be presumed to understand what would be the effect of a libel upon the people of the State of Missouri.

[Here Mr. Meredith interposed, to explain. He had not said that the court did not possess sufficient information to decide the question whether a written paper was a libel or not; but that as this publication dealt in principles of foreign law and referred to circumstances which the court could only know from testimony, it was not improper to take the views of a witness in relation to it.]

There is another palpable view of this subject. The counsel of the respondent, in framing their question to be put to the witness, have used almost the very terms employed by the respondent in a most material part of his answer to the article of impeachment. This will be made manifest from a bare comparison. The language of the answer is that "the immediate tendency and object of the publication were to prejudice the public mind with regard to these claims; to excite the resentment and hostility of the numerous and influential body of land claimants in Missouri, and their connexions, against the Judge, who alone composed the court; to destroy the public confidence in the integrity and judgment of the tribunal." The question now proposed to be put to the witness is, "When you read the strictures signed 'A Citizen,' did they strike you as misrepresenting the Opinion of the court in a manner calculated to awaken the contempt and indignation of the people of Missouri, and to impair the confidence of the suitors in that court in the intelligence and integrity of the tribunal?"

This question in four lines embraces the very essence of the respondent's defence, —the very question to be decided by the court, and asks the witness to substitute

his opinion for the judgment of the tribunal. I ask, is there a court in the United States, however inferior its grade, which, on the trial of an indictment for a libel, would not, without an argument, overrule the opinion of a witness, as to whether the matter charged to be libellous was or was not a libel, and what would be its effect on the public mind? Does it not strike every one at the first blush that no such court could be found in any portion of this country?

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

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

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

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

The gentleman proceeded to observe, that new cases were continually arising in the progress of human society, and that new rules must be made for such cases; and he appeared insensibly to betray to all who heard him his own opinion upon the question now before the court, (in the manner in which it has been said Mr. Lawless discovered himself to be the author of the article signed “A Citizen.”) He has also cited the remark of Lord Mansfield, that he would not take his rules of proceeding from Siderfin or Keble.

But, Sir, is this a new case demanding a new rule? Is there any peculiarity in the question now before you, requiring the court to depart from the established law? You are not now called upon to decide what are the laws of Spain, of Persia, or of China. If this were the case, I admit, that what those laws are would be a question of fact, and like any other fact, they might be proved by

competent witnesses. But no such question arises upon the trial. This court has a far less perplexing duty to perform. It has not even to decide whether the Opinion of Judge Peck be right or wrong; but merely whether the inferences drawn from it in the article signed "A Citizen," were fairly drawn. How then can the argument of the gentleman apply, when this court is neither sitting to settle a question of foreign law, nor even to fix a construction upon the royal ordinance of 1754, or the regulations of O'Reilly, Gayoso, or Morales; but simply to say whether an article in one newspaper be or be not a misrepresentation of another article in another newspaper. Whether this publication was likely to draw down upon the Judge the indignation of the land claimants in Missouri, or not, is purely a matter of opinion. All that is sought by the question is opinion, and but opinion, from first to last. The witness is not asked what effect had this publication in Missouri, but what effect, in your opinion, was it calculated to have? The public feeling itself would not be evidence; but this is only the opinion of a witness as to what would be that feeling. It is barely the opinion of one man in relation to what would probably be the opinions of other men.

The learned counsel says that this testimony may be very important on the question of intention. Let me be indulged in a few words on that subject. How are a man's intentions to be ascertained but from his actions? If one man wilfully and deliberately kills another, shall he be allowed to excuse himself by declaring that he had no intention to commit murder? If a man with coolness and skill counterfeits my name for his own benefit, would any court in order to convict him of forgery require me to prove what was his intention? The criminal intention is always to be inferred from the facts and circumstances attending the criminal action. If on the present occasion we show a case, where a member of the bar, merely because he had made a commentary on the Opinion of the Court in a cause finally decided, was dragged before the Judge, was imprisoned, and was suspended from the practice of his profession for eighteen months, and was thus not only disgraced before the public, but deprived of the means of supporting his wife and children; it will require most powerful testimony indeed to show that such a Judge had no improper intention. His intention is to be inferred from these actions, and not from the opinions of any man. Whether the article of Mr. Lawless made a favorable or unfavorable impression upon the witness, is wholly immaterial. You, and not the witness, are the judges of the respondent's intention; and I admit that if you can have a reasonable doubt in relation to it, it will be your duty to acquit. The offer is but the opinion of the witness as to the intention of the accused;—and has it ever been heard of, in any court of justice, before this case, that after the facts on which the prosecution rested had been fully established, the opposite party was permitted to show by the mere opinion of witnesses that the evil doer had no evil intention?

The gentlemen have not touched the objection of my colleague, who first addressed you, to the admission of this testimony. Should the question be put, will it not open a wide,—a boundless field? In that event, when is this trial to close? It will then become the duty of the managers to cross-examine Judge Wash in the same manner that the counsel for the respondent have cross-examined Mr. Lawless. Opinions on this subject differ in Missouri; and after we examine all the witnesses on both sides, what shall we have obtained? Not fact against fact, but opinion against opinion; and that forsooth to enlighten this Body. Mr. Buchanan concluded his remarks by reading to the Senate the question proposed to be put to the witness.

Mr. Storrs. I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming

principle established, than that in the trial of an impeachment the ordinary rules of evidence are to be relaxed; and I was, I confess, surprised that the respondent should seek to unsettle a principle, the overturning of which might easily lead to the most unjust and oppressive proceedings. If this is to be done in favor of the respondent, will it be done to favor him alone, or may not State favorites be shielded or State victims destroyed by the same process? I know indeed that Mr. Burke was very much dissatisfied with the rules, and was very desirous that when the House of Lords were engaged in the pursuit of a great criminal, he might have found it very expedient that the laws should be changed; but the court left him to his protest, and they did wisely. I was surprised that the counsel should urge as a principle to govern this court that which was overruled as soon as offered. The time may come in this country, and it has long since come elsewhere, when impeachments shall be used for purposes which he would as little approve as I, and this in particular reference to the judicial department. I should esteem it as a great public misfortune if the argument which that gentleman has offered to this court should be listened to with any more respect than that which is always due to him personally. I could not ask, if I was the worst enemy of my country, for the establishment of a more dangerous principle.

It is worthy of remark too that the learned counsel takes it for granted that he must impress this court with the necessity of relaxing the rules of evidence before such a question can be admitted to be put. He says that the opinion he wishes to get at may be received, because it is a professional opinion, and the witness is a professional man. A professional opinion? And on what? As to a fact? No. We ask a witness indeed what is the law of Missouri? What is the law of Spain? What is the law of China? And why? Because that is a species of knowledge peculiar to him. So in the case of a shipwright; in the case of a surgeon. We ask a surgeon, Is this a wound which would naturally produce death? The answer is an opinion, but it is an opinion on a subject peculiarly within his grasp; and even then we must accompany his opinion with the reasons on which it is founded. But this witness is not asked for his professional opinion as to any point in the laws of Missouri. He is only asked for his opinion as to the effect of a certain printed article. The counsel said that the Supreme Court itself was at a loss, when the case of Soulard came up before it. Very true; and what did that court do? Did it ask for the opinion of a witness? No. It asked for facts. It called for transcripts, for ordinances and regulations. Did it ask for an opinion in those ordinances? No: it was not so senseless. The counsel says, this court, before it can rightly compare the strictures with the Opinion, must know the Spanish laws and ordinances. Let him prove them then.

And now on the other branch of the argument, they wish to ask whether the article of Mr. Lawless was calculated to produce the impression in Missouri that justice was not administered in their District Court. Very well. If they want to show this, let them ask what are the facts. What is the character of the people of Missouri? What is the tone of feeling there? What are their prepossessions and prejudices? When these questions are answered, the court can judge for itself what effect such a publication as that of Mr. Lawless was calculated to produce. If these questions were asked first, and then such a question as this was proposed, the court would in a moment see it to be improper. If they first asked the witness, what are the feelings and prejudices of the people of Missouri? and then asked the witness, what is your opinion as to the probable effect of such an article upon them? every one would see at the first blush that the question would be an improper one. Is it any the less improper for being put first in order? This is the whole argument: it was covered, I admit, with most ingenious phrases; but after all, we come back to the simple inquiry, Is this question calculated to elicit fact, or to elicit the opinion of a witness?

The question was then put by the President of the Senate, "Shall this question be put to the witness?" and decided as follows: yeas, 7—nays, 35.

So the question was overruled.

The court then adjourned to Monday next.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Monday, January 10, 1831.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel, also attended.

Mr. Meredith apologized for the absence of Mr. Wirt, whose indisposition confined him to his chamber.

ROBERT WASH *called again.*

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

[To this question the managers objected, and it having been reduced to writing, the question was taken whether it should be answered by the witness;—and decided in the negative, by yeas and nays, as follows:—

Yea.—Mr. Noble.

Nays.—Messrs. Barnard, Barton, Bell, Brown, Burnet, Chambers, Chase, Clayton, Dickerson, Dudley, Ellis, Foot, Forsyth, Frelinghuysen, Grundy, Hayne, Hendricks, Holmes, Iredell, Johnston, Kane, King, Knight, Livingston, McKinley, Marks, Naudain, Robbins, Ruggles, Sanford, Seymour, Smith Md., Smith, S. C., Sprague, Troup, Tyler, White, Willey, Woodbury.

Mr. Meredith then stated that in consequence of this decision of the court, as well as that made on Friday last, he had stricken from the depositions, taken in Missouri, and now to be offered in evidence, all that portion which was covered by the principle of the decision. The depositions had been examined jointly by the managers and himself, and the portions to be expunged had been mutually agreed upon. He then offered the following depositions.

Depositions of witnesses taken and subscribed before William C. Carr, Judge of the Circuit Court of the Third Judicial Circuit of the State of Missouri, to be read on the trial of an impeachment now pending before the Senate of the United States, against James H. Peck, for high misdemeanors in office.

DEPOSITION OF SAMUEL MERRY.

I was at the court during the last day of the rule against Col. Lawless. [Here a clause was stricken out, by agreement of counsel.] I went to the court the next day, and was present during the sitting of the court, or until the Judge had pronounced his final sentence. Col. Strother appeared that day as counsel for Col. Lawless. He spoke for some considerable length of time, taking the same grounds of defence which he had informed me that Col. Lawless' counsel had previously taken:—that is to say, that the Judge could not punish at that time for a contempt, but might indict Col. Lawless:—whereupon Judge Peck inquired of Col. Strother if he had not seen the case reported of which I spoke above; when Col. Strother replied, he had not seen it, but had heard that there was such a case. Judge Peck then mentioned the case; upon which Col. Strother replied to the Judge, that he had no further defence to make; and turned around to Col. Lawless, and advised him to make explanations. Col. Lawless refused to do so. Judge Peck then asked Col. Lawless whether he had any further defence to make? or whether he would answer questions? To which Col. Lawless replied, that he had not, nor should not. Whereupon Judge Peck pro-

nounced his sentence. Judge Peck's manner was courteous and polite, as far as I could discover, both to Col. Lawless and his counsel. His manner was somewhat warm and animated; but I thought, not more so than it was, always, when in conversation, or in an argument. Col. Lawless appeared much irritated and excited. [Clause omitted.] Judge Peck was a very considerable length of time in delivering his Opinion, or commenting upon the discrepancy between his printed Opinion and the publication made by Mr. Lawless.

Q. By Judge Peck. Please state whether the court was abusive or used epithets unbecoming the bench on the occasion, during the delivery of its Opinion.

A. I did not think so.

Q. By the same. Did Col. Lawless, after the delivery of the Opinion, and about the time he was called upon to receive his sentence, endeavor to impress the bystanders, by anything that he said or did, that what he had written was true, and that he was about to suffer for publishing the truth?

A. I do not recollect of any such conduct.

Q. By Mr. Lawless. Were you present when the order for the commitment was made?

A. I was.

Q. By the same. Was I present the whole time that you were in court?

A. You were, to the best of my recollection.

Q. By the same. Do you recollect my leaving the court at any time while you were present?

A. I do not.

Q. By the same. Did you ever read the article signed "A Citizen," or the Opinion to which it refers?

A. I do not think I ever read either entirely through, or ever compared them together.

SAMUEL MERRY.

DEPOSITION OF JOHN BENT.

I was present at the District Court of the United States held at St. Louis, Missouri, during part of the proceedings against Luke E. Lawless, for a contempt of that court, for publishing in the St. Louis Enquirer certain strictures on the Opinion of Judge Peck, delivered in the case of Souldard's heirs against the United States for the confirmation of 10,000 arpents of land. I do not think, however, that I was present when the court first expressed an intention of proceeding against the author of that piece or those strictures for a contempt. My impression is, that it was after hearing that such proceedings would be had, that I was induced to attend. I think, when I first entered the court room, during the pendency of the proceedings on this subject, Col. Lawless was addressing the court, against the rule on the editor. Col. Lawless spoke, on that subject, at great length, as did also Capt. Geyer. I do not recollect whether any other member of the bar addressed the court on that subject, or until the rule was made against Col. Lawless himself. I think Col. Lawless was also again heard by the court, on this subject, the following day; perhaps Capt. Geyer also. They spoke very much at length, and with considerable warmth, although I cannot say that I discovered anything very extraordinary in the manner or matter of Col. Lawless. He is constitutionally sanguine, and generally vehement and determined in his manner, appearing in all cases, great and small, to have convinced himself of the truth of his positions and the strength of his arguments. I recollect that as to Capt. Geyer, it was matter of some remark, among my associates, that he made more of a popular speech than a legal one, and that he seemed to rely more on such arguments as would be likely to operate on the feelings of his hearers, than on such as should correct the opinion of the court in point of law. The arguments of the counsel, in resistance of the rule against Col. Foreman, and in showing cause on the rule against Col. Law-

less, were so similar in their general scope, as to render it impossible for me, at this distant time, to separate them in my mind : or for me to say what particular difference was taken on the two occasions. It was, however, contended, on both these occasions, that the mode of punishment indicated by the rule was unconstitutional, dangerous to the liberty of the citizen, and destructive of the liberty of the press : that the strictures over the signature of " A Citizen," were nothing more than a libel, and should be proceeded upon as libels are required to be proceeded upon at common law, &c. The author might be indicted, but could not constitutionally be punished as was indicated by the rule. It was also insisted that according to the course the court were then pursuing, the court would be sitting both as judge and jury, and that on the trial of his own cause : considerable warmth and earnestness was used on these points, by the counsel, and they were several times interrupted by the court during their arguments, with a view, as I thought, of turning the attention of the gentlemen to some particular point, or to a different view of the point under discussion, from that which counsel seemed to have taken ; but on what particular point I cannot now recollect. The Judge, at such times, seemed rather more firm and positive than is his general custom, but I did not think it either violent or disrespectful. Mr. Lawless, particularly, while endeavoring to show that the strictures contained a true representation of the Opinion of Judge Peck, was several times interrupted by the Judge, as I think, to correct Col. Lawless in his construction of that Opinion, or rather, in his quotations from it. After the rule had been made against the editor, (I think on the third or fourth day,) Col. Foreman, the editor, came forward in person, and on oath purged himself of the contempt. The precise words used, or statement made, by Col. Foreman, I do not now recollect : but it was considered sufficient by the court, and the rule thereupon, discharged ; and a rule dictated by the Judge against Col. Lawless, who had been given up by the editor as the author of the publication signed " A Citizen."

I was, at that time, deputy clerk of the District Court ; and I think I either wrote out the rule, as dictated, or made a copy of it for the marshal, but am inclined to think I wrote the rule as dictated by the Judge. After the rule had been made against Col. Lawless, he appeared by his counsel, Capt. Geyer, Mr. Magenis, and Col. Strother. The same positions were now assumed which had been taken in the argument against the first rule, except, that the court refused to hear anything which might go to show that the matters contained in the publication did not amount to a misrepresentation of the Opinion of the Judge—that question having been previously decided. The manner of counsel was, as I before stated, animated, and somewhat pointed. After the counsel had finished their arguments, the court proceeded to deliver its opinion, considering and treating separately the different points which had been made by counsel, and endeavoring, as well as I recollect, to show the necessity of summary punishment for contempts, and bringing the strictures within the class of offences so punishable ; and insisted that such mode of punishment, so far from impairing the liberty of the citizen, was one of its surest guarantees, by arresting the publication of such matters as were calculated to weaken the confidence of the public in the uprightness, integrity and capacity of their judges, and bring into contempt their decisions. I am not certain that I was in the court room when Judge Peck commenced the delivery of his Opinion. If I was, I was not attending particularly to the proceeding.

The Judge, I think, in the conclusion of his Opinion, requested Mr. Bates, the District Attorney, to read, from the newspaper, the strictures signed " A Citizen," by paragraphs ; which he did. The Judge animadverted on them as read, stating that such and such were slanderous, libellous, or defamatory.

I do not, however, *now* recollect that these epithets were as applicable to Col. Lawless generally, but as applicable to the piece, and probably to the

author of the piece then under consideration. I do not now recollect that Col. Lawless was directly addressed, at all, by the Judge, during the delivery of his Opinion. The manner of the Judge was somewhat more positive and animated than usual with him; he is ordinarily quite mild and placid. This was a case, however, in which I rather incline to believe not only the Judge and counsel, but a greater portion of the standers by, labored under more or less excitement. I did not, for my own part, think that either Col. Lawless, or Judge Peck, manifested as much excitement as I expected on that occasion, from the relative situation in which they stood, and the known irascibility of Col. Lawless.

Q. By Judge Peck. Were you present, generally, from your first appearance in court, during the proceedings above referred to, until the final judgment of the court was rendered against Col. Lawless?

A. I was, according to my present recollection, nearly the whole time.

Q. By the same. Where did the court sit when Mr. Lawless and Capt. Geyer were first heard against the rule?

A. I think, in the baptist meeting-house.

Q. By the same. Were they heard on the same rule whilst the court sat at any other place?

A. Col. Lawless was, and I think Capt. Geyer also, heard, when the court had removed its session to a house then occupied by Clement B. Penrose, Esq.

Q. By the same. Were many persons present in court during the proceedings above referred to?

A. There were generally, during the whole proceedings, a considerable course of people, and at times quite a crowd.

Q. By the same. Did it occur to you that the arguments of counsel were intended more for the bystanders than the court?

A. I cannot say it occurred to me that the arguments used were intended more for bystanders than the court; but I thought that the arguments against the proceeding, on the ground that it was unconstitutional, and dangerous to the liberty of the citizen, and of the press, were more frequently repeated, with little or no variation, by the different counsel, than is usual in arguing a point of law. The same points were made, and similar arguments used, by all the counsel, except perhaps Col. Strother, who said but little,—who when, as well as I recollect, he was attempting to show that the publication referred to was not of that class of offences punishable as a contempt, was interrupted by the court, and his attention referred to a decision reported, (I think in Wheaton's Reports.) He said very little more, and concluded, as I thought, under the impression that argument on any other point was useless.

Q. By the same. Did it occur to your mind, during the whole of the proceedings, either against Col. Foreman, or Col. Lawless, that any remark of the court, or any part of its conduct had for its object to provoke Col. Lawless into the commission of any act of impropriety which might serve as a pretext for his punishment?

A. It did not.

Q. By the same. Was the positive manner of the Judge of which you have spoken, calculated, in your opinion, to prevent, rather than excite to, the commission of such impropriety?

A. As I have just stated, I did not think the manner of the Judge at all calculated to excite improper conduct in Col. Lawless; and it might well have induced the belief, that any such impropriety, should it take place, would be promptly punished by the Judge. In short, the manner of the Judge was such as seemed to me natural and proper, in a Judge determined to enforce and preserve order in his court, as well as due respect for its decisions.

Q. By the same. In the Opinion which was delivered by the court, after the final argument of Col. Lawless' counsel, were the objections discussed and considered which had been raised by the counsel, and the question of contempt, generally, examined by the court?

A. I think, according to my best recollection, the whole were adverted to by the Judge.

Q. By the same. In the delivery of that Opinion, did it occur to you that terms or epithets were used which were either unsuited to the occasion, or uncalled for by the nature of the discussion, or the questions under consideration?

A. It did not.

Q. By the same. How long had you resided in Missouri? and how long since you were admitted a member of the bar?

A. I came to St. Louis in 1806, and have resided here nearly all the time since. I was admitted to the bar in St. Louis, I think, about three or four years ago.

Q. By the same. Had you read the Opinion in the case of Souldard's heirs, and Col. Lawless' strictures upon that Opinion, prior to the proceedings had against him?

A. I had, and think I had also compared them.

[Here clauses are omitted.]

And further this deponent says not.

JOHN BENT.

DEPOSITION OF EDWARD BATES.

In the matter of the impeachment of James H. Peck, Esq. Judge of the United States for the Missouri district.

The deposition of Edward Bates, a witness sworn, charged, and examined, on behalf of said James H. Peck, before William C. Carr, Esq., Judge of the Third Judicial Circuit of the State of Missouri, at the chambers of the said Judge Carr, near the city of St. Louis, in Missouri, on the 20th day of October, 1830.

The said Edward Bates, being duly sworn, on the holy evangelists of Almighty God, doth depose and say, that he has been summoned to appear before the Senate of the United States some time in December next, he thinks the thirteenth of that month, to give testimony in the matter of the impeachment of Judge Peck. That he cannot obey the said summons, because he is now a member of the Missouri Senate, and considers himself under a paramount obligation to attend the session of the General Assembly which, by law, ought to be held on the third Monday of November next, and will probably continue from that time until the first, and perhaps the middle, of January next ensuing.

This deponent was the attorney of the United States for the Missouri district, from April or May, 1824, until February, 1827; and in that capacity had a direct connexion with the District Court, and a knowledge of its proceedings, under the act of Congress of 1824, providing for the adjudication of the French and Spanish land claims: although, from the lapse of time, he cannot now pretend to exact accuracy in his remembrance of those transactions. He defended the interests of the United States against the petition of Souldard's heirs, for 10,000 arpents of land, and argued the cause at length, both on a demurrer to the original petition, and at the hearing of the cause on its general merits: and also attended to the taking of all the testimony in the cause.

And at the time of the proceeding against Mr. Lawless, on which the impeachment of the Judge is founded, this deponent retained a distinct recollection of the material facts and principles of that case, (though, now, many of them have escaped his memory) and was familiar with all the public proceedings had therein. After a decree was rendered against the claim, there seemed to be a general wish, as far as my acquaintance extended, that the Opinion of the Court should be published, in order that those interested for and against the land claims, might know the grounds and principles upon which the court might be expected to proceed in the future, and shape their own course accordingly; as it was generally considered that the claim of Souldard had been selected to be first tried, as a test cause. Accordingly, the Opinion was published in the Missouri Republican newspaper, in the latter part of March, 1826. A short

time afterwards, I read, in the paper, called "the Missouri Advocate, and St. Louis Enquirer," of the 8th of April, 1826, the article signed "A Citizen:" for the writing of which Mr. Lawless was afterwards punished. [Clauses omitted.] I do not believe that I spoke with Judge Peck upon the subject. I am sure I was ignorant of the course he intended to take with the author of the article, until he mentioned the subject in open court, with a view to prosecution.

On the first day of the term, (by referring to the record I suppose it was the third Monday of April, 1826,) after the disposal of some ordinary business, the court being in session, Judge Peck exhibited a copy of "the Missouri Advocate," containing the article signed "A Citizen," and called upon me, officially, as District Attorney, to ascertain, by proper proof, who was the printer and publisher of that paper; announcing, at the same time, his purpose to proceed against him for a contempt, in making that publication. Some conversation ensued between the bench and me, in which I engaged to procure the necessary information by the next meeting of the court. During that conversation, Mr. Lawless stated that he could give the required information; that Stephen W. Foreman was the editor and publisher of the paper in question; and at the request of the court, stated the fact on oath: and thereupon a rule was entered, which the court dictated to the clerk, upon Stephen W. Foreman, to show cause why he should not be attached. Mr. Lawless undertook to appear for Col. Foreman, and show cause against the rule. Both Mr. Lawless and Mr. Geyer argued at much length against the rule, and I thought in a most animated and exciting manner. Mr. Lawless contended, strenuously, that the article signed "A Citizen" was true, and did not misrepresent the Opinion and proceedings of the court, but was a fair and candid exposé of the printed Opinion; and in the course of his remarks, read passages from the one, and the other, alternately. In this part of the argument, the Judge several times interrupted Mr. Lawless, and pointed his attention to correlative passages in the Opinion and the article; and, in allusion to parts of the article, said more than once,—“The statement is false,”—or words to that effect. I believed then, and believe now, that Judge Peck, as an individual, did not doubt, from the beginning, that Mr. Lawless was the author of "A Citizen." But if he had doubted before, he must have been convinced by Mr. Lawless' argument on the rule against the printer. For often, during the argument, Mr. Lawless identified himself with the author, by speaking of him in the first person singular. For instance; in explaining the motives and objects of the writer, he several times used expressions like these: "I thought so and so," "I intended to convey the idea," &c. And the Judge seemed to adopt the same course: for he several times addressed Mr. Lawless as the author, in expressions like this: "You say in your piece, so and so." But whether this was done by design, or through inadvertence, by both, or either of them, I am unable to say. The circumstance struck the attention of others also, and it seemed to be understood by those with whom I conversed about it, that, whatever the forms of law might require, as regarded the printer, both the Judge and the counsel had their minds directed to the author of the piece under criticism. As well as I remember, Mr. Geyer, in his argument, did not touch the question of the truth or falsehood of the article signed "A Citizen," but contended, (as also did Mr. Lawless,) that the article, however false and libellous it might be, could not subject the publisher to a summary trial and punishment, as for a contempt. That the cause to which it related being adjudged and ended, the publisher could only be reached by indictment as in ordinary libels; and this, both by the common law, and under the constitution and laws of Missouri. In the course of the argument, both of the counsel dwelt, with much earnestness, upon the popular topics which stand connected with such a question. They expressed lively apprehensions for the freedom of the press, and the rights and liberties of private citizens, and seemed to consider that that freedom and those liberties and rights would be prostituted and crushed by the encroaching power of the bench, if the

Judge persevered in the course indicated by the rule. The Judge was strikingly represented as sitting in judgment on his own case, to punish a personal affront offered to himself; and many remarks were made whose keenness and piquancy I thought well calculated to touch the feelings of the Judge, to excite the audience, and make impressions on their minds prejudicial to the court and its proceedings.

The objections taken by the counsel were overruled by the court; but whether the rule against Col. Foreman was made absolute, or only an intimation given that it would be so, I cannot now remember. [Clauses omitted.] I stated his request to the court, and thereupon he was sworn, and declared, in substance, that Mr. Lawless was the author of the piece, signed "A Citizen," and procured its publication. That he, as editor, had examined the manuscript, as he commonly did the communications made to his paper, to ascertain that it was decorous in its terms and manner; that finding it unexceptionable, in that respect, and having a responsible author, he published it, without knowing or inquiring into the truth or falsity of the statements it contained. And that, in doing so, he had no intention to commit a contempt, or treat the court with disrespect. And thereupon the rule was discharged, and a rule to show cause was entered against Mr. Lawless, the terms and object of which will appear by the record, better than I can state them. Against this rule, cause was shown by Messrs. Magenis and Geyer, as counsel for Mr. Lawless. Mr. Strother, also, spoke for a short time, and was beginning to make some remarks, which as I understood them were rather of an apologetic character, when he was stopped, I think, by Mr. Lawless; and did not, that I observed, take any further part in the proceeding. Mr. Magenis, who, I think, opened the question, began a course of remarks to show that the article signed "A Citizen" was a true and fair account; but was stopped by the court, and informed that that question had been fully argued and decided on the rule against the printer; and no further argument was heard on that point. In other respects the argument was pretty much the same as that used on the rule against the printer, of which I have already spoken; except perhaps that the counsel indulged in a higher and more impassioned tone, gave additional force and pungency to remarks affecting the Judge personally, and a more extended and popular cast to their illustrations of the evils they depicted as consequential upon the course which the Judge had adopted. The objections taken were disallowed. The rule was made absolute, and Mr. Lawless was committed to prison, and suspended from practice in that court for eighteen months. After remaining in jail a few hours, he was brought, by *habeas corpus*, before the Circuit Court of St. Louis County, and by that court discharged, because the warrant of commitment was without a seal. Before the commitment, Mr. Lawless was brought into court, in custody of the marshal, and was informed by the court that it was his right to purge himself of the contempt; and if he desired it, interrogatories would be exhibited to him. As well as I can now remember, Mr. Lawless replied that he did not wish interrogatories exhibited, and would not answer them if they were.

The Judge, in delivering his Opinion, called upon me to read the article signed "A Citizen:" which I did, pausing at the end of each paragraph, and the Judge commented upon it much at large, with the intent to show that it was a contemptuous and malicious misrepresentation of his published Opinion, and the course he took in Soulard's case.

He often referred to passages in the printed Opinion, and contrasted them with the corresponding passages in the article; and several times applied to the latter the terms "false and malicious." He renewed all the grounds assumed by counsel in defence, and dwelt, with warmth, and occasional vehemence, upon the evils which the country would suffer by the interruption of the course of justice, and the degradation of its tribunals, if the court should tamely suffer themselves to be contemned by falsehood and calumny, such as he considered the article signed "A Citizen." Among other things of illustration, he spoke

of a custom of the Chinese, of punishing the calumniator by blacking his house, that the world might know his vice, and guard against it. I have read the testimony taken by a committee of Congress, and perceive that several of the witnesses were then asked, if they thought the Judge intended to apply the harsh epithets he used to Mr. Lawless personally. I certainly do not believe that Judge Peck sought the occasion to offer personal insult to Mr. Lawless, but that his purpose was to ascertain the true name and character of the offence with which he stood charged, and to designate the offence, and the offender, by apt and suitable words. I cannot doubt, however, that the harsh terms might apply to Mr. Lawless. He was the acknowledged author of the article which the court had pronounced a false and malicious contempt : and in such a case my mind is not sufficiently abstract to discriminate between the offence and the offender, to separate the falsehood from him who tells it, especially, as the proceeding was instituted to punish, not the article, but the writer of it.

The Judge was a good deal excited while delivering his Opinion ; but not more so than I have often seen him, both at the bar, and on the bench, in causes which presented nothing to touch his feelings, or arouse his passions, beyond the importance of the principle under discussion, or the magnitude of the interest involved in the cause. His general manner is mild and placid : he almost always begins in that manner, and when the subject is trivial, or the argument short, he commonly continues so to the end. But when the subject is important, or the argument long, it is the general fault of his delivery to excite himself by the mere act of speaking ; and he is almost sure to wax warm and vehement, as he proceeds. He did so in the present instance.

[Clauses omitted.]

Questions by Judge Peck.

Q. 1. Were you present when the final Opinion in the case of Soulard was delivered?

A. I was, generally, present during the session of the land court, as my official duty required me there. I was present when an Opinion was delivered in that case, in which the whole merits of the claim were considered ; but I think the course was left open, then, in consequence of the temporary absence of Mr. Lawless ; and to afford him an opportunity of further argument, if he should desire it. Whether the Opinion I heard delivered was the final one, as printed, I cannot now recollect.

Q. 2. Was Mr. Lawless present when the bills of exceptions were taken which appear in the case of Soulard?

A. I believe he was. He was the leading counsel in that cause, was engaged in many other land causes, and was generally present during the session of the court.

Q. 3. Was it the general understanding of the counsel concerned in the case of Soulard, on both sides, as well as the general understanding of the bar, that the decision in that case would control the majority of the land cases?

A. I do not know what Soulard's counsel, in particular, expected as the consequence of that case ; but it was the general understanding and belief, that that cause would test the validity, or invalidity, of the great mass of the claims. Many suits were kept back, awaiting the decision in that cause.

[Clauses omitted.]

Q. 4. Was any evidence offered, or given, at the time of Soulard's case, that incomplete concessions, whether floating or located, were treated and considered by the government and population of Louisiana, previous to the cession, as property, saleable, transferrable, and the subject of inheritance and distribution *ab intestato*?

A. I do not think any such was given. If it was, it must be embodied in the record ; as I well remember that great care was taken in the preservation of all the evidence given. In the argument of the cause, however, Mr. Lawless did

assume it as a fact publicly known, that incomplete land titles were considered, and treated, as property, under the former government, and relied upon it as a presumption in favor of the claim then pending.

Q. 5. Have you reason to believe that the Judge was, or was not, a subscriber to "the Missouri Advocate, and St. Louis Enquirer," or whether he had personal knowledge of who was the editor or publisher of that paper?

A. I was in habits of friendly association with the Judge, and was frequently at his chambers, and do not remember to have seen the Advocate there. Although it was publicly known that Stephen W. Foreman was the editor of that paper, I do not suppose the Judge had any other knowledge of the subject than what might be derived from common fame, as I believe he had no intercourse with Col. Foreman beyond a street acquaintance.

Q. 6. Did it appear to you that the court interrupted counsel, for the mere purpose of embarrassing him, or for the purpose of directing his attention to something which was deemed material to be considered by him, or for the purpose of correcting what the court supposed to be a misapprehension or misstatement of the Opinion on his part?

A. I did not then, nor do I now, believe, that the Judge interrupted the counsel for the purpose of embarrassing him: but I believed then, and I believe now, that it was for the purpose of directing his attention to matter which the court thought material to the point at bar.

Q. 7. Did it enter your mind, during any part of the proceedings referred to, that any part of the conduct of the court towards Mr. Lawless proceeded from an intention to provoke or irritate him into the commission of any impropriety, or contempt, which might furnish the court with a pretext for his punishment?

A. No such idea occurred to me.

[Clause omitted.]

Q. 8. Whether was the conduct of the court rather calculated to suppress, than to excite, such impropriety of conduct?

A. The Judge is generally pretty strict in enforcing order in his court. On that occasion, I cannot say that I was struck with anything peculiar, tending either to strain, or relax, the rein of authority.

Q. 9. Were there many persons attending the court during the proceedings referred to?

A. After the first day's argument, the court room was crowded.

[Clauses omitted.]

Q. 11. Was the publication of the Opinion calculated to increase the dissatisfaction of the claimants with the court?

A. I do not think it was.

[Clauses omitted.]

Q. 13. Was it a matter of notoriety that Mr. Lawless had, for many years, directed his attention to the subject of the Spanish land claims, had written a pamphlet on the subject, and had attended two sessions of Congress, as an agent on behalf of some of the claimants?

A. I knew that Mr. Lawless had devoted much attention to the subject of the claims, and had heard of his pamphlet, and his attendance at Washington, and suppose the same was generally known at St. Louis, and especially among the claimants.

[Clauses omitted.]

Questions propounded by Mr. Lawless.

Q. 1. State how long you have resided in the State of Missouri? Whether you are acquainted with the character and habits of that part of the population of St. Louis and Missouri composed of those persons who were subject to the King of Spain, or the French government; and of their descendants? And if so, state whether you believe those people to be either "formidable for their numbers," or "still more formidable by the absence of moral restraint, and by their frontier

habits of life," or to be on the contrary of a mild and supine character, and few in number?

A. I came to Missouri while it was a territory, and have lived in St. Louis upwards of sixteen years. My acquaintance is pretty general in this part of the State, with all classes, as well the ancient inhabitants, as the new settlers. It is impossible for me to say whether I believe the ancient inhabitants and their descendants to be formidable from their numbers. I can only say that I suppose they amount to eight or ten thousand in number. In a moral point of view, I am not able to point out any marked distinction between them and ourselves, the new settlers. I believe they have the same views of their interest, which we entertain of ours, and use the same means to secure it.

Q. 2. State whether, in your opinion, at or after the date of the decree pronounced by Judge Peck, the said Judge was in any danger of "rude assaults," or the "summary process of self redress," on the part of the suitors in his court, or the Missouri land claimants, or the people of St. Louis generally.

[Answer omitted.]

Q. 3. State whether you have ever observed, among those people above mentioned, any disposition to disobey or to disrespect the authority of the law, or of courts of justice in general, or that of Judge Peck in particular.

A. In that respect I know of nothing to distinguish them, materially, from the rest of the community.

Q. 4. State whether you believe that the claims, surveyed or unsurveyed, properly within the jurisdiction of Judge Peck under the act of 1814, amounted in number to "thousands;" or to what number they amounted; and please state the grounds of your belief, whatever they may be.

A. I have no means of judging, with accuracy. No record was kept of concessions granted after the year 1796, or 1797, by the Lieutenant Governor of the Illinois; and consequently, we are left to guess at the number made, and not surveyed. Shortly after the passage of the act of 1824, the subject was much talked of, and various conjectures were made, as to the probable number that would be put in suit. Relying upon the opinion of some well-informed claimants, I had limited my conjecture to about one thousand.

Q. 5. State how many claims, within your knowledge, have been submitted under the law of 1824, which have not been previously submitted to the Commissioners, or the Recorder.

A. It is impossible for me to say. While I was District Attorney, I kept an abstract of all the bills and citations served on me, and among other facts, noted the one in question: but I have not had time, lately, to examine my old docket, and cannot speak on the subject from memory.

Q. 6. State how many claims, to the best of your knowledge and belief, are in existence, which have not been submitted to the former Boards of Commissioners or the Recorder; and what proportion they bear in number to those so submitted?

A. I have no knowledge and no definite belief.

Q. 7. State whether, or not, you, as District Attorney of the United States, were consulted by Judge Peck as to the course he should pursue towards the author of the article signed "A Citizen," which appeared in the St. Louis Advocate of the 8th of April 1826, and what advice, on that subject, you gave Judge Peck?

A. Judge Peck did not consult me on the subject. I knew nothing of his purpose to prosecute the author until he announced it in open court. After the proceeding was begun, I was requested by the Judge to collect law cases for him, (his eyes being then too weak to read,) which I did. Pending the rule upon the printer, I was about to volunteer advice to the Judge, that in point of policy it would be well to let the matter drop as easily as possible, if it could be done. But he gave me promptly to understand that his course was taken, and that it was matter of duty which could not be omitted.

Q. 8. State whether or not it is the usage and custom, in Missouri, to remunerate counsel in a cause, and particularly in land claim causes, by giving them a proportion of the land confirmed; and whether, in general, any other means exist within the possession of the parties to remunerate their counsel?

A. It is not uncommon, in Missouri, for counsel to be paid in part of the land recovered. The land claimants, I have heard, have very generally engaged counsel in that way. As to their other means, I am ignorant.

Q. 9. State whether you have been present when it has been suggested by the court that counsel for the petitioners should act as interpreters; and if so, what counsel, and in what cause?

A. I think I have known such instances: but what counsel, and in what cause, I cannot now remember. I think I have seen Mr. Lawless, as interpreter, by the permission and perhaps at the suggestion of the court.

Q. 10. State whether it has not been frequently difficult to procure a competent person to act as interpreter in the hearing of the petitions for confirmation of Spanish and French concessions, in the United States District Court of Missouri?

A. It has; insomuch, that I urged the court to appoint an interpreter, and certify his account as a necessary incidental expense of the court.

Questions by Judge Peck.

Q. 1. What counsel of land claimants, according to the information of which you spoke above, have engaged to conduct the causes of their clients and receive their remuneration in part of the land to be confirmed?

A. I have heard that Messrs. Lawless, Strother and Benton have made numerous engagements of that sort, and suppose that others have been made.

Q. 2. Please state whether the land claimants, including not merely the ancient inhabitants, but all, by assignment or otherwise, do not form a very wealthy and influential portion of the community, whose good, rather than ill will, would be desirable to any public officer or individual?

A. Certainly, they do. Many of the richest, most intelligent, and respectable men in the State are land claimants under incomplete Spanish grants.

Q. 3. Please state whether a great portion of the ancient inhabitants of this country, who may be numbered among the land claimants, would be likely to receive their impressions from counsel in relation to the measure of justice which was distributed to them, or to form their opinions upon this subject from their own observations or reflections?

A. The mass of land claimants, among the ancient inhabitants, comprises every class, and every degree of information, from the highest to the lowest. The better informed, I suppose, would form their own opinions on the subject. The ignorant, I have no doubt, would adopt the views of the counsel in whom they had placed their confidence, and to whom they had trusted the management of their causes.

Q. 4. Have you reason to believe that, prior to the occurrence which is the subject of your deposition, Judge Peck entertained any malevolent feelings towards Mr. Lawless?

A. There was not much intercourse, and no intimacy between them; but I have no reason to believe that there was any malevolent feeling between them.

Q. 5. Do you remember how many land suits had been brought at St. Genevieve prior to the publication of the article signed "A Citizen"?

A. I do not remember, exactly; but between ten and thirty.

And further this deponent saith not.

EDWARD BATES.

I certify that the foregoing depositions of Samuel Merry, John Bent, and Edward Bates, Esqrs. were severally written and subscribed by them, respectively, in their own proper hand-writing, before me, at my chambers, in the presence of Judge Peck and Luke Edward Lawless, Esq. with the exception, that after the deposition of Samuel Merry was finished, and the body of that of Ed-

ward Bates, and both read by the witnesses themselves, in the hearing of Mr. Lawless, he submitted interrogatories in writing, which, he stated, were all he wished Mr. Bates to answer: and they were each of them answered, and numbered, from one to ten progressively. He then stated he did not wish to put any interrogatories to Mr. Bent, and absented himself.

The examination of the witnesses commenced yesterday, and was by adjournment continued until to-day. They, the said Samuel Merry, John Bent and Edward Bates, having been by me first duly sworn to state the truth, the whole truth, and nothing but the truth, in the matter of the impeachment stated in the caption of their depositions. Given under my hand and seal, at my chambers, this 21st October, 1830.

WILLIAM C. CARR.

DANIEL HOUGH *called and sworn.*

Q. By Mr. Meredith. Please to state to the court whether you were present during the proceedings in the District Court, in the rules against Mr. Foreman and Mr. Lawless? and all that you observed on those occasions.

A. I was present during most of the proceedings. On the first day I understood the court sat in the baptist church. I was not present there. The next morning it removed to the house of Mr. Penrose. As I entered the court room, Mr. Lawless was engaged in addressing the court, and resisting the rule made upon Mr. Foreman the printer, for the publication of an article signed "A Citizen." He was followed by Mr. Geyer, and I think the argument of these two gentlemen consumed pretty much the whole of that day. On the succeeding morning, I entered the court room before the court met. On the meeting of the court, Mr. Foreman came forward and gave up Mr. Lawless as the author of the article. A rule to show cause was then made upon Mr. Lawless, who I believe was not present. He was sent for, and came in, soon after, and stated to the court that he was, at that time, engaged in a cause then under trial in the Circuit Court, on which account he asked for some indulgence—which was granted. When the court again sat, whether it was that afternoon or on the next morning I cannot tell, Mr. Lawless, I think, opened the argument, (though of this I am not certain,) and was followed by Mr. Magenis, Mr. Geyer, and Col. Strother; who successively addressed the court in resistance of the rule. All their objections, however, were overruled by the court; and Mr. Lawless was sentenced to be imprisoned for twentyfour hours, and suspended from the roll for eighteen months. He was then delivered into the custody of the marshal, and sent to prison.

Q. What was the manner of the Judge on this occasion? violent and passionate?

A. During the argument on the rule against Mr. Lawless, Mr. Lawless himself went into a comparison of the strictures with the Opinion of the Court, in order to prove that the strictures did not misrepresent the Opinion; in the course of which something like a colloquy took place between the Judge and Mr. Lawless, as to some of the points of the comparison; in which the Judge sometimes said to Mr. Lawless, "But in such and such a place, you say so and so." This continued but for a short time, during which I saw nothing unusual.

Q. Are you acquainted with the Judge's usual manner on the bench?

A. I have frequently seen him on the bench.

Q. Was his manner on this occasion, different from his ordinary manner?

A. During the delivery of his Opinion I observed much warmth and energy, on certain occasions, but noticed nothing in his manner which was more animated than I have often seen him exhibit by the fireside on very common topics.

Q. Does the Judge frequently become much animated in private conversation?

A. He often becomes warm and energetic in conversation.

Q. Do you recollect his alluding to a law or custom of China? and how it was introduced?

A. Mr. Lawless and his counsel had contended that, even if the article were a misrepresentation, still it was harmless, as the Opinion had first been published before the strictures upon it, and if there was anything wrong in it the reader would be able to correct it. The Judge replied that the Opinion had been published in one paper, and the strictures in another;—that many would read the strictures who would never read the Opinion, and that the people could not know, intuitively, whether the article were false or not, from merely reading it: and that if they could, there would be no reason or propriety in that law of China, which required that the house of a slanderer should be blackened, in order that the whole world might know and avoid him.

Q. Were you present when the printer was discharged from the attachment for a contempt?

A. Yes.

Q. Did the court deliver any opinion in that case?

A. I do not recollect that it did.

Q. Were you present when the Opinion of the Court, in the case of Mr. Lawless himself, was delivered, and when the rule was made absolute against him?

A. I was.

Q. Had the court any recess, after the Opinion was concluded?

A. Mr. Lawless was not present. He was sent for.

Q. Did the court take any recess?

A. I do not recollect any. I think there were a few minutes of detention.

Q. At what time of day was the Opinion concluded?

A. It was nearly night. It was near sunset, but I do not think the sun was down.

Q. Was there any interval of time, or any recess of the court, between the concluding of the Opinion, and the appearance of Mr. Lawless?

A. I do not recollect that there was. When Mr. Lawless was brought in, he was informed that it was his privilege to have interrogatories filed, and to purge himself from the contempt; but he refused to have them filed.

Q. Do you recollect his reply, when he so refused?

A. I think it was, as has been stated by other witnesses, that he did not wish any interrogatories filed, and that he would not answer them, if they were.

Q. Do you recollect his offering any paper in the nature of exceptions?

A. He read a paper, which, I believe, reaffirmed what he had endeavored to prove in his argument, viz. that the strictures were true, and denied the right of the Judge to punish in the way that was threatened. I do not recollect whether he asked that any proceedings might be had on this paper, or not.

Q. Was the court room crowded?—*A.* There were a good many there.

Q. Was there much excitement among the people?

A. There was some, as there always will be, on occasions of that kind.

Q. Do you recollect the language of Judge Peck, when commenting on the article signed "A Citizen"?

A. He frequently used the words "false," "malicious," and perhaps, "contemptuous."

Q. Did he apply those terms to the article? or to Mr. Lawless?

A. I supposed them to be applied to the article, and by inference might be applied to the person who wrote it. Mr. Bates read the article, paragraph by paragraph, and Judge Peck commented upon each, as it was read. He used the words "false and malicious."

Q. Did he apply these terms to the author? or only to the publication?

A. I took them to apply to the publication; and if they applied to that, and were true of the publication, I supposed that they would apply to its author.

Q. This, then, was your inference, and not the assertion of the Judge?

A. It was my inference.

Q. Was there any personal allusion made by the Judge to Mr. Lawless?

A. I think there was none.

Cross-examined.

Q. *By Mr. Spencer.* Was there any interval, between the close of the argument of counsel, and the commencement of the delivery of the Opinion? or did the Judge go on immediately?

A. I do not recollect.

Q. Was there any, to the best of your recollection?

A. I cannot tell whether there was or not. The argument and the Opinion were both in one day; but I do not recollect whether there was an adjournment of the court, or no.

Q. *By Mr. Storrs.* Do you recollect whether, in commenting on the article, the Judge said anything about Mr. Lawless' employing the terms "the Judge," and "Judge Peck," and his inferring that Mr. Lawless meant to reflect upon him personally?

A. I have no recollection of that. The room was much crowded, and conversation was occasionally going on.

Q. Do you remember his adverting to this expression, used by Mr. Lawless in his article, "although the Judge has *thought proper* to decide against the claims"?

A. I do not recollect it.

Q. Will you briefly repeat what you said in reference to the Chinese custom? [Here the witness repeated his former testimony.]

Q. When you replied before, you used the word "intuitively."

A. Yes; I believe such a word was used.

Q. Did you ever see, in print, such a passage as this?—

"Do you recollect that in the argument against the rule, the counsel had insisted that the Opinion being published made it public property; that, if it had been misrepresented, the Opinion itself could be recurred to, to correct any misrepresentation which had been made of it; and that the court, in reply to that argument, said, those who might see the misrepresentation, might never see the Opinion which had been misrepresented; that men could not know, intuitively, whether what they read was true or false; and that if they could, calumny would cease to be mischievous, and would not require punishment; that there would be no wisdom in that law of China by which the dwelling of the calumniator was painted black, as emblematical of the heart of the calumniator, while it afforded an admonition that what he should say should be harmless."

A. Yes: I saw it last spring, in St. Louis.

Q. Do you mean, during the session of Congress last year?

A. Yes. I believe after Congress had adjourned.

Q. Have you seen the same paragraph, since you attended here this winter?

A. No.

Q. Who showed you the pamphlet in St. Louis? Did Judge Peck?

A. Judge Peck, I believe, brought it to St. Louis; but I do not know who showed it to me, whether Judge Peck or Mr. Spalding.

Q. *By Mr. Buchanan.* How long was Judge Peck occupied in delivering his Opinion?

A. Two hours, or more.

Q. Did he not repeatedly use the words "false, slanderous, malicious, calumnious," &c.?

A. Frequently; at least I am confident he used some of those words several times.

Q. Was not his manner, on this occasion, more violent than you had ever before seen it, on the bench?

A. He exhibited more warmth and energy than I had ever before witnessed in him, when on the bench. I think, however, that I had never heard him deliver an opinion from the bench but twice before.

Q. Was not the Judge much excited?

A. He exhibited, as I said, much warmth and energy, and much decision.

Q. Have you been intimately acquainted with the Judge?

A. I have, for several years.

Q. What is your profession?

A. I am in the mercantile business, at this time.

Q. Do you say that, when the rule was made against Mr. Lawless, Mr. Lawless himself took part in the argument?

A. Such is my impression, though I cannot be positive. I recollect his speaking, either then, or in the argument on the rule against Foreman.

Q. When Mr. Lawless was engaged in the case against Foreman, was he not frequently interrupted by the Judge?

A. When Mr. Lawless was comparing the article and the Opinion, to show that there was no misrepresentation, he was interrupted several times.

Q. Did you not, on that occasion, hear the Judge frequently say to Mr. Lawless, "It is false"?

A. I do not recollect whether it was then that he used the term "false," or when he was delivering his Opinion. Perhaps it was on both occasions: I do not remember.

Q. By Mr. Spencer. Are you confident that Mr. Lawless spoke in the argument on the rule against him?

A. I cannot be confident; but I should have said so, without doubt, previous to what I have heard on this trial. I remember that he spoke on one of the rules, if not on both: such, at least, is my impression.

Q. By Mr. Storrs. Did he speak before, or after, Mr. Magenis?

A. My impression was that he spoke after Mr. Magenis.

Q. And after Mr. Geyer?—*A.* No; I think before Mr. Geyer.

Q. What particular point did Mr. Lawless state, in his argument?

A. He argued, either then, or in the rule against Foreman, the general point that the representation in the article was true.

Q. Did Mr. Magenis speak in Foreman's case?

A. He might; but my impression is, that he did not.

Q. Is that your opinion, on your best recollection?

A. I cannot recollect the exact order in which they spoke. I know that those gentlemen I have mentioned did speak, on one rule, or the other, or on both.

GEORGE H. C. MELODY, *called and sworn.*

Q. Were you present during the proceedings against Mr. Foreman and Mr. Lawless?

A. I am under the impression that it was on the first day of these proceedings that I was passing by the baptist church, and heard Mr. Lawless speaking. There had not been any court held there, and I stepped into the church; when the first person I met was Col. Foreman. I asked him what * * *

[*Managers.* Pass over that conversation.]

Mr. Lawless was speaking. I remained in the court house fifteen or twenty minutes. While I was there, Judge Peck set Mr. Lawless down. I was behind Mr. Lawless, as he sat down, and heard him mutter out some remarks about the blindness of the Judge's mind; observing that the avenues to his mind were as blind as his eye-sight, or something of that purport. I remained in the court room till he got up again, and began to speak. I was at the court the next day, perhaps; but whether I was in the court room, or not, I do not recollect. I was on the steps, and at the door. The court house was crowded. I was present in court when the Judge told Mr. Lawless that he had an opportunity of purging himself from the contempt.

Q. After these proceedings were over, were you present during a conversation with Mr. Lawless? or did you hear him make any remark on Judge Peck, or on the course of proceeding? if you did, relate the circumstances.

A. A few days after Mr. Lawless had been imprisoned, Mr. West and my-

self went into a porter-cellar. Col. Lawless and Mr. Magenis were there. When we went in, they were talking about a trial of Col. Chouteau. Mr. West and I had not been long there, before Mr. Lawless spoke of the trial between himself and Judge Peck, and he remarked that every person ought to feel as if it was his own case. He talked for some minutes, and wound up by saying that "he did not care about it;" "that he had Peck then where he wanted him."

Q. What further did he say?

A. There was not anything more said about the trial.

Cross-examined by Mr. Buchanan.

Q. How near were you to Mr. Lawless when the court set him down?

A. Within four feet;—within three, or four feet, perhaps. I was immediately behind him.

Q. To whom did he make the remarks you mentioned?

A. He appeared to be talking to himself.

Q. How loudly were the words spoken?—A. In a low tone.

Q. You say he "muttered out" those words. What do you mean by that expression?

A. I meant that he was talking in a low tone of voice.

Q. Was it possible for the court to hear the words, at the distance at which the Judge sat?

A. I should think not.

Q. Who sat beside Mr. Lawless at the time?

A. I do not now recollect.

Q. Did the court set him down more than once?—A. Not that I saw.

Q. What did the court say to him? Did the Judge order him to sit down?

A. The court pointed out one article in the paragraph, and observed "that is false," and some other remarks passed.

Q. Did the court order Mr. Lawless to sit down? or did he sit down of his own accord?

A. Of his own accord my inference is.

Q. What other remarks did the court make?

A. I do not recollect now.

Q. Was this in the baptist church?—A. Yes.

Q. How long did Mr. Lawless continue to sit and the Judge to speak, before Mr. Lawless rose again?

A. I do not know;—three minutes, perhaps: probably two or three minutes.

Q. And now, as regards the conversation in the porter-cellar. You told us that Mr. Lawless said that every one should make the case his own; that then he made some other remarks, and that he concluded by saying he had Peck where he wanted him;—what were those intermediate remarks?

A. I do not recollect, particularly. I think he went on to speak of the liberty of the press, and the liberty of speech.

Q. To whom did he address these remarks?

A. To Mr. Magenis; but he appeared to be addressing me and Mr. West:—that was our opinion of it.

Q. *By Mr. Wickliffe.* How long were you in the court house at any one time?

A. About twenty minutes, in the baptist church.

Q. Do you recollect telling any one, since you were now in Washington, that you knew little or nothing about the matter, and that you had no recollection of what took place in the court house?

A. Yes: that is, I said I could not tell a connected story. I was not in the court house every day.

Q. Did you not tell me, that you knew nothing about the matter, and did not know why you had been sent for?

A. I did not. I said that all I knew could be proved by others, and that I did not know much about it.

Q. By Mr. Storrs. You say, I think, that Mr. Lawless made use of this remark, "I do n't care anything about it, for I have got Peck where I want him?"

A. Yes; that was about the amount of it.

Q. What time of the year was this?

A. In the spring of the year.

Q. How early in the spring?

A. I think in the month of April.

Q. April of the next year? or the same month in which this took place?

A. A few days after the commitment of Mr. Lawless.

Q. By Mr. Wickliffe. You were subpoenaed by the United States,—were you not?

A. I was.

Q. Repeat the conversation you had with Mr. Lawless when he applied to you to ascertain what you knew about it.

A. I met Mr. Lawless, about the middle of October last, in St. Louis. He met me at the corner of a street, and said he had been hunting me, all over town. He then asked me whether I had not been in the habit of being at Judge Peck's house? I told him that I had. He then asked me if I had ever heard Judge Peck speak disrespectfully of him, at his house? I told him in reply that I would not volunteer my testimony. He asked me if it would be inconvenient for me to go on to Washington? I told him that it would be. There were some other remarks passed between us, when he observed that he wanted respectable persons as his witnesses. I then turned round and left him.

Q. Did not Mr. Lawless inform you that Col. Strother told him that you would be an important witness for the United States?

A. He did not.

Q. Did he not ask you whether you knew anything material, and request, if you did not, that you would inform him of it?

A. He did not.

Q. Do you not recollect that you told him that you knew of something material for the United States?

A. No.

Q. By Mr. Storrs. You told him it would be inconvenient for you to come?

A. Yes.

Q. Why did you not tell him that you knew nothing material?

A. Because I considered his question impertinent, and I was somewhat in a passion.

Q. Was the cause of your being in a passion this,—that you thought the question impertinent, when Mr. Lawless asked you whether you had heard anything disrespectful of him?

A. Yes; I did consider it an impertinent question.

Q. And was that the reason that you submitted to the inconvenience of coming to Washington?

A. Yes; I considered it as impertinent.

Q. By Mr. Buchanan. Did you bring any company with you from Missouri? Was not your lady along with you?

A. Yes—a part of the way.

Q. How far?—*A.* She is now in Virginia.

Q. To what part of Virginia did she accompany you?—*A.* To Shenandoah.

Q. By Mr. Storrs. Have you not been subpoenaed on both sides?—*A.* Yes. [*Mr. Meredith.* We have subpoenaed him since you dismissed him.]

Q. By Mr. Storrs. Were not you and your lady about to visit Virginia this winter, whether you were subpoenaed or not?

A. We were.

Q. By Mr. Meredith. I am requested to ask you whether, from the time

these proceedings were had, until you were discharged by the managers, you have had any conversation whatever with Judge Peck ?

A. I have not.

Q. By Mr. Buchanan. Did you ever tell one of the managers what you knew in relation to this ?

A. Mr. Wickliffe asked me up to his house, to have an interview with him. I called at his lodgings, but he was not in. On the morning after, I met him at the house where I put up. Then he asked me what I knew.

Q. By Mr. Storrs. What did you tell him ?

A. I told him that I did not know much about it.

Q. Did you mention to him any of the particulars you have now related ?

A. I did not. I could not tell him any connected story.

Q. You did not tell him any particulars, then ?—*A.* No.

Q. Did he not tell you, then, that you might be discharged ?—*A.* No.

Q. By Mr. Meredith. Have you been particularly intimate with Judge Peck ?

A. I have not.

Q. Have you been often at his house ?—*A.* I have been at his house.

Q. Was your acquaintance with him, or with some member of his family ?

A. I was acquainted with a brother of his.

WILLIAM C. CARR called again.

Q. By Mr. Meredith. Were you not appointed as agent of the United States in 1825, to appear before the Board of Commissioners for the trial of land claims ?

A. I was.

Q. What was the number of the land claimants, or what is their number now ?—are they a numerous body ?

A. I believe they are very numerous ;—but I cannot pretend to tell their number ; and it would be a wild guess in me to attempt it : there are many claims not decided.

Q. What is the character of the claimants, generally ?

A. They comprise persons of all descriptions. Some of them are very wealthy, and very respectable. I suppose there may be some of an opposite character.

Q. Do you know the effect of the decision of Soulard's case, or the claimants generally ?

[This question was objected to ; but the objection was afterwards waived.]

A. I am unable to say. I have not had much communication with the land claimants since the decision :—shortly after, I was appointed a Judge of the Circuit Court, since which I have had but little intercourse with them. It is not in my power to state what their impressions were.

[*Mr. Buchanan.* We do not wish you to state your impressions.]

Q. Do you know, from general reputation, what was the effect of that decision on the claimants ?

[This question was objected to by the managers, and after some conversation the counsel for the defence concluded not to press it.]

Q. Are you well acquainted with Mr. Lawless ?

A. I have known him ever since he came to Missouri.

Q. What is his general reputation, as regards his deportment towards courts ?

[*Mr. Buchanan.* We do not consider this to be evidence ; but we are very willing the inquiry should be fully gone into.]

A. Does the question apply to his talents ? or to what ?

Q. Is his demeanor towards courts respectful, or disrespectful ?—what is it ?

A. It is a matter of great delicacy for the judge of a court before which Mr. Lawless is a practitioner to answer such a question.

Q. What is his general reputation on this subject ?

A. I take a distinction between what is his general reputation, and what is his general deportment. Replying to the question in the first of these senses, I answer, that I have heard more objections to him on that subject than to any

other gentleman of the bar in Missouri, arising, however, more from the peculiar organization of his mind, I presume, than from anything else. He is never satisfied with a decision, if it goes against him; but is very apt to murmur, and to speak harshly of the court making such decisions.

Q. What terms is he reputed to use on such occasions?

A. I do not know that I can designate particularly. Expressions have been mentioned to me, as uttered by Mr. Lawless, which I consider highly derogatory from that respect which should always characterize the deportment of gentlemen who are members of the bar, toward the court. The expressions to which I allude were such as these,—calling the members of the court “asses;” speaking of them as “very stupid men, who could not understand either what was said to them, or what they read.”

Q. What has been his deportment in your own court?

A. I must say that it has sometimes been not so respectful as I could wish. So much has this been the case, that I have been compelled to admonish Mr. Lawless, that if he did not desist from the repetition of such conduct, I should be constrained to punish him. I think, however, that of late it has been less his habit than formerly.

Q. Within what space of time has this change been observable?

A. During the last eighteen months, or two years, he seems to have become more sensible that he should submit to the decision of the court, whether he considered it as proper or improper: because, as I have frequently stated to him, if my decisions were wrong, he had an obvious mode of redress, by appealing to a higher court.

Q. By Mr. Storrs. You say he had an obvious mode of redress?

A. Yes;—either by an appeal or writ of error, to the court above, where any error that I might commit, would be corrected.

Q. Was there not a case in your court where a man was flogged, and the sentence was afterwards reversed by the court above?

A. There was such a case.

Q. Did not the case produce great excitement?

A. There was such a case. A negro man was sentenced to be flogged, and the sentence was afterwards reversed.

Q. Did he not ask to have the sentence suspended?

A. I cannot say:—I think it is probable: it is more than probable that he did.

Q. Are you not sure of it?

A. I am not. I have said that I think it quite probable that such a request was made, but I do not remember that it was.

Q. And you executed the sentence, after an appeal had been taken.

A. Yes; the sentence was executed.

Q. Has not Mr. Lawless found a great deal of fault with your sentences?

A. He has found a good deal of fault.

Q. This was a negro man, was it?

A. Yes. But it would have been precisely the same if he had been a white man: no distinction is made in carrying the laws of the country into effect, between a white man and a black one.

Q. Was he in custody?

A. I cannot certainly say whether he was in custody, or on bail. It seems to me that his master was bail for him.

Q. By Mr. Wickliffe. Has not Mr. Lawless reversed a great many of your decisions?

A. If he has, the record will show;—some have been reversed.

Q. By Mr. Buchanan. Has he ever taken a writ of error from your decision in any case in which the decision has not been reversed?

A. Yes, a good many. There may, however, have been more reversed than confirmed. I cannot say, with any certainty.

Q. By Mr. Storrs. But what is your judgment about it?

A. I have no opinion upon it;—none on earth;—not the slightest.

Q. How, then, could you say, that more of your decisions had been confirmed, than reversed?

A. I never said that: I said nothing like it.

Q. Was not this decision of yours reversed without argument?

A. I cannot say. I am not counsel in the Supreme Court. It might be that the court decided after Mr. Lawless had argued the question on one side. I cannot tell what was done in the Supreme Court.

Q. Have you not heard to the contrary?—*A.* I have not.

Q. Was not Mr. Lawless stopped by the court, and told that he need go no further?

A. I cannot say. The case made very little impression on me; though I perceive that it has made a great impression here.

Q. Did not the case come back to you?—*A.* I do not recollect.

Q. Was not the man acquitted?

A. I do not remember: as I have already said, the matter made very little impression upon me.

Q. Did you not say that if the sentence was reversed, they could not get the lashes off?

A. I do not remember:—it is possible I may have said so. I can't say whether I did, or not.

Q. Was the appeal taken before the man was flogged? or after?

A. I suppose it was taken before. If there was an appeal, I suppose it was taken immediately after the sentence. I have but a very vague impression of what took place, and I cannot detail the records of the court.

Q. *By Mr. Buchanan.* The execution of your sentence would not form a part of the record, would it?

A. It would not.

Q. Had you not a conversation with Mr. Lawless the day after Judge Peck imprisoned him?

A. I do not remember:—I may have had:—it is very possible I had.

Q. Do you not believe that you had?

A. I have no belief on the subject. I cannot say yea or nay.

Q. Did you not tell him that you protested against the proceedings of Judge Peck, as illegal, unjust, and arbitrary?

A. I do not recollect saying so; but it may have been.

Q. Had you not this conversation with him sitting on horseback, opposite his house, the day after the trial?

A. I do not know; I cannot now even recollect whether I was in town or not that day.

Q. Have you taxed your recollections respecting it?

A. I have, and cannot recollect anything on the subject.

Q. Can you say that you had not such a conversation?

A. I cannot. It is probable that I may have had a conversation of the kind, for the matter was represented to me very variously, and in very strong colors, and some persons condemned the conduct of the Judge very decidedly.

Q. Were you not present, yourself, in the court house at the time, and would you take the representations of others about a matter that you saw yourself?

A. I was present in the court house, but only at the conclusion of the affair; I did not know the facts; I had not heard the argument; I had not read the Opinion; or seen the article signed "A Citizen."

Q. *By Mr. Buchanan.* Why had you the negro flogged? and why did you not suspend the execution?

A. The punishment was inflicted in pursuance of the laws of the country. I do not know that the law fixes any particular time in which the sentence is to be executed. The usual mode in Missouri is to have the sheriff sworn to execute the sentence of the court without favor or partiality.

Q. But had you not power to suspend the execution?—*A.* Possibly so.

Q. Do you not know that you had?

A. It is possible I had. I believe so. The man might possibly have been out on bail; but it is not usual to postpone the sentence longer than four days, unless asked for.

Q. Was not the writ of error taken immediately?

A. I suppose it was; I believe it was. Writs of error usually are.

Q. Has not a writ of error, by the law of Missouri, the effect of a *supersedeas*?

A. Not unless that effect is given it by the Supreme Court, or one of the Judges of that Court.

Q. Cannot the court below fix a day for the execution, so as to allow the writ of error to have that effect?

A. It may be so in some cases. I am not certain that I can state the law on that subject.

Q. How long have you been upon the bench?

A. For some three or four years.

Q. How long were you a practising lawyer?

A. I had been many years out of practice, when I went on the bench.

Q. *By Mr. Wickliffe.* Was this one of the cases in which you considered the conduct of Mr. Lawless objectionable?

A. I believe not.

Q. Can you state the cases where any disrespectful conduct has occurred?

A. I cannot refer to particular cases. The individual cases are not so remarkable, as the general fact.

Q. Have you any idea of the number of claimants under the New Madrid certificates?

A. Not the least in the world.

Q. *By Mr. Spencer.* Do you mean to be understood that the conduct of Mr. Lawless is rude and disrespectful?

A. His manner is offensive.

Q. How?

A. He continues arguing the case after the court has decided it. He will get up, and ask the court whether it is possible that the court can think of establishing such an absurdity as that? It is possible that much of this is the effect of his temperament.

Q. Is he not obedient? Does he not sit down when he is ordered?

A. He has been obliged to be more obedient of late.

Q. Has he ever refused to sit down when ordered by the court?

A. Yes, he has. I once had to order him twice, before he would take his seat. He then said that he did not wish to be punished by the court, and that he had no intention of committing a contempt.

Q. Is he not a gentlemanly man?

A. He is, in general, very gentlemanly in his private department. No man is more so in private life, as far as I know.

Q. It does not then appear to be his intention to commit a contempt, but rather to be the effect of his peculiar temperament?

A. I should wish to believe so; but his conduct is sometimes very reprehensible; and you need not be told that the public cannot always make allowance in these cases.

[*Mr. Buchanan.* We have not yet come to the matter of public opinion, nor do we wish any testimony on that subject.]

Q. *By Mr. Storrs.* What was the offence of the negro who was flogged?

A. I think it was larceny.

Q. Was he convicted by a jury?—*A.* Yes.

Q. What was the point of error on which the cause was appealed?

A. I think it was the admission of some part of the evidence.

Q. What? was it a confession obtained under the lash?

A. The confession was made, I believe, under the lash ; but after hearing all the evidence, I was well satisfied that the declarations of the negro were not made with any view of getting rid of the punishment: I hope I know, that that would be improper.

Q. But the confessions were made under the lash?

A. At the time the confession was made, I believe they were not flogging the negro. I think he had been whipped previously.

Q. But his confessions were not the effect of the lash?

A. That was my opinion.

Q. He had been whipped to make him confess where the money was?

A. I suppose so.

Q. And they were going to whip him again?

A. I believe they were.

Q. Did not Mr. Lawless express himself very freely on that occasion?

A. I do not remember that he did.

Q. Did he not say that it was a cruel proceeding?

A. I do not recollect. Perhaps he did.

Q. Did he read any law to show that confessions taken under the lash were not evidence?

A. I have no doubt that he did read law.

Q. Was any law read by the court, to prove the contrary?

A. I cannot say ; but think none was read by the court to that effect.

JOSIAH SPALDING called and sworn.

Q. What is the general reputation of Mr. Lawless, as to his deportment before courts?

A. I have heard what may be called his general reputation ; but it is confined chiefly to members of the bar, to judges, and to the clerks of court. He is a man of warm temperament. During the earlier part of his practice at the bar he was more unruly than in latter times. The report circulated, within the limits I have already stated, is, that he is very restive, that he does not willingly submit to the decisions of court, that he is apt to use harsh expressions in relation to them, and to enter into controversy with the judges in relation to his cases.

Q. What are the remarks he is in the habit of making?

A. Am I asked what remarks I have heard him make ?

Q. Yes, or what is his general reputation?

[*Mr. Buchanan.* We object to that question. The witness is a professional man, and we are willing that he should give his own opinion of Mr. Lawless' deportment, so far as it rests on his own observation.]

A. He is in the habit of making rather harsh expressions respecting the court, when under the excitement produced by a decision against him. I have heard him use such expressions as were mentioned by Judge Carr, and I have heard him call the three Judges of the Supreme Court "three judicial monsters."

Q. By *Mr. McDuffie.* Did he say this to the court?

A. No. He said it to me in my office. I remember the expression, because it diverted me much at the time, but I never heard him use such language in court. His demeanor in court is such as arises mainly from his peculiar temper. He shows great warmth, insists on talking, and re-arguing a case after it has been decided. He seems to wish to crowd on the court, and will interrupt the court, perhaps, while giving its decisions.

Q. By *Mr. Meredith.* What is the number of the land claimants in Missouri?

A. I do not know the number: I have had very little connexion with the land causes.

Q. How long have you been in Missouri ?

A. Ten years.

Q. Are there not many influential and respectable men among the land claimants?

A. Some of them are among the most so in the State.

Q. Are there many ignorant and unlearned men among them?

A. There are some such. I recollect an instance or two.

Q. You have said that the general reputation of Mr. Lawless with regard to his deportment toward courts is disrespectful. What are the terms in which he speaks of them?

[*Mr. Buchanan.* In court, not out of court. We shall object to testimony as to his expressions concerning judges when out of court. We wish the question reduced to writing. This was accordingly done, in the words following :]

Q. What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts, both in their presence, and out of court?

[*Mr. Buchanan.* There is one part of this question to which we object, more for the sake of saving time than on any other ground. Our objection is chiefly intended to prevent the examination of others upon this subject; because the witness now under examination has already, in fact, answered the question. He has referred to conversations which took place between Mr. Lawless and his companions at the bar, whilst he was smarting under the decisions of the court; and has told you that Mr. Lawless on one occasion called the Judges of the Supreme Court of Missouri "judicial monsters." The managers, so far from being unwilling, are, on the contrary, desirous and anxious, to go into a full examination of the deportment of Mr. Lawless before the courts in Missouri; and have no objection to indulging the examination upon that subject to any and to every extent; not because it has any relation to the guilt or innocence of the accused, but because it may have an important bearing on the character and reputation of Mr. Lawless. We were perfectly willing that Mr. Spalding, a lawyer of ten years standing, should fully declare his opinion of the demeanor of Mr. Lawless towards courts. He has done so:—but the question is now passed one step farther:—it is asked what, according to general reputation, are the terms used by Mr. Lawless in speaking of judges when out of court? Do counsel suppose that this court will admit in evidence all his conversations with respect to the character and conduct of all the judges in Missouri? We know how lawyers are sometimes in the habit of talking about judges among themselves, and the question now to be decided is, whether all such tittle-tattle, such loose conversation, is to be detailed before this court? We trust that the Senate will never permit what this gentleman has said in porter-cellars, and lawyers' offices, in moments of unreserved and unguarded conversation, to be given in evidence. We object to it.

Mr. Meredith. I should not have asked the question, but for what I understood to be the consent of the managers. Conversations which took place out of court in moments of excitement I should have deemed inadmissible, had we not received *carte blanche* as I supposed from the managers. But we regard the question of general reputation, as perfectly competent and proper. There are two questions before the court. The first is, whether Judge Peck possessed the power which he exercised?—whether he had a right to punish for a contempt? If this shall be decided in the affirmative, another question arises:—Was the punishment proportioned to the offence? or was it so severe as to justify the inference of malice? Is it not then competent to show what considerations governed the respondent in inflicting the punishment? Is not this evidence which must have influenced his judgment? Was it not proper for him to inquire into the general deportment of the individual he was about to punish towards courts of justice? whether it was respectful or otherwise? whether this was his first offence of this description? If it was, might not a punishment which would otherwise have been considered proper, be justly pronounced arbitrary and oppressive? Are there no extrinsic circumstances which a judge may

and ought to take into consideration, where his power of punishment is discretionary? Is not the previous conduct of an offender a common inquiry in courts of criminal judicature? and does not the extent of punishment very often depend on such inquiry? Might not Judge Peck very properly have asked, "Is this his first offence? Has Mr. Lawless heretofore been uniformly respectful to courts? Is this a mere act of inadvertence, or produced by sudden excitement? or is he known to be in the habit of speaking of courts, of judges and of their decisions in the most contemptuous manner?" The question, as I have observed, is, whether the punishment was in proportion to the offence? admitting the Judge to possess the power to punish. To ascertain this, we consider the evidence as competent and proper.

Mr. McDuffie. There is a single point, on this subject, which, I think, must be perfectly conclusive. The gentleman seems to suppose that if a part of the question has been admitted, the whole has been; whereas the converse is true. The admission of a part excludes the residue. The question now proposed by the respondent's counsel has for its object to establish particular facts, by a general reputation. General reputation is one thing, and facts are another. The rule is, that general reputation must be proved by general rumor. You may not even prove it by facts: but was such a thing ever heard of as an attempt to prove particular facts by general reputation? We are called upon by gentlemen to permit them to establish, first, the general reputation of Mr. Lawless, as to his mode of speaking to judges in their presence, and then his mode of speaking of them out of court; and we are called to establish the terms that he uses by general rumor. This we consider utterly objectionable.

Mr. Storrs. The objection which has just been urged by my colleague, is, I think, quite conclusive. We have already consented that the question should be put as to Mr. Lawless' reputation, concerning his conduct when *in* court; even this is admissible only because it is consented to; but, we object to the other branch of the inquiry, because to do so, is the only means of putting any limit to this inquiry. Under our admission of a part, the counsel now seeks to draw us into an admission of the whole.

But there are other objections to such a question. Is it to be maintained that, without open inquiry, without giving any notice to the opposite party, and merely on secret inquiries of the judge, a man is to be punished, or the degree of his punishment to be regulated? If it can be shown to the court that the individual has been guilty before, it is a valid reason for increasing his punishment; but that must be *shown*. If it is proved that a man has had thievish habits previous to the present theft, his punishment may be increased; but now we hear, that without any opportunity being afforded to the party to meet and to rebut the proof of previous delinquency, the judge is to be permitted to set on foot a secret inquisition, and that, too, in the case of an attachment, of all other cases, where the proceeding is summary. The judge, to be sure, has a discretionary power; but this is not to be his mere arbitrary caprice. It is a *judicial* discretion. It is not his mere *fiat* that is to measure the punishment. The punishment must be in proportion to the atrocity of the offence, as that atrocity is shown to the judge. Is a judge to take that opportunity to avenge himself for secret expressions which have passed in the freedom of private intercourse?—and is that one of the grounds under which the respondent seeks to shelter himself? I was surprised that his counsel should take for him a ground like this. He presents the respondent before this court in an attitude like this, that he may call into view any conversations of his victim that he has ever heard of, and take them into the measure of punishment, though the very conversations themselves, if confessed, or proved in open court, would not be punishable. If Mr. Lawless did say that the judges were stupid men, and could not understand what they read, the words are not punishable if uttered out of court. A man may attack the capacity of any and of every judge. Yet now it is pretended that such expressions may have been looked to in measuring out the punishment of Mr. Law-

less, though they would not, themselves, have been punishable if proved. Any man is at liberty to say of any court that it is "a stupid court," and that its decisions are "monstrous." Admitting that Mr. Lawless did use disrespectful expressions, shall we be permitted to show that he spoke the truth? Why not? Are we not to have the license in this case which we had in the case of Judge Carr? and if he did say that the judges were "judicial monsters," is he not to be allowed to prove it, if he can? and if it has been a decision of which all professional men not only may, but ought to speak, are they not the sentinels whose official duty it is to protect the rights of all the community? I was reluctant to go into this inquiry before: but if it is now insisted that they may prove the terms he used, we shall insist on proving that he was justified in using them. It must not be gratuitously assumed that he was unjustifiable. It may as well be assumed that he used epithets which embodied the feelings of every man in the community. We are willing to go into the inquiry. We shall be able to show that in a dozen cases the decisions of these courts have been reversed without argument. We know that they were the decisions of men high in station. It was their infirmity. We do not complain of them. We have admitted that Mr. Lawless has, sometimes, exhibited a want of due respect in his deportment in court, and that fact might be an item in making up an opinion on the intention of the Judge; but they may not go out of court to show this; and, above all, not to show facts by general rumor.

The question was now put by the President of the Court on admitting the question, viz. "What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts both in their presence and out of courts?"—and decided in the *negative*, by yeas and nays, as follows:

Yeas,—Messrs. Noble, Ruggles, Smith of S. C.—3.

Nays,—Messrs. Barnard, Barton, Bell, Brown, Burnett, Chambers, Chase, Clayton, Dickerson, Dudley, Ellis, Foot, Forsyth, Frelinghuysen, Grundy, Hayne, Hendricks, Iredell, Johnston, Kane, King, Knight, Livingston, McKinley, Marks, Naudain, Robbins, Sanford, Seymour, Silsbee, Smith Md., Sprague, Tazewell, Troup, Tyler, Webster, White, Willey, Woodbury.—39.

So the question was overruled.

Q. Is it the general reputation of Mr. Lawless, as to his deportment toward courts, that he is generally respectful, or otherwise?

[*Mr. Buchanan.* In court.]

[*Mr. Meredith.* Yes,—in court.]

A. I might say that his general reputation is such as I have before stated, viz. that he is apt to be disrespectful to them. The epithet *disrespectful*, however, I should not choose myself, by which to designate his character, but rather call it *troublesome* and *turbulent*. This would be my conclusion from conversations with members of the bar. I have frequently conversed with them on the subject, and what I heard produced that impression upon my mind.

Q. Is it his general reputation that he is disrespectful toward courts and judges, when not in court?

[*Mr. Buchanan.* That is the very question which has just been rejected.]

[*Mr. Meredith.* No: it is not the same question; but if it is objected to, we waive it.]

Cross-examined.

Q. By Mr. Buchanan. What, in your opinion, (and as a lawyer, you have had an opportunity to judge,) has been the conduct of Mr. Lawless, when in court, towards Judge Peck, or towards any other judge, from the beginning of the year 1823, to the present time? First, toward Judge Peck.

A. I cannot say that I have observed any disrespectful behavior on his part, toward Judge Peck, within that time, or at any time. I was not present during this affair.

Q. Now please to state your own opinion, from your own personal observation, of his deportment in other courts than Judge Peck's.

A. It has been somewhat of the character I before stated, but rather less so than formerly. I have seen some instances where he would maintain a controversy with the court, until the court would become a little excited, and would tell him to stop. I have seen him very ardent and impetuous, so that he would not listen to what the court would say; and have known him to be very troublesome in that way.

Q. Before what court?—*A.* In the Circuit Court.

Q. Is that Judge Carr's Court?

A. Yes. I have seen him conduct somewhat in the same manner in the Supreme Court.

Q. Do you recollect any instances?

A. I do not recollect any instance, in the Supreme Court, when he has been particularly boisterous and troublesome. They argue, there, none but questions of law, and there is not the same opportunity.

Q. Then it has been confined to Judge Carr's Court?

A. Chiefly in that court; both since Judge Carr presided, and in the time of his predecessors, Judge Stewart, and Judge Tucker

Q. Is not his manner, except when excited, very respectful towards the court?

A. Very much so, until he becomes earnest in a cause.

Q. By *Mr. Spencer.* He then becomes impatient of contradiction, or interruption?

A. Yes, very much so. This is his character, both at the bar and in private life.

Q. By *Mr. Buchanan.* You say that his general manner is respectful, except when excited by his cause: have you often seen him thus excited, since 1823?

A. I have, a number of times.

Q. Never, you say, before Judge Peck?

A. I have not observed anything of that kind in him before Judge Peck.

Q. By *Mr. Storrs.* He is a man, you say, of warm feelings and ardent temperament?

A. Particularly so.

Q. By *Mr. Buchanan.* Even when he is excited, is not his language to the court perfectly respectful?

A. Sometimes it is not. He will sometimes make observations which seem disrespectful. He will go on, and argue on the absurdity of a decision, after it has been made by the court.

Q. Is he singular in that? or has not such conduct been frequent in Missouri?

A. It has been somewhat the case with others, but Mr. Lawless has been more remarkable than any one. Formerly the bar of Missouri were pretty troublesome to the court,—about six years back. But under the present Judge of the Circuit Court, there has been very little of this generally.

Q. By *Mr. Spencer.* Were you present in that court on the trial of the case of the negro, which has been referred to?

A. I was, during part of the time, in and about the court. I have heard much said of it.

Q. By *Mr. Meredith.* Was the society in which Judge Peck moved in Missouri composed chiefly of land claimants? Were not his personal friends and acquaintance among them?

A. I imagine that must have been the fact.

[Here the examination closed.]

Mr. Meredith. We offer now in evidence a copy taken from a record in Missouri called the *Livre Terrien*, in order to show that no such practice has, does, or can exist, as is referred to in the 15th specification of Mr. Lawless' article; which is in these words: "That the uniform practice of the sub-delegates or

Lieutenant Governors of Upper Louisiana, from the first establishment of that province to the 10th of March, 1804, is to be disregarded as a proof of law, usage, or custom therein." We offer it, to prove that from the year 1766, down to 1797, not a single grant has been made *for services*: nor any one for more than a league square: and to show that no such evidence could have been offered to the court in Soulard's case, and of course, no such evidence was "disregarded."

Mr. Buchanan. If the counsel had simply offered his book, we should have made no objection to it. We are indeed anxious that the book shall be produced. The Judge puts his whole case, in deciding against Soulard, on the point, that the sub-delegates in Upper Louisiana had no power to make concessions of land; and this book will show that they were in the constant practice of making such concessions.

Mr. Meredith. If the honorable manager makes out that proposition, I agree to give up the cause. I aver that the whole doctrine of the Judge's Opinion is directly the reverse, and that he admits throughout, that the Lieutenant Governors were authorised to grant concessions.

WILSON PRIMM *called and sworn.*

[A paper being handed to the witness,]

Q. Is this, or is it not, a list of all the grants for tracts of land of over three hundred arpents, contained in the *Livre Terrien*? Has it been examined by you? and was it copied from the original book?

Mr. Buchanan. Are not all the concessions there?

Mr. Meredith. Only those over three hundred arpents.

Mr. B. Have you no copy of the whole book?

Mr. M. No.

Mr. B. Have you not the book itself?

Mr. M. No; the book is a record, and is in a public office in Missouri.

[The paper having been examined by the managers, was objected to.]

Mr. Meredith. This paper is a list of all concessions over three hundred arpents, down to the year 1796. I hold it to be admissible. What is the rule? that it is competent to produce an examined copy of a record in evidence: and that it is sufficient to produce that part of it which is relevant to the matter in question. (Here Mr. M. read from Starkie.) What is the matter in question here? it is to show that during a certain period not a single grant was made for more land than a league square. What concessions were made for quantities under 300 arpents cannot be material. This is a list of all grants which exceeded that amount.

Mr. Buchanan. It is admitted that this is not a copy of the record. We are willing to admit that the *Livre Terrien* is a record; but this is not a copy from it.]

Q. By Mr. Meredith. How was this copy taken by you?

A. It was compared by me with the grants recorded in the *Livre Terrien*. This book contains the concessions made by the Lieutenant Governors of Upper Louisiana. The list I have in my hand does not give the form of the concessions: it is an abstract from those above 300 arpents, giving their date, the number of arpents, the person to whom the land was granted, and the Lieutenant Governor by whom it was granted. In some cases the date of the concession is omitted in the record.

Q. By Mr. Buchanan. Does the book consist only of lists like this? or does it contain the concessions themselves?

A. It contains the concessions.

Mr. Buchanan. We find that this is a copy of nothing. It is a copy, neither of the entire record, nor of a part of the record. It is a mere list, compiled from the book by somebody. We hoped that the book itself would be produced.

We were anxious that it should be, for several reasons. We were most anxious, because it would show whether the concessions, on the face of them, had been made, subject to the regulations of O'Reilly, Gayoso, or Morales. We expected a copy of the book,—and instead of that, we have an abstract—a list—which merely states the names of the grantees who obtained concessions for more than three hundred arpents, the dates of their concessions, and the number of arpents in each. Admitting the *Livre Terrien* to be a book of record, (which we are not disposed to dispute) this paper cannot be received, as it is neither a copy of the whole, nor of any part of it.]

Q. Have you examined the *Livre Terrien*?

A. I believe I have examined the whole of it.

Q. From beginning to end?

A. From the beginning to the end, with attention.

Q. Of how many books does it consist?

A. Of six :—five of them contain the records of concessions, and the sixth a record of surveys.

Q. Did you examine the whole of each of these books?—A. Yes, I did.

Q. Did you find, throughout the whole, one single grant made for services?

A. I did not.

Q. Did you find any grant of a tract exceeding a league square?

A. I do not recollect any. All the concessions over three hundred arpents, are in this list.

[*Mr. Wickliffe.* Do the counsel mean to prove the contents of the book by parol testimony?

Mr. Meredith. Not at all; we only wish him to explain the nature of the list.]

Q. *By Mr. Buchanan.* Are not all the concessions in those five books, concessions made by the Lieutenant Governors of Upper Louisiana?

A. I will look at the memorandum which I made at the time I examined the book.

Q. We do not ask you for the contents of your memorandum; we wish you to give a prompt answer,—as you did to the former question, put by the counsel on the other side. You answered *his* question so promptly as not to allow the managers time to object. Please to answer ours in the same manner.

A. I believe I have a right to refer to my memorandum; but since this is objected to, I answer without such reference that I think they were.

[*Mr. Meredith.* There is no need of any solicitude on that subject: the fact is admitted :—we have never disputed it.]

Q. In the concessions recorded, does any reference appear, on the face of them, to the regulations of O'Reilly, of Gayoso, or of Morales?

A. Those names are not mentioned, that I recollect; but all the grants are made on the condition of cultivation and settlement within a year and a day, except in the case of stock farms, where it is extended to three years.

Q. Are there any grants which refer to the regulations of O'Reilly, Gayoso, and Morales by name?

A. I do not recollect any.

Q. Do you mean to say that every grant in that book had reference to some sort of cultivation?

A. Yes; under the circumstances that I mentioned.

[*By the Court.* Do the counsel for the respondent wish this paper to be received in evidence?

Mr. Meredith. We shall not press the document.

Mr. Buchanan now produced and delivered over to the opposite counsel a written translation of the objections of Lieutenant Governor Delassus to the regulations of Morales.

Mr. Wickliffe applied for the printing of a deposition of Maria P. Le Duc as having a bearing on the Opinion delivered by the District Court in the case of Mackay Wherry.

Mr. Meredith applied for a *Subpœna duces tecum* to obtain from the Commissioner of the General Land Office, an abstract of complete titles under the Spanish government of lands and a part of the province of Louisiana from the year 1771 to the cession of Louisiana to the United States.]

The Court then adjourned to 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Tuesday, January 11.

The managers, accompanied by the House of Representatives, attended: James H. Peck, the respondent, and his Counsel also attended.

Mr. Meredith. We offer the transcripts of certain concessions granted by the Lieutenant Governor of Upper Louisiana for services rendered or to be rendered; with a view to show that there were cases of that description pending in the District Court at the time the decision was made in the case of Soulard.

Mr. Buchanan. Please to reduce your offer to writing, and we will then take the opinion of the Senate upon it.

Mr. Meredith. We will waive it, for the present.

Judge Peck. We wish to offer to the court seventeen complete records of cases pending before the court at the date of the publication of the "Citizen": in eight of which Mr. Lawless was solicitor. They have his signature attached to them, and are partly in his hand writing. We offer them to show that at the time of writing that article he was apprised of the pendency of cases similar to that on which he affected to comment, and to show that there were many of these cases which embraced all the points in that of Soulard. They are complete records, and duly certified, according to the acts of Congress.

Mr. Buchanan. Read them to the court.

Judge Peck. We do not wish to detain the court by reading the whole of them. We only wish them to be in evidence, in order that we may refer to them, and read such parts as may be necessary.

Mr. Buchanan. For what purpose are they offered in evidence? I really have not ingenuity enough to discover with what view they can have been presented.

Mr. Meredith. A single word will be sufficient to show that. One ground of complaint against the publication of Mr. Lawless was, that it seemed designed to affect the public mind with regard to cases then pending, and which were similar in their circumstances to that of Soulard. This testimony is offered, to show that there were many such.

Mr. Buchanan. Very well You have already proved there were many such cases.

Mr. Meredith. Only by parol;—this is documentary proof.

Judge Peck. We have also copies of all the petitions that have ever been filed before me, amounting to upwards of two hundred. We produce them, that it may be seen whether the commentary of Mr. Lawless had reference to these, or to the case of Soulard. We present them all; and the gentlemen can make such use of them as they may think proper. I deem it necessary to show that the counsel who practised before me were generally concerned in these land causes; that the parties concerned in them were numerous, and powerful, and exercised great influence in the State; that there were many counsel employed on the one side, while, on the other, there were none but the attorney for the government, and that it was intended to array those numerous claimants against the court, as well as to bring it into ridicule and contempt, and break down its authority. We propose to adduce this proof to show the necessity and the obligation under which the court felt itself bound, to resist and to punish such an attempt. We offer them, in order to show this court that these two

hundred cases were not pending at the time of the publication of the "Citizen," but that twentythree of them and no more were depending at St. Louis at that date and sixteen at St. Genevieve, and that all except those thirtynine were brought *afterward*, and almost immediately after the appearance of the article signed "A Citizen." The witness, Mr. Lawless, tells this court, that a great amount of costs have been incurred in vain: and that these costs amount to near four thousand dollars. Even admitting that statement to be true, these papers will show that the court is not chargeable for that result, because a large proportion of the suitors brought their cases *after* the views of the court had been fully given. These records as well as the testimony of Judge Wash will prove that Mr. Lawless had not eighty cases depending as he has stated, but only eight. We shall present a certified copy of the docket, in order to show the number of them, and that the rest were filed *after* the decision, and the publication of the strictures.

Mr. Buchanan. Some remarks have fallen from the respondent which, as one of the managers of this impeachment, I might consider it my duty to answer: but I waive this right. The petitions to which the respondent has referred, and all other documents in his possession, he is at liberty to produce, without any opposition on our part. We shall admit, so far as we are concerned, all the records which have been filed in his court.

ROBERT WASH called again, and examined by Mr. Meredith.

Q. Have you examined the docket of the District Court? and if you have, can you state what was the number of cases upon it on the 8th of April, 1826?

A. I have examined the docket, exhibited to me by the clerk of the court, and have compared it with this paper. In glancing into the causes, I extracted some facts, which Judge Peck requested I would note. I did so, and have the memorandum now in my hand.

Q. By Mr. Buchanan. Are these notes taken from the record?

A. No: from the petitions. In looking over the petitions filed during September term, 1824, I found that the first No. was written partly in the hand of Mr. Strother, the conclusion by Mr. Lawless, and it was signed by Mr. Lawless. The second is in the hand-writing of Mr. Strother, and signed by Mr. Lawless. No. 3 and No. 4 are also signed by Mr. Lawless. Of the petitions at March term, 1825, No. 1 is not on file, No. 2 is in the hand writing of Mr. Benton, as is No. 3 also. Nos. 4, 5, 6, and 7, are in the hand writing of Mr. Lawless. The remaining two, Nos. 8 and 9, in that of Mr. Hempstead. Of the petitions of May term, 1825, there are more by Mr. Lawless. No. 1 is by Mr. Benton; No. 2 by Mr. McGirk; the rest are by Mr. Cozens. Of those at July term, 1825, No. 1 is by Mr. Lawless; No. 2 is in the writing of Mr. Strother, but signed by Mr. Lawless; and Nos. 21, 23, 24, 31, 37, 38, 107, and 117, were drawn and endorsed by Mr. Lawless, but stand on the docket in the name of Mr. Strother.

Q. By Judge Peck. This was after the 26th of April?—*A.* Yes.

Q. That is, after the publication?—*A.* These are up to July term, 1826.

Q. Are these all the cases which were filed by Mr. Lawless?—*A.* Yes.

Q. Are they in the same order as on the docket?—*Yes.*

Q. By Mr. Buchanan. How many of these claims were on the Docket previous to the decision of Soulard's case?

A. I do not know, indeed.

Judge Peck. There were twentythree in St. Louis County, and sixteen in St. Genevieve, brought previous to the publication:—all the rest were brought within a little more than one month after the publication of the "Citizen."

Q. By Judge Peck. Can you certify this paper to be in the hand-writing of Judge McGirk of the Supreme Court of Missouri?

A. Yes.

Q. By Mr. Meredith. Will you state what is the general deportment of Mr. Lawless in the courts in which he practised?

A. It would be a difficult matter for me to describe his deportment with accuracy. He is of a hasty, impetuous temper, and he displays it often when cases are decided against him.

Q. Is his deportment respectful, or otherwise?

A. He is deemed troublesome in court, when cases go against him. He is apt, on such occasions, to rise hastily,—I should say—to hop up, and to suggest something to the court which he presumes it has overlooked. He is apt to use strong terms, and not always well weighed. He will say, for example, that “he hopes the court does not intend to establish such a monstrous doctrine.” But, he does not do this so frequently of late, as he formerly did. He is of a warm temper, and takes hold of the cause of his client with all his might and soul, and is unwilling ever to be beaten. He carries this feeling much too far in court, as I have told him. When not excited, his conduct is respectful, and perfectly decorous. But under these excitements, he seems to use terms stronger than he is aware of.

Q. By Judge Peck. Are you acquainted with very many of the land claimants of Missouri? How long have you resided there?

A. I have a very general acquaintance through the State. I have lived there for twenty years. I know many of the land claimants intimately, and a large proportion of them by reputation.

Q. Are many of these claimants of my acquaintance? Were many of them among my friends? and do many of them form in part the society into which, as a citizen of St. Louis, my associations must necessarily lead me?

A. Yes, many of them.

Q. Among that large body of the community, do you know any one individual to whom you believe me to have been personally inimical at the date of my Opinion in the case of Soulard’s heirs?

A. I have no knowledge that would induce such a belief—none whatever.

Q. Do you know, whether, ever since your residence in Missouri, there has not been a general rumor and belief of the fraudulent character of those claims?

[*Mr. Buchanan.* We object to that question. We are not to try land titles by common rumor. Let the question be reduced to writing, and submitted to the court.

Mr. Meredith. The object to which this question is directed, was distinctly announced in the opening of the respondent’s case. The situation of the District Court with reference to these claims, their number and peculiar character, was described, and it was urged as one of the grounds of the defence, that although in an ordinary cause, in a private controversy between individuals, the court might not perhaps have felt itself bound to interfere; yet when it looked to the publication as bearing upon hundreds of claims still undecided; when cautioned by the act of Congress and the general rumor of the country, to remember that many of these claims were fraudulent, and would be pressed upon the court for confirmation, the respondent was imperatively called on to gather around him all the guards with which the laws of his country furnished him, to defend the authority of the court, from what he considered as the first attack, which if unresisted, might invite further assaults.

The act of Congress is before the court. We now desire to prove by this witness, that such a report and belief prevailed in Missouri.

The question having been reduced to writing, was offered in the following words:

“Do you, or not, know that at and before the time of the publication there was a general report and belief in the State of Missouri that many claims to lands in that State under Spanish grants were fraudulent?”

Mr. Wickliffe. I do not know whether the managers would not be consulting their duty, if they should submit this question without argument. There has

been a latitude of investigation, and an extent of topics, heretofore indulged in the course of this impeachment, which has gone far beyond any conceptions of minè, as to the rules of evidence: but the present question is, I think, the most extraordinary of any which has yet been proposed. In the trial of a District Judge, for the imprisonment of a citizen without law, and unjustly, the court is to be led off to the trial of fraudulent land claims in Missouri, and to the trial of them by common rumor. To what will this lead? Are we not to have the rumors on the other side? Might it not be insisted that although the United States are represented as being mainly interested in the resistance of these claims, the owners of New Madrid certificates are principally interested in the defeat of them? Is the court to be led off by an inquiry into the comparative merits and documents of land jobbers in Missouri? We should object, even if there were positive proof of the fraudulent character of these claims. There may, no doubt, exist such a rumor; and it may have been set on foot in order that the owner of New Madrid certificates might get the lands claimed under Spanish titles. But a rumor may be proved, on the other side, that the Spanish grants are valid, and this, in like manner, may have been designed to aid the holders of the Spanish grants against those of New Madrid certificates. Where is this to end? We object to any such question.

Mr. Meredith. We are willing, and ready, to prove fraud in particular cases.

Mr. Buchanan. In Soulard's case?

Mr. Meredith. Yes; we are prepared to show, by his own letter, and his own acts, that there was fraud in that concession. But in addition to the reasons I have urged for the admissibility of this proof, there is another view of the subject which may be presented to the court. One of the "assumptions" ascribed to the respondent in the publication of Mr. Lawless is this;—"that the uniform practice of the sub-delegates, or Lieutenant Governors of Upper Louisiana, from the first establishment of that province, to the 10th of March, 1804, is to be disregarded, as a proof of law, usage, or custom therein." Now, in his answer, the respondent avers that no such uniform practice was made out by the evidence in Soulard's case, and that all the proof offered upon that subject was not only disregarded, but admitted and considered. In order to show that no proof amounting to an uniform practice was given, we have endeavored to show that such proof was impossible. We have shown, by a copy of the *Livre Terrien*, that for thirty years there is not a single instance of a concession contrary to the regulations of O'Reilly;—that none were granted as rewards for services, and none for more than a league square (which is 7056 arpents.) But a practice may be relied upon subsequent to the date of the *Livre Terrien*, from the time when Antoine Soulard was appointed surveyor general, down to the cession of the province to the United States. And to rebut this proof, we desire to show that at the close of the Spanish government, and with a full knowledge of the treaty of Paris, concessions were granted in fraud of that treaty, and were antedated to conceal the fraud. We are sincerely desirous of avoiding all unnecessary proof; but this examination will take but a short time, and I hold it to be very important to the defence of the respondent: I should not otherwise press it.

Mr. Storrs. The question is this,—Was there a rumor in Missouri, in 1826, that there existed then many fraudulent land titles? The question is not, on what was the usage of confirming concessions founded? but, whether there was a rumor that there existed many fraudulent land titles? Does the respondent raise this argument in favor of the decision of the court? Is there any court which dare,—I say *dare*,—in making up its opinion upon a case before it, suffer itself to look to the rumors afloat in the community? (Here Mr. Meredith interposed, wishing to explain.) I understand the gentlemen perfectly. He need not explain. I understand the force of the evidence, when admitted. He will use it to show that the decision was correct, because some land was saved to the United States. But is that to form an item in an impeachment? Is the consti-

tution of the United States to be bartered away for land? The gentleman did not press it in these points of view, I know; but said that it was necessary that the court should draw around itself all the authority which had been conferred upon it by law. Admitted. But the question whether the claims were fraudulent, or not, does not touch that; the court would have that right, whether the claims were fraudulent or not. But is rumor evidence in *any* case? Can the gentleman find a single case in which rumor was ever given in proof? If the claims were fraudulent, how is it to be proved? By proving that there was such a rumor? Is that the sort of evidence which the House of Representatives have to meet? I know that general reputation may be admitted, in certain cases; but whether these titles were false, or not, is immaterial to the matter in hand. The court, unquestionably, was authorized to draw round itself all the power which the law had given it; but not any power which the law had not given it. How are we to meet this inquiry? By proving a counter rumor? Or are we to prove that there was no such rumor? the rumor is to form the ground of a presumption that some of the claims were fraudulent; but the Judge could not act upon rumor. In truth, the whole question is so bald that it defies all argument. I do not know that I ever saw such an inquiry proposed to a court. Suppose it could be proved that there are ten thousand fraudulent land claims in Missouri; what bearing has it on the question of this impeachment? The question is, whether Mr. Lawless fairly represented the Opinion delivered by the court? or whether the Judge might commit him for a contempt in publishing such an article? Admit, even, that the claim of Soulard was fraudulent; that claim is not in issue here: we are not to try the merits of the Soulard case. But there is one fact staring the respondent in the face, which, one might think, ought to have deterred him from bringing forward such an argument as has been now urged. There is a verdict of a jury, rendered in his own court, when this case was under his immediate care, and which he is not at liberty to controvert, even by a suggestion. There is an indecorum in doing so, which ought to have presented itself to his mind. Had he not the power, if the verdict was erroneous, to set it aside? But that is no branch of this inquiry. We will relieve the gentleman from the burden of all such proof: we shall draw no inference from the Opinion; whether it was correct or not, whether it was not an able Opinion; whether it was not conclusive; or whether it was not founded on the testimony: we shall not go into that question, and the inquiry seems to be now proposed only with a view of bringing into this court some of the paraphernalia of the Soulard case. It has no bearing on this impeachment, and we are now in a court which well knows whether it has, or not. We should not raise these legal objections had we not cherished the belief that we were now near the close of the testimony, and were we not unwilling further to prolong the proceedings.

Judge Peck: The Hon. manager thinks that we may not go into the proof of the rumors which prevailed in Missouri; but we consider it proper, to show what facts the court might fairly have had in its mind when the proceeding against Lawless was had. If the court believed that the publication contained a misrepresentation of the Opinion, and was intended to show that the claims were of a fair character, and that an Opinion which pronounced them otherwise was absurd and ridiculous, might it not have supposed, that these claims were thus to be pressed through the court, whether fair or otherwise? and if so, was it not the duty of the court to repress such an attempt? to discourage it? and to punish and make an example of those who were guilty of it? Can it be believed that I had resided so long in Missouri, and did not know what the general impression with regard to these claims was? In all controversies there are two interests involved; and was the court to sit still while the interests on one side of the question were attempted to be beaten down, without endeavoring to protect them? Is it not among the highest duties of courts to see that all who come before it, whether as parties or triers, should come free from prejudice? Are

not the rights of parties committed to the protection of the court? and may not the court consider it a duty to punish any invasion of those rights, even the smallest? If the court had reason to believe that the party making these impressions was acting against his own knowledge and belief, was the court to be blind to that fact? and if the paper represented facts as the court had reason to believe they did not exist, might not that be shown? As to disrespect towards the jury, it was not the duty of the court to set aside the verdict, if no application to that effect was made. The court might not have felt itself authorized to interfere though it was not without suspicions as to the fairness of the claim. It might be inferred that suspicions of fraud in relation to the case of Soulard's heirs were entertained, from the reference of the question of concession or no concession to the jury.

As to what has been said in relation to the duty of the court, to set aside the finding of the jury if it was not satisfied therewith,—the answer is, that it was not for the court, but for the officer of government, to search for evidence, and move to set the verdict aside. The question proposed does not reflect on the jury, or their finding.

Mr Meredith here modified the question, by striking out the words “report and.”

Mr. Buchanan. We supposed we had closed this argument; but as the respondent has seen fit to make some observations, I shall offer one or two words in reply. I begin to fear that we shall, in our arguments, become as discursive as we have been in the testimony; and when this cause is to end I really cannot anticipate. What is the question before the court? The respondent, a Judge in Missouri, believing or affecting to believe, that certain strictures on his Opinion, published in a newspaper, were a contempt of his court, became himself both the accuser and the judge; and has, according to his own sense and measure of justice, condemned and punished Mr. Lawless for this alleged offence. The question is, was he justified in so doing? The whole merits of the case lie within a nut-shell. The Opinion of the Court, the article of Mr. Lawless, his deportment and the deportment and acts of the Judge during these proceedings comprise the whole cause. But we have been wandering about, till we have now got before us the records of all the land causes in the different land districts of Missouri; and the gentlemen can, if they please, examine each of these records, and if they contain any proofs of fraud they can use such proofs as they think proper. After thus exhausting the records of the court, and after our free admission of the whole, they now produce Judge Wash to prove that there was, in Missouri, a general belief that many of these claims were fraudulent. Great Heavens! and is the respondent, who is charged with being guilty of cruelty and oppression against Mr. Lawless, to excuse himself by offering evidence that there was a rumor or a belief that some of these claims in which that gentleman was concerned, as counsel, were fraudulent? Rumor! and is rumor to justify a judge in pronouncing, and carrying into effect, a severe sentence of imprisonment and suspension for an imaginary contempt? And this rumor is neither pointed at nor confined to the case of Soulard, but extends, in the general language of the offer, to “many claims to lands” “under Spanish grants” in Missouri! I shall not repeat the argument just urged by my colleague: I will merely advert to one thing. The Judge says that he was suspicious of fraud in the case of Soulard.

[Here Judge Peck explained. He had said that it might be inferred that he had suspicions, from the fact of his having required a jury.]

Yes: but if the Judge entertained such suspicions, could he not, without difficulty, have suggested and procured a motion for a new trial? Was not Mr. Bates the District Attorney? Was he not known to be an able and efficient officer? Did not the jury, under the Judge's immediate direction, find that the representations of the claimant contained in his petition had been correct? and did not the respondent, in his decision, proceed upon admitted facts? And now,

in 1830, we are called upon to admit evidence, not that this claim was fraudulent, which might have some little remote bearing on the question ; but that there existed in Missouri a rumor or a belief, that many of the land claims were fraudulent.

Mr. Meredith. The only question put to the jury in the case of Soulard was, whether the concession had ever, in point of fact, been granted? not whether it was fraudulent?

Mr. Buchanan. I stated it so. If fraudulent, it would have been no concession.

The President of the court now put the question, whether the witness should answer the question proposed by the counsel of the respondent, in these words, viz.—

“Do you, or not, know that at and before the time of the publication, there was a general belief of the State of Missouri, that many claims to lands in that State under Spanish grants, were fraudulent?”

And it was decided in the negative, by yeas and nays, as follows :

Yeas.—Messrs. Barton, Bell, Burnet, Chase, Forsyth, Grundy, Hendricks, Iredell, Knight, Marks, Naudain, Noble, Tyler, White.—14.

Nays.—Messrs. Brown, Chambers, Clayton, Dickerson, Dudley, Ellis, Foot, Frelinghuysen, Hayne, Holmes, Johnston, Kane, King, Livingston, McKinley, Robbins, Ruggles, Sanford, Seymour, Silsbee, Smith Md., Smith S. C., Sprague, Tazewell, Troup, Webster, Woodbury.—27.

So the question was overruled.

Cross-examined.

Q. By Mr. Buchanan. Were you not interested in the general question concerning the validity of Spanish land claims, at the time the decision was made in Soulard's case?

A. I never had the remotest interest in any unconfirmed claims in Missouri. I never would have anything to do with them.

Q. Were you not interested in New Madrid certificates?

A. Largely interested ; but they did not rest in unconfirmed titles.

Q. Is there not an hostility of interest between those New Madrid certificates, and the Spanish claims?

A. I think not. I do not know of more than a single case where there was any collision between them. The New Madrid certificates were generally located beyond the limits of the Spanish claims.

Q. Were you never in collision with those claims yourself?

A. Never. I carefully avoided all collision between the rights of pre-emption and the New Madrid certificates. There has been some collision with the rights of pre-emption, because I did not know exactly how far the pre-emptions extended.

Q. Is there not, now, an actual interference between your locations and the Spanish claims?

A. In the district immediately around St. Louis there has been a great deal of collision ; but it has arisen from claims recently set up, and not upon record. Locations were sometimes made on lands which, at the time, were thought to be vacant, but to which claims have since arisen.

Q. Have you come in collision, there, with any Spanish claim?

A. With no one.

Q. Are you not, at this time, a party as defendant in one of these suits?

A. No; not personally: only as the guardian of infant heirs. I have but one claim which interferes with the rights of pre-emption.

Q. To what rights of pre-emption do you refer? To those of Spanish settlers?

A. No: those of American settlers.

SAMUEL DAVIDSON KING *called and sworn.*

Mr. Meredith. This gentleman is a clerk in the General Land Office, and the books we wish him to certify are produced in order to show a succession of complete titles from 1770, which are all in perfect conformity to the regulations of O'Reilly.

Q. Please to state to the court what this book is, and what is its title ?

A. Its title is in the following words :—

“An Abstract of Complete Titles under the Spanish Government of Lands in a Part of the Province of Louisiana, from the year 1771 to the Cession to the United States.”

“A Book containing Reports of Confirmations by the Recorder in the State of Missouri.”

“Reports of Land Claims in the Western Part of the Province of Louisiana, by the Commissioners for the Adjustment of said Claims.”

Mr. Storrs. Is this any part of the proof in the case of Soulard ?

Mr. Meredith. No.

Mr. Buchanan. This record appears to belong to the “Western District of the Territory of Orleans.” What is embraced under those terms ?

Mr. Meredith. New Orleans was the seat of government for the province ; and we produce this record in order to show that there existed no such practice as Mr. Lawless in his article relies upon.

Mr. Buchanan. Does it include Missouri ? I believe not.

Mr. Meredith. The book contains titles to lands throughout the province which were confirmed by the Governor General at New Orleans.

Mr. Buchanan. It appears to have no connexion with the case. It regards land titles in another part of the province. I believe it is not pretended to relate to Upper Louisiana.

Mr. Meredith. We offer it, as relating to all parts of the province.

Mr. Storrs. We object to this document. Mr. Lawless asserts that the Judge decided what would be the legal effect of a certain alleged practice in Upper Louisiana, and this book is now offered, in order to show what the practice was in another part of the province ; but we cannot try the Soulard case here. It may be a very proper document for the Supreme Court, but it has no place in this cause. What the Judge decided was, the effect of a certain practice ; now, let the practice turn out to have been on the one side, or the other, that is not the question. Whatever it may have been, in point of fact, will not change the nature of the Judge's decision. The testimony in Soulard's case will show whether such was the practice, or not. If this is a part of the evidence in that case, it might very properly enter the record. The Opinion of the Judge was not on a fact, but on a point of law, viz: That that practice was not authorized by the ordinance of 1754. What the practice was is totally irrelevant. To admit it would be entering into the evidence to show that the Judge decided correctly or otherwise.

Mr. Meredith. We have not the slightest intention of asking this court to re-try the case of Soulard ; but we produce these records as illustrative proofs of the Opinion in that case, which Opinion it is necessary that this court should thoroughly understand, that they may be enabled to judge of the true character of the publication. But again. Mr. Lawless has attempted to prove a certain practice, to support one of the specifications of error in the Opinion of the respondent ; we produce this documentary evidence to rebut that proof.

Mr. McDuffie. The respondent's counsel seems not to have perceived our objection to this document. The document purports to refer to grants in Western Louisiana, that is, in Lower Louisiana. But this does not apply to Upper Louisiana. The contest in Soulard's case was, whether the Lieutenant Governors were in the habit of making concessions in Upper Louisiana, which they might make in the lower province ? And in order to prove that they could not

make these concessions in Upper Louisiana, they offer a transcript of facts in the lower province, where all admit that a different practice prevailed. The book purports to be no more than an abstract from the records; it is not a sworn copy, or an examined copy: there is no oath to verify it.

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

The question being put by the President of the Court, the Senate decided unanimously that the document should be admitted.—Ayes, 40.

LUKE E. LAWLESS called again.

Mr. Meredith. We wish the witness to look at certain articles published in these papers, and to say whether he is the author of them or not. Our purpose is to show his feeling towards Judge Peck, and his object in writing the article signed "A Citizen."

Q. This is a commentary on the Opinion of the District Court in the case of Chouteau. Are you the author of it?

A. Yes. I wrote that.

Q. Please to look at this number of the Missouri Republican of the 13th of July, 1830, containing a recommendation of Mr. Le Duc; it is signed by your name;—are you the author of it?

A. I am the author: it has my name to it.

Q. Please to look at this number of the St. Louis Beacon, of July 29, 1830.

Mr. Buchanan. We should like to have the opinion of the Senate, whether all this mass of newspapers is evidence or not.

Mr. Meredith. I do not know whether the articles marked in these papers, and shown to the witness, were, or were not, written by him. If they were, I shall use them as proofs of the temper and feeling under which he has given his testimony in this cause, and as proof also of his intention in writing the article signed "A Citizen." In this latter view I hold the evidence to be clearly admissible. In the case of libel, or slander, subsequent words, or libels, may be given in evidence, in order to show *quo animo* the words were spoken, or the libel written. This was at one time doubted, but is now a settled principle of evidence. If authority is required, I beg leave to read a passage from 2d *Saunders* on Pleading and Evidence, p. 382:—

"Other libels than those on which the action is brought may be read to show the *quo animo* of the slanderer; and in actions for words, the plaintiff has been allowed to give evidence of words subsequently spoken, for the purpose of showing that the original words were spoken maliciously and to injure: *per Sir J. Mansfield, C. J. in Finnerty vs. Tipper, cited Selwyn's N. P. 1042.* And in *Rustel vs. Macquisitor, 1 Campb. 49. n. ib.*, the plaintiff having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards, and it was held by Lord Ellenborough that evidence might be given of any words, as well as any act of the defendant, to show *quo animo* he spoke the words which were the subject of the action, though it would be the duty of the judge to tell the jury that they must give damages for the words only which were the subject of the action; and the distinction laid down by Lord Kenyon in *Mead vs. Daubigny, Peake's Rep. 125*, that words not actionable in themselves were only admissible, was exploded.

I offer these publications, though of a subsequent date, to show the intention with which the article signed "A Citizen" was written and published.

Mr. Buchanan. We wish to take the opinion of the court on one point. Representing the House of Representatives, in conducting this impeachment, we do not care one farthing whether the testimony is received, or not, on account of any effect it can have in the case before the court:—but we stand here, not only to prosecute on the part of the United States, but to maintain the great principles of justice, and of constitutional law. The respondent, after having

been indulged in giving many documents in evidence which, in legal strictness, ought not to have been received, has collected a bundle of newspapers, containing numbers of the Richmond Enquirer, the Missouri Republican, the St. Louis Beacon, and I know not how many others, and calls upon Mr. Lawless to answer the question, Are you, or are you not, the author of such and such articles in these papers? He does not attempt to prove by any witness, by any third person, that Mr. Lawless is the author. To justify this inquisition, he has read an authority to prove that words spoken or libels written subsequently to those which are the foundation of the action, may be received in evidence. Does this authority prove, that such testimony may be extracted from the author of the alleged libel? and that he may be subjected to an inquisition of this sort,—“Are you the author of this and that publication?” and thus compelled, if those publications were reprehensible, to accuse himself?

[Mr. Lawless here interposed, and said that he had no objection to answer the question.]

I know you have not any objection; but I want the point decided, whether a witness, on his cross-examination, may be compelled to give a history of all his publications in the newspapers, and answer any questions in relation to them which may be asked him? The dates of these papers are two, three, and four years subsequent to the transaction on which this impeachment rests. This is not an action for a libel, and it does not depend upon the rules of law, applicable to such actions. The authority which has been read may be very good law; but it only shows that the intention with which one libel has been written may be proven by other libels of a subsequent date. It does not relate to the mode of proof. I have never before heard of such a thing as calling upon a witness to say, “Did you write this or that article?” thus establishing an inquisition which may extend over his whole life, and call upon him to accuse himself. The managers of this impeachment, deeming themselves bound to arrest such an examination, wish to have the opinion of the Senate upon the question. As for the contents of these newspapers, we care nothing about them. We ask the counsel to reduce the question to writing.

Mr. McDuffie. While the question is being reduced to writing, I will barely state one or two points which appear to have a bearing upon the question. The authority which has been read might be very proper if Mr. Lawless was now on his trial for a libel, (and the whole course of the defence seems, indeed, to have gone on the idea that it is not the respondent who has been on his trial, but rather Mr. Lawless.) If it were a civil suit between the parties for a libel, other libels, of a subsequent date, might, perhaps, operate to increase the damages; but are they to be brought into this court on a question whether Judge Peck is, or is not, guilty of illegally imprisoning an American citizen? Could Judge Peck, when he imprisoned Mr. Lawless, and suspended him from practice for eighteen months, have had any foresight of these publications? Could they have been a motive in the Judge’s mind for committing him to prison? And are they now offered in any other spirit than that in which Mr. Lawless was committed? Why are they introduced here? Have they any legal or moral relation to the question in this impeachment? Are they not wholly external? Why then are they offered, unless with a view to produce (what they cannot produce,) prejudice in such a court as this?

Mr. Meredith. I am perfectly aware that we are not now trying Mr. Lawless for a libel. The argument and the authority were merely analogical: they both apply to this case. The principle is the same as in a case of libel. One of the great questions, in this cause, is the question of misrepresentation. After we have shown the misrepresentation, it may be necessary perhaps to go a step further, and show that it was intentional. We take that step, when we show subsequent attacks upon the respondent, of which Mr. Lawless was the author. Is not this the object of such evidence in the case of a libel? and why should it not be as competent in a case of this kind, where intention is the question? It

matters not at what subsequent period these publications were made, whether one, two, three, or four years. They relate back to the original publication, and show the design and intention of its author.

Again ; does the lapse of time at all affect the second view with which this testimony is offered? Mr. Lawless is a witness in this cause. He has testified before this court, and one inquiry, and a main inquiry, is, with what temper is he here as a witness? And do not these publications, if he be the author of them, go to evince that temper and feeling? One of the managers professed great astonishment at the offer of this evidence: I confess my surprise that it should meet with objection.

Mr. Buchanan. We have, I believe, the right to reply, and I shall offer one or two observations. The gentleman has not attempted to answer the argument I offered. Can he produce an authority to prove that a witness under examination may have any number of papers exhibited to him, and be called upon to establish his own guilt, (if there be any,) by his own testimony? Is it not directly in the face of the constitution of the United States, which declares that no person shall be compelled to be a witness against himself? It was impossible that he should answer this argument. It is not to be answered. And I repeat, that it is for that constitutional principle the managers contend. As to these papers, we care nothing about them. But now, as to the other view of this subject: the counsel insists that these publications, made in 1830, relate back to an article written in 1826, and show *quo animo* that article was written. But can this be so? If Mr. Lawless, goaded to madness by the punishment inflicted upon him in 1826, had afterwards written and published libels without number against the Judge,—what then? Shall a Judge first be permitted to drive a man, by his cruelty and oppression, into the public newspapers for redress; and then be allowed to use these very publications for the purpose of proving the existence of malice in the author previous to the date of his punishment? These publications are but the consequences of that oppression, and yet the counsel would argue from them the existence of previous malice? Admitting Mr. Lawless to have been the author; these articles were written in 1830; after he had been imprisoned by Judge Peck, and suspended from the practice of his profession for eighteen months. Are they to be given in evidence to show that he was influenced by malice in writing the article signed “A Citizen” in 1826? And this when it has been proved that the relations between Mr. Lawless and Judge Peck previous to that time were of an amicable character? What light can documents like these shed upon this impeachment? The transaction on which the impeachment rests ended, when Mr. Lawless was imprisoned and suspended from practice. Yet the respondent now offers to give in evidence publications extorted from that gentleman by the injustice of the sentence, to prove that he had malice against the Judge before that very sentence was pronounced. The testimony is irrelevant. Even if the authorship of the publications were proved by a third person, they could not be admitted; but, as the case now stands, there is no question but one, and that is the great constitutional question, whether a man shall be called upon to give evidence against himself, on which we resist this testimony.

The question was now put by the President of the Court, whether the witness should answer the question in the following words: “Are you the author of all, or either, of the articles contained in the newspapers now handed you, relating to the respondent?” and it was decided in the affirmative, by yeas and nays, as follows:—

Yeas.—Messrs. Barton, Bell, Brown, Burnet, Chambers, Chase, Dickerson, Dudley, Foot, Forsyth, Frelinghuysen, Hendricks, Holmes, Iredell, Kane, King, McKinley, Marks, Naudain, Robbins, Sanford, Seymour, Silsbee, Smith S. C., Sprague, Tazewell, Tyler, Webster.—28.

Nays.—Messrs. Clayton, Ellis, Grundy, Hayne, Johnston, King, Livingston, Noble, Ruggles, Smith Md., Troup, White, Woodbury.—13.

So the question was allowed.

Q. Please to look at this number of the St. Louis Beacon, of June the 17th, 1830.

A. I am the author of an article in this paper, beginning with the following words:—(shall I read it?)

[*Mr. Meredith.* You are at liberty to do so, if you please.

Mr. Buchanan. It is unnecessary to detain the court by reading it.]

The article begins with these words: "Our readers will perhaps recollect."

Q. Please to look at this number of the St. Louis Beacon, of the 29th of July, 1830.

A. I am the author of an article beginning thus: "Lord Mansfield, in the full vigor of his mental faculties."

Q. Please to look at this number of the St. Louis Beacon, of July the 1st, 1830.

A. I am the author of an article in this paper, beginning with these words: "Mr. Livingston, in his admirable speech on Foote's Resolution."

Q. *By the Court.* At the time you wrote and published the article signed "A Citizen," were there any cases remaining before Judge Peck's court, which you knew depended upon the principles and doctrines contained in the Opinion published in the Soulard case?

A. As I stated before, I considered the principles and doctrines in Soulard's case, as they appeared in the Opinion published, as fatal to nearly all the cases pending. The same principles and doctrines are applicable to all of them: and I believed that if Judge Peck's decision should be affirmed by the Supreme Court, not a single case which was before Judge Peck, nor even one of those which had been before the Board of Commissioners, could, or ought to have been, confirmed.

Q. Do you know whether any of these claims were confirmed by Judge Peck?

A. Yes, one; which ought not to have been, according to my view of the principles he held. It was a claim to an island in the Missouri, I think, containing a few hundred arpents. My impression was, that it ought not to have been confirmed.

Q. How many of these land claims have been decided by Judge Peck?

A. Let me see—perhaps eight: eight or nine, I think. I am not exactly certain; but I imagine the record will show.

Q. Did the case you referred to, as confirmed, arise on a concession of a Lieutenant Governor?

A. I think it did. I cannot enter into the particulars, but the impression on my mind was, that, acting consistently, Judge Peck should not have confirmed it.

Q. *By Mr. Storrs.* Have you reason to know that Judge Peck, when he made his decision, knew that it would be fatal to most of the claims? were so many of them brought to his attention?

A. Yes: he says it, in his answer.

Q. Was there no previous misunderstanding between you and Judge Peck? were you on amicable terms?

A. I entertained no hostility toward him: there had been no quarrel whatever; we were on friendly terms: but there existed no social intercourse between us—none whatever.

Q. *By Judge Spencer.* You meant, in your article, to give a compendium of the Opinion of Judge Peck?

A. Yes: in good faith: without any malicious intention whatever.

Q. Why did you not submit to answer interrogatories?

A. I considered it my duty not to do anything which might in any manner assent to what I considered an usurpation of authority. That was the principal ground of my refusal. I considered the proposing of interrogatories, in those circumstances, to be adding insult to injury. To call on me to answer interrogatories could only be to afford me an opportunity of protecting myself by my

replies. But how could I answer? I must either deny the fact, or admit a malicious misrepresentation, or else a misconception of the Opinion. I could do neither one nor the other, consistently with truth. I should have been compelled to admit that I was the author: I must have denied that there was any misrepresentation; and it would have been a falsehood to say that I did not understand the Judge. What, then, was I to answer? The Judge had prejudged the main point, and assumed that the article was libellous.

Q. By Mr. Storrs. Were you told that a rule had been entered for your answering interrogatories? Were you required to answer?

A. I was not.

Q. Was any rule shown to you requiring you to answer?

A. No. The court told me that it was my right.

Q. No order was made that you should answer interrogatories?

A. No. I was committed forthwith.

B. C. LUCAS now presented himself, and addressed the court as follows:—

I find it incumbent upon me to suggest to the court that since I gave my testimony, some facts have occurred to my recollection which then escaped my memory, and which I will state, if required.

Mr. Meredith. The witness appears with the view of explaining or supplying a defect in his testimony as before delivered.

By the President of the Court. The witness has a right to make an explanation of his testimony.

Mr. Lucas. I do not consider it a matter of right, but a matter of obligation. I was sworn to tell the truth, the whole truth, and nothing but the truth; and I now remember a part of the truth which I omitted.

What I have to say is not so much a matter of explanation as of fact. I before stated that I was not present in the court all the time. I was present when the Judge offered a paper, and required Mr. Bates, the District Attorney, to read it. I was present, also, when the rule was made on Mr. Foreman, the printer; also, when Mr. Foreman appeared, and gave up Mr. Lawless as the author of the article signed "A Citizen"; also when the Judge concluded the delivery of his Opinion, and passed sentence on Mr. Lawless. I omitted to state that I was present when the Judge tendered, or offered to Mr. Lawless, or gave him an opportunity, of purging himself of the contempt by answering interrogatories, and Mr. Lawless refused to do it. I also remember, toward the conclusion, when the Judge was about passing sentence, he alluded to the custom of some foreign country, China perhaps, to have the house of a libeller blacked, I believe, or painted yellow, or designated by a particular mark or stamp. He did not lay any stress, as I understood him, on the particular kind of color employed, but on the house's being designated by some color. And I could not say but this came in, in consequence of an allusion, by the Judge, to a misrepresentation in the article: and it was introduced by way of illustrating the odium which was attached in China, (a country so far from us,) to a misrepresentation of any fact or opinion in that country. I remember some other circumstances, but do not know whether they will be considered as relevant, or not. I could relate the conduct of Mr. Lawless in the court, when the Soulard case was tried in the presence of Judge Peck; also in the Supreme Court, where Judge Carr was presiding.

By the President of the Court. The witness can explain.

Mr. Lucas. Very well. [Here he was retiring, (having apparently misunderstood the reply) but was called back by Mr. Meredith.]

Q. Did you not argue the case of Soulard as associate counsel with the District Attorney?

A. Yes.

Q. In the argument of that case, was a copy of the Spanish ordinance of 1754 produced to the court?

A. There were some extracts from the ordinance of 1754 produced,—translated into English, I believe, as they appeared in a paper which was said, in the court, to be a translation made by Col. Benton from the original law.

Q. Did you not, subsequently, procure in this city a full copy of a translation of that ordinance, from the Department of State, for the use of the court?

A. After the cause was tried, I heard a great deal said out of doors, and felt an inclination to get at the whole of the law which had been given so partially. I accordingly wrote to my old friend, George Graham, Esq., who was then Commissioner of the General Land Office, stating to him that a part of that law had been produced, and requesting him to get a copy of the whole of it from the office of the Secretary of State, or anywhere else. That gentleman wrote me a very polite reply, and sent me the whole of the law of 1754.

Q. Was the document used afterwards?

A. Yes. We were taken in some measure by surprise; and I supplied afterward in a printed pamphlet, containing the outline of my argument, what had been omitted, and which appeared to me as making for the United States.

Q. By Mr. Wickliffe. Did you write a commentary in the paper on the Spanish claims, before the case of Soulard was tried?

A. I said the other day that I had no recollection of having done so; and I say, now, that I have no recollection of it.

[Mr. Meredith, in behalf of the respondent, stated to the court that the testimony on the part of the respondent was now closed.]

CHARLES HEMPSTEAD *called again.*

Q. By Mr. Buchanan. We have already stated your means of observation: state now what is the general deportment of Mr. Lawless towards courts, so far as you have observed it.

A. The general deportment of Col. Lawless before courts is, in my opinion, (from what I know of the temper, disposition and character of the man) respectful.

Q. How long have you practised with him?

A. I think since 1816 or 1817—about thirteen years.

Q. One of the witnesses mentioned that his general deportment had not been respectful when before Judge Stewart? Do you know what was the opinion of Judge Stewart himself on that subject?

[Here a conversation took place between Mr. Buchanan and Mr. Meredith as to the admissibility of this testimony; but Mr. Meredith waived his objection to it.]

A. In conversation with Judge Stewart, at several different times, in speaking of the conduct of the bar generally, I have heard him make this remark,—that one among the most respectful of the members of the bar was Mr. Lawless: that although his manner was unhappy, and he was vehement, and impetuous, in his way, yet that, before *him*, his conduct had been perfectly deferential.

Q. By Mr. Meredith. I am requested to ask you whether you were present during the proceedings against Mr. Ford, the printer, for a contempt? and also in the cases against Mr. Lawless and Mr. Charless?

[*By Mr. Buchanan.* Were these all cases of attachment for contempts?

Mr. Meredith. Yes. There were three cases, two in the Circuit Court, and one in the Supreme Court of Missouri.]

A. I do not recollect whether I was present, or not.

Q. Was there any general excitement on those occasions?

A. There was some talk about them, I think;—but I do not recollect;—it is probable I may have been in court, but I do not now remember.

[*Mr. Buchanan.* We thought the examination on the part of the defence had been closed, and that nothing further was to be produced by the respondent, but merely rebutting testimony.]

Q. You said, when last examined, that you were one of the members of the bar who requested the publication of Judge Peck's Opinion in Soulard's case?

A. You must have misunderstood me. I was not one of them. But I will go this far, and state, that if I had been consulted I should have joined in the request.

HENRY S. GEYER *called again.*

Q. *By Mr. Buchanan.* Will you state to the court what is the general deportment of Mr. Lawless towards courts, as compared with that of other gentlemen of the bar, or as it is in itself?

A. I have been long acquainted with Mr. Lawless, and have practised with him in all the courts. His manner is sometimes unfortunate, and would perhaps appear, to persons not well acquainted with him, to be rude. He is impatient of interruption. When he commences his argument he is self-possessed, and usually very clear; and is respectful in manner, as much so, as any gentleman I ever heard; but when he is interrupted, or anything unexpected occurs, his manner becomes hurried and abrupt: he seems to concentrate his whole attention upon his object, and does not hear what is said. I have drawn this conclusion from exhibitions of his manner, at different times. As I said, I consider his manner on such occasions as unfortunate. I do not believe it is his purpose to insult the court, but such would I think be the impression on one not previously acquainted with his manner. I was present at the argument of one case in the Circuit Court mentioned by Judge Carr, when Mr. Lawless was addressing the Judge after the decision of the court had been given. The Judge spoke to him two or three times to stop; but he seemed not to hear what was said to him. The Judge said that if he did not desist, the court must punish him. He then for the first time appeared to me to hear what was said to him, and immediately answered that he did not wish to be punished. He stood still, but did not say anything more. I here wish to add an explanation of part of my testimony. I was asked whether the misrepresentation of Mr. Lawless in the case of *Bellisime vs. McCoy* was of the facts of the case, or of the Opinion of the Court?—and I then answered in the facts of the case. I now wish to add, that if it was a misrepresentation of the facts, on which the Opinion was founded, it must, of course, be a misrepresentation of the Opinion.

I was also asked whether there was any previous understanding between Mr. Lawless and his counsel as to the course to be pursued in their defence of him when the rule had been discharged as on Mr. Foreman, and made upon Mr. Lawless; and I said that I did not distinctly remember any specific declaration of Mr. Lawless on that subject, but stated my general impressions. Since then, I have taxed my memory, and I do now distinctly remember that Mr. Lawless said he would in no event make any acknowledgement nor purge himself of any contempt, none having been committed.

Q. *By Mr. Spencer.* At the time of your first argument in the case against Foreman, you say, that you had not then compared the article of Mr. Lawless with the Opinion of the Judge?

A. No: I had not then compared them.

Q. Had any other person been heard besides Mr. Lawless when you addressed the court?

A. None other to my knowledge.

Q. Were you prepared to make that comparison when you spoke on the second occasion?

A. No.

Q. Did Mr. Magenis argue that?

A. I think he did. He and I had differed in opinion. Mr. Magenis spoke on the question of jurisdiction. I differed from him on that point. I thought that when the court was satisfied that a contempt had been committed, there was

no question as to its jurisdiction. In the conclusion of my second argument I did appeal to the court to stay proceedings, as being at least of doubtful authority, and referred to different provisions of the constitution.

Q. By Mr. Buchanan. Did you ever argue this question in the baptist church?

A. Never. I did not know that the court had been sitting there, except for information.

Q. By Mr. Meredith. Can you say what is the general reputation of Mr. Lawless, as to his deportment before courts?

A. I have had conversations on that subject with members of the bar,—perhaps seven or eight of them, and also with judges and officers of court. My conclusions would be drawn from what I heard from them. Is that what you wish me to state? I do not know that I have heard what is the opinion of others on the subject.

Q. Do you recollect the cases of Ford, and Charless, which have been referred to?

A. Yes.

Q. Did they produce any excitement at the time?

A. I do not remember any.

Q. Was not Mr. Charless imprisoned on an attachment for contempt?

[The question was objected to by the managers, and was not insisted upon.]

MARIA PHILLIPPI LE DUC *called and sworn.*

Q. By Mr. Buchanan. Did you make the translation, which has been produced here, of the objections of Lieutenant Governor Delassus to the regulations of Morales?

A. I did.

Q. Is it a correct translation?

A. To the best of my knowledge and capacity, it is.

Q. By whom were you *subpœnaed* here?

A. By Judge Peck.

Q. From your official situation, I ask you to state what you know as to the number of Spanish grants in Upper Louisiana, and the quantity of land comprised in them?

A. I do not know either the number of grants or the quantity of land. I can guess at it, but cannot be certain. I should say there are five or six hundred concessions unconfirmed, and the amount of land (exclusive of the two grants to Clamorgan) must be about seven or eight hundred thousand arpents. I think it cannot exceed that. This however is a rough guess.

Q. Do you know what is the usual deportment of Mr. Lawless before the courts in Missouri?

A. He puts himself in the place of his client, and is very warm, whether for plaintiff or defendant. He is very warm.

Q. How is his deportment towards the court? Respectful or otherwise?

A. I never saw him disrespectful; but he is very warm—very warm. He speaks in a very high tone: he speaks very loud.

Q. By Mr. Wickliffe. You are acquainted with the facts stated in your deposition in the case of Mackay Wherry; are those facts correct?

A. Yes. They were stated from a certified copy in the court.

Q. By Mr. Meredith. What quantity of land is comprised in the confirmed grants, recorded in the *Livre Terrien*?

A. When I was called as a witness in Wherry's case, I had with me documents, to which I then referred. My deposition itself will state the quantity. It is on file.

Q. Do you recollect the quantity of land?

A. I do not. I had it there, in a transcript taken from the *Livre Terrien*.

Q. Can you come anywhere near the quantity?

A. I do not recollect.

Q. Cannot you make a conjecture, as you did just now, when a similar question was put to you on the other side?

A. If I had my deposition with me, it would assist my memory. The grants are for various quantities of land ; some for six hundred, for four hundred, two hundred, down to forty arpents.

Q. How long have you resided in Missouri?

A. Since February, 1793 ; and in St. Louis from 1799.

Q. Your last answer suggests to me another question. When you came to St. Louis, in 1799, who was the Lieutenant Governor?

A. Col. Delassus.

Q. Did you reside in his family?—*A.* Yes.

Q. What was your appointment in his house?

A. I was his private secretary.

Q. Are you not yourself a claimant?—*A.* Yes.

Q. To what amount?—*A.* Fifteen thousand arpents.

Q. Was the grant made to you by Delassus ?

A. Yes ; and a league square of it has been confirmed.

Q. Have you any other claim ?

A. I had another concession for eight hundred arpents, which was never before the board for confirmation.

Q. Has it not been sued upon in your name ?

A. Yes ; but I had transferred it.

Q. *By Mr. Wickliffe.* What was the consideration in your concession for fifteen thousand arpents ?

A. It was for public services, well known to the Lieutenant Governor.

Q. *By Mr. Meredith.* Are these the only claims in which you are interested?

A. No. There are others in which I have an interest, as they are my security for advances of money which I made. I gave testimony in relation to this concession on a suit in the District Court. After I had proved the signature to the concession, I was discharged ; but returned again to court and voluntarily stated that I was myself interested in the concession.

Hon. SPENCER PETTIS appeared for the purpose of making an explanation of his testimony.

When I was on my cross-examination, one of the managers asked me if I was not influenced by a strong feeling in favor of the acquittal of the respondent ? I commenced my reply, and had expressed my opinion, as preparatory to the explanation I was about to give, when I was interrupted, and the question was subsequently withdrawn ; in consequence of which, I had no opportunity of making the explanation. Under these circumstances, lest what I said might be misinterpreted, I wish to give my answer to the general question which had been proposed to me.

[Some conversation and discussion took place among the managers.]

By the President of the Court. The witness will proceed, unless his testimony is objected to.

Mr. Buchanan. There is no such question, I believe, as that which has been mentioned by the witness.

A. No. It was withdrawn, after I had begun my reply. I had been asked, whether I was not influenced by a strong wish that the Judge should be acquitted ? I now say, in the presence of God, and of this court, that I have no wish that the respondent should be acquitted against the constitution, the law, and the facts of the case. I have every wish that all the facts should come out. It is very true that, entertaining the feeling which I do, I should be gratified if the respondent can be acquitted ; but not, if his acquittal shall be against the constitution and law, and the justice of the case.

Mr. Buchanan. We have now concluded the testimony on the part of the United States, save that we wish to ask one question of Col. Benton, who is not now present, and who, I presume, from a feeling of delicacy, will not appear unless he is subpoenaed. His testimony will occupy but a few minutes.

By the President of the Court. Call LUKE EDWARD LAWLESS.

Mr. Lawless having appeared,—

Q. By the Court. Could the witness, if he had consented to answer interrogatories, have said, with truth, that by making the publication signed "A Citizen," he did not intend any disrespect to the court? and did not, in that publication, intentionally misrepresent the Judge's Opinion?

A. Certainly I could.

Q. By the Court. Why, then, did you refuse to answer interrogatories?

A. I have already answered that question. I considered the whole proceeding an usurpation, and I thought it a duty to myself, as well as to my adopted country, not to submit to such usurpation. I considered the interrogatories as being offered to me, not in order to fix the contempt, but to enable me to purge myself from it. The question of contempt had been prejudged. The Judge pronounced my article to be a contempt. What then was I to answer? That I was not its author? that would have been false. That it was a malicious perversion of the facts? that would have been false. That I had not understood the Judge? that would have been equally false. I therefore concluded that no good purpose could be attained by answering; because the Judge, as I have stated, had prejudged the case, and pronounced the article a contempt; and in doing so had made use of language, which I considered as grossly insulting; the sense of which insult actuated me fully as much as my imprisonment and suspension.

Q. By Mr. Meredith. If you had said that you meant no intentional disrespect, what do you suppose would have been the effect of such a reply?

A. I do not know what would have been the effect of it.

Q. By Mr. Buchanan. Did you not disavow all intentional disrespect in the argument of the rule against Foreman?

A. I did.

Q. By Mr. Meredith. Did you make that disavowal for yourself, or for Mr. Foreman?

A. For myself, when I unwittingly betrayed that I was the author of the piece. I made the disavowal on behalf of the author; but I believe I was perfectly understood by the Judge to be myself the author. He appeared to treat me as such, and the witnesses have testified that they had the same understanding.

Q. By Mr. Meredith. Was not the question in Foreman's case this, whether the publication of the article was a contempt in Mr. Foreman?

A. Yes.

Q. And was not your answer the answer of your client?

A. Certainly; but, as I have already stated, while making the answer in his name, I unwittingly gave it as my own.

Q. By Mr. Storrs. Did you know what the questions in the interrogatories would be?

A. I did not.

Q. Did the Judge tell you what the queries would be?

A. He did not.

Q. The Judge told you that it was your right; but he did not tell you that there was any order of court, compelling you to answer?

A. Certainly not. The nature of the interrogatories was not stated to me, and I answered that I did not want any interrogatories filed, and should not have answered if they had been propounded.

HON. THOMAS H. BENTON *called and sworn.*

[A manuscript being shown to the witness.]

Q. By Mr. Wickliffe. This manuscript purports to be an extract from the ordinance of 1754. It has been said that a part of the ordinance has been left out. Please to state whether the translation was correctly made; and why the residue was not translated?

A. This is my hand-writing. It is entitled "Extract from a Book entitled 'Royal Ordinances for the Establishment of the Military and Provincial Intendants of the Kingdom of New Spain,' published by Order of his Catholic Majesty at Madrid, in the year 1786."

I made this translation for my own use. I took it from a book of four or five hundred pages, which is now in the Department of State.

Q. Some part of the ordinance is not here?

A. I dare say. The manuscript consists only of extracts.

Q. Was any part of the ordinance relating to the land claims in Missouri omitted by you, so far as you thought it had any bearing?

A. I made the translation for my own use, six or seven years ago. I took out from the book what I thought pertinent to those claims.

Q. The paper does not purport to be a translation of the whole ordinance?

A. It is headed "Extracts."

Q. What is the manner and deportment of Mr. Lawless towards courts? Is it respectful, or otherwise?

A. It is this; that he is a man of ardent feelings, and strongly identifies himself with his client. His manner is often warm, and impassioned, before the court.

Q. By Mr. Buchanan. Is his manner respectful, or otherwise?

A. It always appeared to me respectful; but it is, as I have said, impassioned and warm.

Q. By Mr. Storrs. Do you know how his manner will compare with his friend Mr. Emmett's?

A. No. I have not seen Mr. Emmett under the same trials. I have only heard him plead before the Supreme Court.

[The managers here stated that they had no farther evidence to produce, and rested the cause on the part of the United States.]

The Court then adjourned to 12 o'clock to-morrow.]

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Wednesday, January 12.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel also attended.

The state of Mr. Wirt's health was represented to be such, that on motion of Mr. Tazewell,

The Court adjourned to 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Thursday, January 13.

The managers attended.

James H. Peck, the respondent, and his counsel, Mr. Meredith, also attended.

The Vice President communicated a letter from the attending physician, stating the condition of the health of William Wirt, Esq., one of the counsel of the respondent, to be such as to prevent his attendance on the court before Monday next. Whereupon

The Court adjourned to meet on Monday next.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Monday, January 17.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

WILLIAM C. CARR presented himself before the court, and stated, that since the evidence had been closed, a written statement of the testimony had been shown to him, from which, if correctly taken, he perceived that the evidence which he had given in regard to one point of the inquiry was defective, from the want of a remembrance, at the time he was examined, of circumstances which had taken place before him, when sitting as a judge in the Circuit Court of Missouri. He now, therefore, prayed leave of the court to present a condensed statement of the facts which had been omitted. He had reduced them to writing, under the solemnity of the oath which had been administered to him; in doing so, he had not chosen to rely, altogether, upon his own recollection; but had referred to that of Mr. Geyer, and Mr. Spalding, witnesses in this cause, and also counsel present in the Circuit Court at the time; and also of Judge Wash; each of which gentlemen had added a written certificate of the correctness of his statement. He hoped that the court would deem this paper admissible; but, if not, then it was his desire to be subjected to an oral examination touching the facts alluded to.

The managers, being asked by the court whether they consented to the admission of this paper in evidence, desired an opportunity to read it. The witness thereupon handed it to the managers.

Mr. Buchanan then stated to the court that, from the character of the paper, which appeared to contain a minute history of the case of the State of Missouri vs. Hector, a negro slave, he did not feel himself justified in admitting it in evidence. If the court should conclude to open the case again, the managers would prefer going into the examination, orally.

Mr. Meredith stated to the court that he understood the paper now offered contained a statement of the proceedings in the Circuit Court of Missouri against a negro, convicted of larceny, and sentenced to be whipped; which had been carried up, by appeal, to the Supreme Court of that State, where the judgment had been reversed. The court would recollect that this whole case had come out on cross-examination; that it was purely of a collateral kind, having no direct connexion whatever with the present trial. The facts had occurred a long time ago, probably five or six years since; but as to the exact time he was not certain. The mind of the witness had been suddenly and unexpectedly called to the case, on a cross-examination, and it certainly could not be considered extraordinary that in the multitude of cases continually occurring in his court, the witness should have forgotten, at the moment, the particular circumstances of this case. The paper now offered was tendered, simply as an explanation. It contained his own statement of facts, revived in his mind, partly by the recollection of others, and partly by his own. It was drawn up under oath, and the correctness of the statements it contained was confirmed by three respectable witnesses, Mr. Geyer, Mr. Spalding, and Judge Wash, Judge of the Supreme Court, to which the case went by appeal. The witness was induced to present it, now, with a view to prevent the interruption of the argument of the managers; but Mr. M. was instructed to say that the witness had no objection whatever to a cross-examination.

Mr. Wickliffe said that, as one of the managers of the impeachment, he must protest against the practice.

The paper was thereupon withdrawn.

Mr. Meredith now expressed the desire of the witness to undergo an oral examination, which he considered due to his character, and to truth.

WILLIAM C. CARR.

The court will recollect that on my cross-examination by the managers of this impeachment, I was suddenly interrogated about the trial of a negro slave, whose name I now remember was Hector. It was a case of the State, against him, on an indictment for burglary, and for stealing in the house entered. It was proved that the negro man Hector had, on or about—

[*Mr. Buchanan.* If the witness wishes to explain his former testimony, agreed. But if his intention is, to go into a minute detail of the circumstances of this case, we object to it.

[*By the Court.* The witness will confine himself, as much as possible, to explanation.]

That is what I was endeavoring to do ; and I was stating the circumstances, as introductory to what seemed to be the principal point in the view of the managers, when examining me on this subject before, viz. the time of executing the sentence. It was shortly proved that the accused had brought a box, broken open, to another negro man, and had given him five dollars to conceal it. The accused was a waiter, in the house from which the box was taken, and well acquainted with the apartments of the house. Mr. McKinney, a witness, stated that he had heard a noise as of a person being flogged. That after a little while the noise ceased, soon after which the witness rose, and opened his windows, in order to pursue his usual avocation. He was then seen by the negro, Hector, who appealed to him, and asked him to step forward and be his friend. Mr. McKinney accordingly went to the spot where the apprehenders of the negro had been flogging him. They had ceased to flog him, and were then debating, among themselves, whether it would be best to take the negro before a magistrate, or carry him to his master. Hector now asked McKinney to step aside, promising that he would tell him all about the matter, saying that he did not wish them to hear ; but, if Mr. McKinney would go with him alone, he would show him where the money was. To this the apprehenders objected, fearing that he would escape. They all or some of them therefore went with him to the place where he conducted them to get the money, but no money was there. Mr. McKinney then said to Hector, "I have now come with you according to your desire as you friend, and you do not show the money, as you promised." Then, calling him "a lying dog," he gave him some blows with a switch, or cow-hide, and left him. This concession of the negro to Mr. McKinney was objected to by his counsel, Mr. Lawless, on the ground that it had been extorted under the lash. I considered the testimony to be such as induced me to overrule the objection, because the confession was made privately to a friend, and had not been made, as I understood it, under the lash ; but, although I consider it as not being incompetent evidence, I told Mr. Lawless that I would put the case before the jury, in such a light that his client should receive no injury from its admission ; that I would instruct the jury that if they believe the confession to have been extorted under the lash, the law declared it to be incompetent evidence, and they must entirely disregard it. The jury then retired, and in a very short time brought in a verdict of "guilty." I am not positive whether Mr. Lawless moved at all for a new trial. If he did, the motion was not pressed or argued, as I think. By the law of Missouri, if the sentence upon a criminal consists, in part, of corporal punishment, it is usual for the court to fix the day for punishment, and the hours between which it shall be inflicted : and I now firmly believe, from my own recollection, as well as the recollection of others, that corporal punishment in this case, was not inflicted, till near the end of the term ; and the terms of our court usually last six or eight weeks, during which perhaps several hundreds of such cases are tried. I hope, therefore, that this court will see that it is not possible for a witness, when suddenly and unexpectedly ques-

tioned, to bring all the circumstances of each case to mind. I recollect that a question was put to me suddenly, my answer to which, as it was taken down, and as I presume it was given, might convey the idea that the testimony of the negro was extorted under the lash; I therefore felt desirous of making this explanation. Appeals, in Missouri, do not apply to criminal, but only to civil cases; but writs of error include both. I have understood, though I do not personally know, that a writ of error was in this case obtained; but of this I am sure, that no *supersedeas* was served upon the Circuit Court, and the sentence was executed at the end of the term, after a *supersedeas* had been applied for and refused, as I understood.

[Some explanations were now had as to extending the examination of this witness; the result of which was that any further questions put to him must be confined to the present explanation, and not open new ground.]

Q. By Mr. Buchanan. The writ of error was not presented to you before this negro had been flogged?

A. That is my recollection. A writ of error would not have been presented to the Circuit Court unless it had been made a *supersedeas* by the court above, and this I am confident was not done.

Q. Do I understand you to say that you had not the power of suspending the execution of the sentence on the negro, if you had wished to do so?

A. No: I do not say that.

Q. Did you not say, on your former examination, that the objection urged by Mr. Lawless was this, that they had flogged the negro once, and were going to flog him again, when his confession was made?

A. I do not recollect. I cannot remember all that I stated before. It is possible I may have said so.

Q. Did you not state, before, that the confession of the negro was made under the lash?

A. I think, from the report of my testimony which was taken down, and has since been shown to me, that, through want of reflection, I did state that; but, from my testimony, as taken down, it will also appear that, in answer to another question, I said that I did not consider that the confession had been extorted by the lash, but was made voluntarily, and that I overruled the objection on that ground.

Q. What do you now recollect as to your having said that if the sentence was reversed they could not take off the lashes?

A. I firmly believe that that expression was not used by the court, but by the Circuit Attorney. I most firmly believe I never said so; or, if I did, it was only in relating what had been remarked by the Circuit Attorney, or some member of the bar.

Q. By Mr. Storrs. You say, now, that after Mr. McKinney had found there was no money forthcoming, and had said to Hector, "you are a lying dog," that they whipped him again?

A. When the negro got to his house, he could not produce the money, on which, Mr. McKinney said to him, "I find you are a lying dog," and gave him some strokes with a switch, or a cow-hide, I do not remember which.

Q. By Mr. Storrs. It was this confession, then, made between two whippings, which you admitted as testimony?

A. Yes.

The Hon. AMBROSE SPENCER, one of the managers, then addressed the court, on behalf of the United States, as follows:—

Mr. President:

I trust, sir, that my past life will protect me from the imputation or even suspicion of doing or saying aught from hostility to the judicial institutions of this nation. If there be one department of this government, that has commanded my reverence and affections more than any other, it is the judiciary. My profession, the habits of my life, and my best reflections, all combine to convince me

that the permanency of this government, the happiness, union and security of this people depend on a learned, upright and independent judiciary. But I also think, that its excellence and value consists in the judges restraining themselves within their legal and constitutional spheres of action ; and that when they transcend their powers and prostitute their offices to the oppression of their fellow citizens, unless they are rebuked and punished, instead of being blessings to the community, they become scourges.

It is well known that an opinion is prevalent among us, and it has had, and yet has, eminent advocates, that the judges should hold their offices for short and limited periods, that they may periodically be brought in review before the appointing power. This opinion is founded on a supposed tendency on the part of the judiciary to encroach on the other departments of the government ; and also on the natural propensity of the human mind to usurp more power than has been granted. If the constitutional power of the House of Representatives to impeach officers of this government, and the power of the Senate to try them, should become inefficient, and a *solemn mockery*, as it has been represented it would be ; and if the people come to believe, that guilty men can pass this ordeal unhurt and untouched ; the inevitable consequence will be, that the tenure of judicial offices will be changed, and the independence of the judiciary will be destroyed. From such a calamity, may we be preserved. The duty assigned me by the House of Representatives, is a painful one. I am about to urge the conviction of the respondent, for a high judicial misdemeanor ; and he has much at stake. The consequences of his conviction have been eloquently and even pathetically described, by his learned advocate ; and I felt the full force of the appeal he made to the sensibilities of his auditors. My duty is stern and inflexible, which no considerations or feelings of sympathy can influence. There is, however, one cheering and consolatory reflection ;—the House of Representatives, after a patient and full examination, came to the resolution to impeach Judge Peck, by a very large majority ; and the record will show an absence of all party feeling. Could I believe, that that baleful spirit had mingled itself with and predominated in that vote, no earthly consideration could have prevailed on me to appear here as one of the prosecutors of this impeachment. I have not language to express the abhorrence of my soul, at the indulgence of such unhallowed feelings, on such a solemn procedure. The respondent's counsel have exerted, and doubtless will exert, their utmost skill and powers of persuasion, in drawing the attention of the court from the real character and heinousness of his judicial conduct, by going into a great variety of extraneous, and, as I apprehend, irrelevant inquiries. I cannot believe they will succeed in seducing the attention of the court from the real points in issue. Much less will I believe, that the court will allow any supposed and boasted services of the respondent, in saving a part of the national domain, to be offset against his official delinquencies. If I understand the duties of a manager as contradistinguished from those of an advocate, I shall keep myself within my proper sphere, and urge nothing which I do not conscientiously believe pertinent and well founded. Believing Judge Peck's judicial proceedings against Mr. Lawless to have been tyrannical, illegal, and unmerciful, I shall be compelled to say so. My unfeigned respect for this high tribunal, and for myself, shall restrain me from all unnecessary harshness of epithet and language.

At this stage of the trial, I shall not go into an examination or comparison of the article written by Mr. Lawless with the Opinion of Judge Peck ; I leave this in abler hands. The substantial truth and innocency of Mr. Lawless' analysis of the Opinion will be made manifest. This trial, it must be evident, involves questions of the highest magnitude ;—the powers of an inferior court of the United States to punish a citizen summarily ; depriving the party accused of a trial by his peers ; subjecting him to the jurisdiction of an irritated Judge, who supposes himself aggrieved, without appeal and without review. It involves an inquiry into the liberty of speech and the press, those great bulwarks of free-

dom ; and as I think into the well being and stability of the judiciary itself : but above all into the sacred immunity of personal liberty.

I have thought it but fair to the respondent and his counsel to give a more expanded view, at this period of the trial, of the principles on which I think this impeachment depends, and by which it must be governed. In the views I am about to submit to the court, propositions may be advanced which will not be controverted ; but not knowing the line of argument intended to be pursued by the respondent's counsel, I shall endeavor to anticipate such as I presume will be insisted on.

It is necessary to a right understanding of the impeachment, to ascertain and define, what offences constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act *colore officii* with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives. To illustrate the last proposition ; the 8th article of the amendments of the constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel or unusual punishments. If a judge should disregard these provisions, and from bad motives violate them, his offence would consist, not in the want of power, but in the manner of his executing an authority intrusted to him, and for exceeding a just and lawful discretion.

I shall insist, 1st. That Judge Peck, under the facts and circumstances of the case, had no jurisdiction to punish Mr. Lawless by imprisonment.

2d. If he had jurisdiction, I shall deny that Mr. Lawless had committed any offence whatever ; that he had a perfect and indisputable right to publish the article, "A Citizen."

3d. I admit that Judge Peck had the power, in a case proper for its exercise, to suspend Mr. Lawless, or even to strike him from the rolls as an attorney and counsellor of his court. I shall insist that no offence having been committed, his suspension was an arbitrary and wanton act of judicial oppression. I shall insist, that admitting both the power, and that an offence was committed by Mr. Lawless, that the punishment was so unfit and disproportioned to the offence, as to furnish the clearest proof of a wicked and bad motive, amounting to a misdemeanor in office.

Had Judge Peck jurisdiction, under the facts and circumstances of the case, to punish Mr. Lawless by imprisonment ?

This inquiry proceeds on the supposition that the article, "A Citizen" is what Judge Peck has asserted it to be, a false and malicious libel. The only sources of power from which this jurisdiction can be derived are, 1st. the statutory provisions of the United States. 2d. The common law, or *lex non scripta* of England, or of the United States in their national capacity ; or, 3d. The inherent or implied power of the courts of the United States, resulting from the authority conferred on them to hear, try and determine causes.

Do the laws of the United States confer the jurisdiction in question ?

This I apprehend will not be asserted ; should it be, however, it is easily disproved. The 17th section of the judiciary act of the 24th of September, 1789, declares, "that all the said courts of the United States shall have power to administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

By the known rules of construction, effect must be given to every member of the clause : the contempts of authority must occur in a cause or hearing before the courts : the cause or hearing must be pending in the courts : thus broadly marking the distinction between such cases as would be contempts of authority, in causes or hearings before the courts, and such as would not be thus punished, and which might occur in relation to causes or hearings which had been acted upon, and ceased to be before the courts.

This power was undoubtedly conferred on the courts, to enable them to ef-

fectuate their orders and decrees in causes pending before them. When these courts were in the exercise of their common law jurisdiction, it would be essential in many cases; but the exercise of their equity jurisdiction rendered such powers absolutely necessary. The proceedings of a court of equity are ordinarily *in personam*. The power to compel an answer to a bill, and to carry into specific execution contracts for the conveyance of lands, are instances of the necessity of proceeding by attachment, where the orders and decrees of a court are disobeyed. This section also gives authority to the courts of the United States to punish such contempts as are committed in the face of the court, or its immediate precincts, by tumultuous conduct, disturbance of the court, or any indecorous conduct, obstructing or interrupting that good order and decency necessary to be observed in all courts; for these are contempts of authority, whilst the courts are engaged in the business before them, and therefore are contempts of authority in a cause or hearing before the courts.

But most clearly, the power thus given to the courts, can by no known rule of construction be made to extend to causes or hearings which had been before the court, but had been finished, and removed from its cognizance, and were not before the court, when an act took place, which, had a case been pending, might have been treated as a contempt of authority. The distinction is a plain and obvious one. Contempts of authority in relation to a pending and undecided cause, might prejudice one of the parties, or it might intimidate the court, and thus it might obstruct and disturb the pure and fearless administration of justice: these contempts might require immediate suppression; but when a cause had been terminated and ceased to be pending, no such consequences could take place, and therefore, with respect to such causes or hearings, no such power was necessary, nor given.

The court will please to bear in mind, that Mr. Lawless' alleged contempt took place in relation to a cause (Soulard's heirs *vs.* the United States) which had been finally adjudicated, and removed from the District Court of Missouri, by appeal to the Supreme Court of the United States, several months before the article "A Citizen" was published. If I do not greatly deceive myself, the negative of the proposition, that Judge Peck had jurisdiction derived under the laws of the United States, to proceed against Mr. Lawless in the manner he did, has been made out.

Is the common law, or the *lex non scripta*, the law of the United States in its national capacity, and could Judge Peck derive his jurisdiction to proceed summarily, and punish Mr. Lawless, from that source?

This question opens a wide field of inquiry and argument; but it has already been explored, and I shall content myself, by showing that the question has been decided in such a manner and with such weight of authority as to preclude the necessity of renewed argument, and to put it at rest forever.

The report to the House of Delegates of Virginia, universally ascribed to Mr. Madison, contains such a copious and masterly view of this point, it so exhausts the subject, that nothing now can be added to it. It commanded my full and hearty assent at the time, and I believe I may add the assent of the nation. It is not eulogy, but matter of history to say, that no man better understood the great principles of the national constitution, than this pre-eminent constitutional lawyer. Indeed, even at this day, his expositions of that instrument are regarded with veneration, and carry with them so much authority as to settle the construction of the import and meaning of that instrument.

It had been asserted in some of the resolutions of the States, responding to the original resolutions of the Virginia Legislature, disapproving the sedition law of Congress, that the common or unwritten law, both in civil and criminal cases, made a part of the law of the States in their united or national capacity. The report referred to, states, that the novelty and extravagance of this pretension would have consigned it to silence, but that the auspices under which this innovation presented itself constrain the committee to notice it. The committee

assert that the common law was the separate law of each colony prior to the revolution, and was unknown as a law pervading and operating through the whole as one society; that it was not the same in any two of the colonies, the modifications were materially and extensively variant; there was no common legislature by which a common will could be expressed, nor any common magistracy by which such a law could be carried into effect. Did the revolution imply or introduce the common law as a law of the Union? the fundamental principle of the revolution was, that the colonies were co-ordinate members with each other and with Great Britain of an Empire, united by a common executive sovereign, but not united by a common legislative sovereign. The legislative power was maintained to be as complete in each American parliament, as in the British parliament; and the royal prerogative was in force in each colony by virtue of its acknowledging the king for its executive magistrate, as it was in Great Britain by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the revolution. The committee next examine the articles of confederation, and assert, that no such law is named, or implied, or alluded to, as being in force, or as brought into force by that compact; that such inference is precluded by the second article, which declares, "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." It is admitted that parts of the common law have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases, expressing the power delegated, and so far as such other parts may be adopted by Congress as are necessary and proper for carrying into execution the powers expressly delegated. And it is asked, if the common law had been understood to be a law of the United States, why was it not expressed in the constitution? The difficulties and confusion inseparable from a constructive introduction of the common law would afford powerful reasons against it. Is it to be the common law with or without the British statutes? if without the British statutes, the vices of the code would be insupportable. If with these amendments, what period is to be fixed for limiting the British authority over us? Is it to be the date of the eldest, or the youngest of the colonies? Or are the dates to be thrown together, and a medium deduced? Or is our independence to be taken for the date? Is again regard to be had to the various changes in the common law made by the local codes of America? Is regard to be had to such changes subsequent as well as prior to the establishment of the constitution? Is regard to be had to future as well as past changes? Is the law to be different in every State, as differently modified by its code, or are the modifications of any particular State to be applied to all?

But I forbear to trouble the court with any further extracts. The report proceeds in an irresistible train of reasoning, to refute the absurd idea, that the common law of England, in civil or criminal cases, is applicable to the courts of the United States in their united and national capacity. The report admits that the common law would furnish the rules of decision, but not the source of power, in many cases, in which jurisdiction is given to the courts of the United States by the constitution and the laws of Congress pursuant thereto, the judiciary power extending to several cases, not within the legislative power of Congress, as in suits in the courts of the United States, between citizens of different States, and between a citizen of a State and a foreign citizen or subject, and several other cases. And consequently we find, in the 34th section of the judiciary act, a provision "that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common in the courts of the United States in cases where they apply." And in the case of the United States *vs.* Aaron Burr, 1 Kent's Commentaries, 313, Chief Justice Marshall declared, "that the laws of the several States could not be regarded as rules of

decision in trials for offences against the United States, because he said no man could be condemned or prosecuted in the federal courts on a State law. The expression 'trials at common law,' used in the 34th section of the judicial act, was not applicable to prosecutions for crimes. It applied to civil suits as contradistinguished from criminal prosecutions, and to suits at common law as contradistinguished from those which came before the court, sitting as a court of equity or admiralty." In the case of the United States *vs.* Worrall, 2d Dallas, 384, which was an indictment for an attempt to bribe a commissioner of the revenue of the United States, Judge Chase held that an indictment at common law could not be sustained in the Circuit Court of the United States. He admitted Congress were authorized to define and punish the crime of bribery in such a case, but as the act charged as an offence had not been declared by law to be criminal, the courts of the United States could not sustain a criminal prosecution for it. The United States (he said in their national capacity, have no common law, and their courts have not any common law jurisdiction in criminal cases. The District Judge (Mr. Peters) held that the courts of the United States, had jurisdiction, and he considered the offence as one against the well-being of the United States, and from its very nature cognizable under their authority. He does not affirm the existence of a common law jurisdiction in criminal cases, unless it be in a case where the offence is solely against the United States and not cognizable elsewhere. In the case of the United States *vs.* Hudson & Goodwin, 7th Cranch, 32, the question came directly before the Supreme Court of the United States. The defendants were indicted, in the Circuit Court of the United States for the District of Connecticut, for a libel on the President of the United States and Congress; and it was decided that the courts of the United States could not exercise a common law jurisdiction in criminal cases. Mr. Justice Johnson gave the opinion of the court. He treats it as a question settled in public opinion, and one to be decided by simple and obvious reasoning. The powers (he says) of the general government are made up of concessions from the several States: whatever is not expressly given to the former, the latter expressly reserve. The Supreme Court possess jurisdiction derived immediately from the constitution, of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction, but what is given by the power that creates them, and can be vested with none, but what the power ceded to the general government will authorize them to confer. But all exercise of criminal jurisdiction in common law cases, we are of opinion, are not within their implied powers.

This decision adopts substantially Mr. Madison's reasoning in his celebrated report, and has forever put at rest the question whether the courts of the United States have a common law criminal jurisdiction. It has, however, been reiterated in the case of the United States *vs.* Coolidge and others, 1 Wheaton. The defendants were indicted for forcibly rescuing a prize taken by two American privateers, on the high seas. The Attorney General declined arguing the case, and after some conversation on the bench, Mr. Justice Johnson, in giving the opinion, says, "that the Attorney General having declined to argue the case, and no one appearing for the defendants, under these circumstances the court would not choose to review their former decision, or throw it into doubt," and affirmed the judgment below.

The next inquiry is, whether a contempt of court, consisting of a libel, in an alleged misrepresentation of an opinion, is a criminal offence. It is only necessary to ask, what constitutes a crime? It is the doing an act forbidden by the law, or the omission to do an act which the law enjoins. Libellous publications concerning individuals and magistrates, is a criminal offence, and punished as such in all civilized communities; and the proceeding to punish a libel as a contempt of court is a criminal proceeding: and so Judge Peck considered it, for his rule against Mr. Lawless is entitled, *The United States vs. Luke E. Lawless*. He treated it as an offence against the United States, that the authority of its

court had been contemned. Mr. Justice Blackstone so considers it, for he says, 4th Com. 287, in speaking of an attachment for a contempt, "this summary process makes the defendant answer on oath to a criminal charge." It is so considered by every elementary writer. It may be contended, that the punishment of a contempt, by summary process, is not the exercise of a criminal jurisdiction, because it has been exercised by courts not possessed of such jurisdiction, the Courts of Chancery and other courts of mere civil jurisdiction. The want of a general criminal jurisdiction in these courts, proves nothing. If they are armed with it, in punishing contempts, *quoad hoc*, they have a criminal jurisdiction; though in all other respects they may not possess it.

I have, I trust, established the proposition, that the United States, in their national capacity, have no common law, and that the courts instituted under their authority do not possess any common law criminal jurisdiction. The consequence must be, that if Judge Peck has resorted to the common law as a source of jurisdiction, he has usurped a power he did not possess, and must be judged to have acted illegally.

It comes then to be examined, whether the respondent could legally punish Mr. Lawless by imprisonment, by virtue of any inherent or implied power in the court in which he presided.

1. Although I admit, that had there been no statutory provision for punishing contempts of the nature of that alleged to have been committed by Mr. Lawless, there would have been an inherent or implied power in the court to punish *certain* contempts; yet that there being a statute regulation in such cases, it must be observed and could not rightfully be transcended.

2. I propose to show, if the last proposition be untenable, that the inherent or implied power in question cannot lawfully be extended or enforced beyond the necessities of the case, and ought not and does not extend to the punishment of libels in reference to causes which have been decided and passed from the cognizance of the court.

I have already commented on the 17th section of the judiciary act, stated its terms and the powers it confers on the courts of the United States, and I think proved, that the power to punish for contempts of authority are expressly restricted to such causes or hearings, as are pending at the time before the courts, and that the power does not extend to punish for contempts in reference to causes which have been finally decided and removed from the cognizance of the courts. I now insist that this statutory provision excludes all inherent or implied powers, emphatically in those cases wherein the legislative will has been expressed. The judicial act of 1789 created all the inferior courts of the United States; and although, by the constitution, it is declared that "the judicial power of the United States shall be vested in our Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," the District and Circuit Courts had no existence until they were established by law. The very law calling them into existence prescribed their powers as to certain kinds of contempts; and the makers of the law expressed their will, that the punishment by fine or imprisonment for contempts of authority in relation to causes or hearings, should be in such causes or hearings only as were before the courts—to causes or hearings pending in the courts. This enactment operated as a limitation of the powers of the courts, if their inherent or implied powers would have authorized these courts to punish for contempts of authority in causes or hearings *not before* the courts; for it is an undeniable principle, founded on the soundest reasons, that where a new jurisdiction is created, and a power is conferred, which is required to be exercised under certain qualifications, and under a particular state of facts; it is virtually a negation of the exercise of that same power, in the absence of the required facts. When Congress therefore authorized all their courts, in the very act creating them, *to punish by fine or imprisonment all contempts of authority in any cause or hearing before the same*; they negated the power to punish in that manner, all contempts of authority in

any cause or hearing not before these courts. I contend that the power was not only negated as to such causes as were not pending, but that it involved an absolute absurdity to suppose there can be a contempt of *authority* committed as to causes no longer before a court. In *ex parte* Bollman and Swartwout, 4 Cranch, 93, Chief Justice Marshall laid down this rule: "Courts which originate in the common law, possess a jurisdiction, which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." This elementary principle, applied to the present inquiry, with the additional fact, that the law which created those courts, and gave the jurisdiction to punish for contempts, restrained the exercise of the power to causes pending when the contempt of authority took place, seems to me to be decisive of the question.

But suppose it be admitted that the courts of the United States have an inherent or implied power, not regulated by statute; what is its extent and under what circumstances may it be exerted? I freely admit that in the absence of any legislative provision the conferring a power on courts to hear, try and determine causes, implies the power to use all means necessary to accomplish the principal powers. And Mr. Justice Johnson very truly said, in the case of the United States *vs.* Hudson & Goodwin, that "to fine for contempts, imprison for contumacy, (which Blackstone defines a wilful disobedience of the orders of a court,) enforce the observance of order, are powers which cannot be dispensed with, because they are necessary to the exercise of all others."

This implied power extends no further than necessity requires; and if it be not thus limited, it is without limits, and in weak or wicked hands might be used to a fearful extent, utterly incompatible with the rights and liberties of the people. If it be unlimited, if it is to depend on the mere discretion of the judges, it is a despotic power, and intolerable in a society governed by known laws. My positions are, first, that no act can be punished under this implied power as a contempt, unless it takes place when the courts are in the exercise of their judicial functions; and, 2d, that it can by no possibility extend to authorize the punishment as for a contempt, of such an act as that for which Mr. Lawless was punished. These propositions can, I think, be established by the highest authority. *Anderson vs. Dunn*, 6th Wheaton, 204. The action was for an assault and battery and false imprisonment. The special plea was most skilfully and ingeniously drawn so as to conceal from the court the nature of the contempt committed, and common rumor and newspapers only, inform us what it was. It was doubtless drawn by the then Attorney General (Mr. Wirt.) [Here Mr. Meredith said in a low tone, that Mr. Wirt did not draw it, but that Mr. Jones did.] It states substantially, that the defendant was serjeant-at-arms of the House of Representatives; that he had executed the speaker's warrant, in arresting and detaining the plaintiff, pursuant to the orders of the House, by whom it was resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same; that after he had been brought before the House, and the matter had been examined into, the House finally resolved and adjudged the plaintiff to be guilty, and convicted him of the charge aforesaid, and directed that he should be reprimanded by the speaker and discharged. The plaintiff, instead of setting forth by replication the true cause of his arrest, demurred to the plea, and on this the argument proceeded. The defendant's counsel, one of whom was Mr. Wirt, then Attorney General, advanced doctrines, with which I entirely concur, and if I mistake not, placed the exercise of the implied and inherent power of the House of Representatives and courts of justice, on grounds not only rational, but impregnable; and I think I have his authority for the limitations of this power for which I contend. He insisted that the necessity of self-defence was as incidental to legislative as to judicial authority; that this power was not a substantive provision of the common law adopted by us, but was rather a principle of

universal law, growing out of the natural right of self-defence belonging to all persons ; that it was confessedly within the competency of the House to render such a judgment in some cases, such as that of a direct interruption to its proceedings by open violence within its walls. But from the plea *non constat* what was the nature of the offence? That it was sufficient for the protection of the officer, that the House had jurisdiction to punish for contempt, and that it had adjudged the plaintiff guilty of a contempt. The power of punishing for contempts (he said) was incidental to all courts of justice, and even to the most inferior magistrates *when in the exercise of their public functions*, and arises out of the absolute necessity of the case which renders it indispensable that they should have such a power.

I have given the pith of the argument, and agree to every word of it. It contains a most important admission, which it will be difficult to surmount—that the implied power of the courts to punish for contempts is a protective power only, that of self-defence ; and was to be called into exercise only, when the courts contemned or interrupted, were at the time of such contempt, in the performance of their public functions. And I must insist that these are the only safe and salutary principles, with which courts of justice can be armed ; and if they are departed from, and a broad and undefined discretion shall be conceded to them, there is no security for personal liberty. Mr. Justice Blackstone, who was not deficient in loyalty, nor adverse to the prerogative of the king, or courts, admits that the power exercised by the latter, of summary proceedings in cases of contempts, is adverse to the genius of the constitution in all other respects.

But to come back to the case of Anderson and Dunn, the Supreme Court adopted Mr. Wirt's argument, and unless I should fatigue the court with unnecessary citations, I will merely submit one sentence of the opinion delivered by Mr. Justice Johnson. In page 226, he says : " But there is one maxim which necessarily rides over all others ; it is, that the public functionaries must be left at liberty to exercise the powers the people have entrusted to them. The interests and the dignity of those who created them require the exertion of the powers *indispensable* to the attainment of the ends of their creation." The whole scope of the opinion places the power as arising from necessity, and confines its exercise to indispensable necessity.

We are now then prepared for the inquiry, whether the powers exercised by the respondent in the case before the court, were *necessary and indispensable* to the performance of his judicial functions. If words have not lost their meaning, there existed no *indispensable necessity*, calling for the exercise of this anomalous and dangerous power in the case before the court. The pretended offence of Mr. Lawless took place in vacation of term ; it consisted of a synopsis of the errors of doctrine and fact into which, he humbly believed, the Judge had fallen. These errors were attributed to an opinion published by the Judge himself in a newspaper long after the cause had been decided, and long after it had been removed by appeal from his court. The publication made by Mr. Lawless was fastidiously respectful, imputing nothing to the Judge but error. Judge Peck has seen fit and felt it to be necessary, to brand this innocent and harmless publication as a most outrageous and wanton libel. If it was so in fact, then Mr. Lawless was punishable by indictment or information in the State courts of Missouri, where we are to presume ample justice would have been dealt out. By the summary process adopted by the respondent, Mr. Lawless is stripped of every right guaranteed to freemen. His prosecutor is the respondent himself ; the offence imputed to him, cloak the matter as we can, is one against the respondent himself ; and he, the aggrieved party, erects himself into a tribunal, to try before himself and punish by his sole authority, this wrong against himself, thus trampling upon the sacred rights of every American citizen, of a trial before his peers, by an impartial tribunal. And all this is attempted to be justified by the pretended necessity, indispensable necessity of the case. What necessity was there of an instantaneous proceeding ; were the operations of the law

too tardy in their usual and accustomed forms? The greatest malefactor has secured to him an impartial trial before his peers; and did Mr. Lawless' offence divest him of the same rights? There is not a shadow of pretext for the exercise of this odious power of summary proceeding against Mr. Lawless—and this I hope hereafter to make more manifest; and I submit to the justice and good sense of this court, that the natural and proper limitation of this implied power of the courts to punish for contempts, is to such cases as directly interrupt and impede its functions.

Admitting, for the purposes of the argument, that the respondent may resort to the common law not only as a source of jurisdiction, but, if his counsel choose, as evidence of the exercise of the implied power of the courts to punish for contempts,—I shall yet insist, that even this code furnishes no precedent, and no authority to the respondent, for the course he has pursued. I must not be understood to admit, that the exercise of this power in England has its origin in the inherent or implied powers of the courts. It has grown up there from immemorial usage, and by gradual encroachments of the courts. Its existence there affords no proof of its originating from indispensable necessity.

I shall contend, 1st, That after a cause has been decided finally, and passed from the cognizance of the court deciding it, it is perfectly lawful by the common law for any man to comment on the decision, to expose its errors, and even to censure it, provided there be no imputation of dishonest or improper motives, on the court or magistrate, whose opinion is reviewed. 2d. If there be the imputation of dishonest or base motives on the court or judges, in a case thus circumstanced, the only legal mode of punishment would be by information or indictment as for a libel.

The first proposition would seem to require, in a land of freedom, no authority for its support. It is as important and interesting to the community that erroneous judicial opinions, involving great interests, should be as open to discussion and criticism, as treatises on ethics, religion, or politics. To impute errors to a judicial opinion, neither scandalizes those who have pronounced it, nor affects their standing or usefulness, unless indeed judges claim an infallibility, to which all other men have no pretensions. Commentaries on opinions have useful effects—they may correct errors; but at all events they have a tendency to induce greater caution and circumspection. It would seem to me that a judge who would consider himself insulted and his court brought into disrespect by ascribing to him errors of law or fact, must either be a very vain man, or else feel a consciousness of his unfitness for his station.

The law of England recognizes the right of discussing the opinions of courts in the fullest and amplest manner; and surely it will not be contended that our institutions are less tolerant in this respect. Holt, a late writer on the doctrine of libels, has collected most of the cases determined in England, and deduced from them the most correct and just conclusions: he puts in contrast, some of the ancient and modern decisions, and shows the progress of civilization and improvement. He gives (page 170) an account of the proceedings against Northampton, reported in 3d Institute, 174: it occurred in 18th of Edward III, 1344. I refer to it as the only case countenancing the respondent's proceedings, and it may have been his precedent. Northampton wrote a letter to one of the king's counsel, importing that neither Sir William Scott, Chief Justice, nor his followers, the king's justices, nor their clerks, any great things would do by commandment of our sovereign lord the king, nor of queen Phillipa, in that place, more than any other of the realm. On being called before the court, he confessed the letter, and the judgment of the court was, that his having confessed it, and that the letter is not true, by color whereof the king may be offended with the court and his justices on that account, which would tend to the disgrace of the justices and the court; he was committed to the marshal and ordered to find six sureties for his good behavior. The folly and absurdity of

this proceeding and its occurrence in a barbarous age, require, that it should be held up as a beacon to be avoided.

After reviewing the cases, Mr. Holt says, "it is therefore a rule founded on the reason of the common law, that all contempts to the process of the court, to its judges, juries, officers and ministers, *when acting in the due discharge of their respective duties*, whether such contempts be by direct obstruction, or consequentially, that is to say, whether they be by act or writing, are punishable by the court, or they may be abated *instantly*, as nuisances to public justice, and subject the party offending to fine and imprisonment." Thus adopting the distinction on which I insist, between acts done when the court is performing its functions, and acts done when their functions have ceased.

Again, he says, "it is undoubtedly within the natural compass of the liberty of the press to discuss in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error; and, provided it be done in the language and with the views of fair criticism, to censure what is apparently wrong: but with this limitation, that no false or dishonest motives be assigned to any party." It will possibly be said, that Mr. Lawless' article is not a fair criticism, that it is a perversion of the Opinion. Its language is decent and temperate, and the author professes to believe that Judge Peck erred in two particulars pointed out; and I understand Mr. Holt to maintain, that there is no other limit to the discussion of opinions of a court, than that false and dishonest motives must not be charged, or otherwise the discussion would be libellous. 2d Salk. 697. One Langley was indicted for saying to the Mayor of Salisbury, that he was a rogue and a rascal. Holt, Chief Justice, held the words not to be indictable, for the mayor was not in the execution of his office; and by the whole court, words that directly tend to a breach of the peace, as if one man challenge another, are indictable; but for these petit offences which are *contra bonos mores*, the law has another provision, by requiring surety of the peace and good behavior, in default whereof the magistrate may commit him, when spoken out of court; and when in court, then the magistrate may proceed summarily against him, and fine him for the contempt. To the professional gentlemen of the court it would be superfluous to speak of this eminent and distinguished Judge, whose fame as a jurist, and whose fearless integrity as a judge, have secured for him the respect and veneration of posterity. I ask, is there any difference in principle between written and verbal calumny? Might Mr. Lawless, without fear of the summary process of Judge Peck's court, revile the Judge, and impute to him the basest of motives for the Opinion he delivered; and yet be liable to this process, for writing a temperate and decent article, free from any kind of improper or disrespectful expressions? The turpitude of the offence would be the same, whether the words were written or spoken; and had he spoken what he has published, would it be a contempt of court? The only difference between speaking and writing is this, that the latter is more permanent, and may be more widely circulated, and therefore when libellous, may aggravate the offence; but the moral delinquency is precisely the same.

It appears from the testimony that the respondent had Blackstone's Commentaries before him, in his proceedings upon the rules against Foreman and Lawless, and he seems to place great reliance on this commentator. Blackstone, after speaking of direct contempts in the face of the court, treats of those which are consequential, and says, "others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptuously of the court or judges *acting* in their judicial capacity; by printing false accounts, or even true ones, without proper permission, of causes then depending in judgment." Blackstone speaks most accurately, and it seems impossible for an intelligent man to misconceive him, and that nothing but passion or prejudice could have produced so erroneous a construction of his text, as Judge Peck has fallen into. He puts speaking

and writing upon the same footing, and with respect to contempts of either kind he manifestly indicates, that they must take place, to authorize a summary proceeding, *when* the judges are acting in their judicial capacities, or when these false representations are made in causes undecided and then depending in judgment. There is some show of reason in summarily punishing such offences in pending causes, because they may pollute the jury, or overawe and intimidate the judge, and thus poison the sources of justice. But in decided causes no such consequences can be produced, and therefore the power never existed, and is constantly denied; and a safe and effectual constitutional remedy is at hand, indictment and trial before a jury and an impartial court. Huggonson's case, 2 Atk. 469, was cited by the respondent in his argument before the House. There a gross libel had been published, abusing the party and third persons who had made affidavits, and it was a pending and undecided cause before the courts. Lord Hardwicke said there were three sorts of contempts—scandalizing the court, another in abusing the parties, and the last in prejudicing mankind against persons before the cause is heard. He does not define in what scandalizing the court consists, nor when it is punishable: but a judge must always be considered in general observations, to mean them to apply to the case under consideration, or a case circumstanced like it; and evidently by scandalizing he meant direct reproach. Great reliance will probably be placed on the case of the King *vs.* Almon, or rather the undelivered opinion of Chief Justice Wilmot, found among his papers and published. This opinion is entitled to no more respect, and as for myself I do not consider it entitled to as much respect, as the opinions of many American lawyers. If I mistake not, this is the same Judge Wilmot, who maintained that the consideration of a promissory note, between the original parties, was not inquirable into, and he probably led Blackstone into one of the greatest errors in maintaining that assertion, in his whole Commentaries. Not being able to foresee the use which may be made of this opinion, I cheerfully leave it in abler hands. The case of the people *vs.* Freer, 1 Caines, 485. The people *vs.* Few, 2 Johns. 290, and Oswald's case, 1 Dal. 319, have been referred to by the respondent, to justify his proceedings. In all these cases, the causes were depending before the courts when the publications were made. In Darby's case, before the Supreme Court of Tennessee, the court justify themselves in striking him from the rolls, on the ground of his having made a publication, for the purpose of forestalling the public opinion on the merits of a pending case.

And here I beg leave to state my views of the power of the courts of the United States in suspending and striking from the rolls the attorneys and counsellors of those courts. Although I shall not have the temerity to dispute the propositions of Chief Justice Marshall, in the case *ex parte* Burr, 9th Wheaton, 531, yet I do think this power may be vindicated on different grounds. By the 35th section of the judiciary act, it is enacted "that in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein." This permission is given in the shape of licenses, and the attorneys and counsellors take an oath to demean themselves fairly and honestly. For gross professional misconduct, or the commission of crimes denoting the absence of all integrity, the courts may and ought to revoke the licenses. It is a trust for the benefit of the people, who may be suitors in courts of justice: to allow a man to continue in a trust, without the qualities essential to its faithful execution, would be to countenance and uphold the violators of the trust. The power vested in the courts at their discretion to permit counsellors to appear before them and manage causes therein, implies a power to revoke that permission, and upon principles of universal law the power competent to grant a license, must have the power when it is perverted, to rescind or revoke it. Besides, it is matter of absolute necessity to the public good, not to tolerate dishonest men in the ex-

ercise of a profession requiring learning and integrity. Attorneys and counsellors are amenable for their conduct to no other department of the government, but the court; and if the power to remove them from office for just cause did not exist, the profession itself and the administration of justice would fall into deserved contempt. It is, I trust, manifest that the power of suspending and striking attorneys from the rolls, is entirely distinct from that of summary proceedings for contempts. I think myself fully warranted in asserting that no adjudged case in modern times can be produced, showing the exercise of the power in an English court of punishing as for contempts, libellous publications on courts or parties to suits, in reference to causes finally adjudicated and decided: if there are such cases, they have escaped my researches. The books are full of cases of indictments, and informations for such offences against judges and juries.

I have spoken of the harmless tendency of the article written by Mr. Lawless; and believe it has been shown, that there exists no foundation for the exercise of the anomalous summary process adopted by Judge Peck, in the laws of the United States, the common law, or the inherent power of courts. It will, it must be conceded, that the exercise of this high and as it seems to me, in weak or wicked hands, most dangerous power, is invested in courts, for the public good, to be exercised only in cases of absolute necessity, when the authority and dignity of the courts require immediate vindication, for the preservation of order and decorum. It is not given to courts for their personal benefit, to be used to avenge their personal wrongs, or satiate their private vengeance. When therefore it is made use of to punish libels as contempts, in pending causes, the publication supposed to be a contempt, must be so considered by the reading portion of the people. It must be so *per se*, palpably and plainly: a paper which requires subtle and ingenious argument to be proved to be a contempt; or to be compared with a long and elaborate opinion, in order to make out its discrepancies with the opinion, is no contempt. Indeed it appears to me that an argumentative contempt is a perfect solecism. Judge Peck himself was conscious, that the article "A Citizen" would not be a contempt unless it had the effect to bring odium on the court, and impaired the public confidence in the purity of its decisions; for he states this as the *gravamen* in his rule against Mr. Foreman, in express terms. Mr. Lawless' publication being read under these views, I hold it as impossible for any man of common intelligence to discover anything contemptuous in it, unless the suggestion of error in the opinion would make it so; and I hope in this country such suggestion is not libellous.

I wish to bring the proposition to the test, and to push the inquiry, whether it be probable or possible, that the reading public could perceive any libellous matter in a publication which the Judge has denounced as a gross and abominable libel. I shall be very much aided in this view of the question by Judge Peck's answer in this court, and his argument before the House. And here I cannot avoid observing, that it appears to be ordained by Providence, that if guilty men are permitted, when questioned on their guilt, to tell their own stories *in extenso*, they weave such a web of inconsistency and falsehood as to detect themselves. The authors of the late horrid and appalling murder in the East, were detected, by overacting in attempting to prove themselves innocent, and they were caught in their own toils.

I will submit to the court a natural classification of the readers of the article written by Mr. Lawless, and the Opinion reviewed.

I will suppose the readers to consist, 1st. of those who read Mr. Lawless' article only, but who lived in Missouri, and understood the controversy in Soulard's case. 2d. Of those who read both the article and the Opinion hastily and superficially, without understanding the controversy. 3d. Of those who read the article only and did not live in Missouri. And, 4th. of those who read both the article and Opinion attentively, with a view of mastering the question of contempt or not, and who had sufficient force of mind for that purpose.

Judge Peck, in his plea and answer, page 8, says, "In the country in which

the publication took place, and in which it was intended to operate, the controversy was understood, and therefore the absurdities which that publication imputed to the court were immediately perceived and felt, and produced their intended effect, on all who took their impressions only from that article." This is strange reasoning—the conclusion is at variance with the premises. If those who understood the controversy, and immediately perceived and felt the absurdities which the publication imputed to the court; how could they take their impressions only from that article, without obliterating from their minds their pre-existing knowledge of the controversy? The conclusion drawn by the respondent appears to me to be illigical and absurd. As to the 2d class of readers, Judge Peck invokes the court, that they may properly estimate the effects of the publication on the people of Missouri, to possess the same familiarity with the nature of the controversy, and the peculiar character of the laws by which it was to be decided. "For (he says) this respondent is convinced that without this familiar acquaintance with the subject, no person who now for the first time reads the Opinion hastily and superficially, and as hastily and superficially compares it with the publication, will be struck with the misrepresentation; but that such a reader will on the contrary be apt to suppose, that there is resemblance enough between the argumentative conclusions, drawn by the Judge in his Opinion, and the assumptions imputed to him by the publication, to authorize the belief that the Judge must have acted vindictively in treating it as a misrepresentation and punishing it as a contempt."

In this proposition, we must exclude that part of the people of Missouri who understood the controversy before Mr. Lawless published his article;—and then I ask, can credulity itself believe, that any other class of people would read the article, and the Judge's Opinion, consisting of nineteen octavo pages, in any other manner than hastily and superficially? No one but those interested in the controversy would read it at all; but to expect, that a person having no interest in those claims and whose duty did not compel him to read the Opinion, and not only to read it, but to master the subject, is an extravagant and irrational supposition. But as to the third class of readers, those who read the article only. If a hasty and superficial reading of both the Opinion and the article, would produce the conviction that the Judge must have acted vindictively in treating it as a misrepresentation and punishing it as a contempt, how much more readily would the readers of the article only come to that conclusion? We may defy the ingenuity of man, to torture the article, read by itself, into a contempt of court. It is harmless, decent, but unintelligible to such readers. And here Judge Peck has involved himself in another gross inconsistency: he says in his answer and plea, "This respondent now begs leave to turn the attention of this honorable Court to the publication of Luke E. Lawless, signed 'A Citizen,' barely requesting this honorable Court to bear in mind that this latter article appeared in a different newspaper from that in which the Opinion had been published—a paper of a different political complexion, supported for the most part by different subscribers, and consequently that few if any of the readers of the article signed 'A Citizen' could have any knowledge of the Opinion which it professed to censure, other than that which they derived from the article itself;" thus admitting the improbability, if not impossibility, of any injurious consequences being produced by the publication of the article.

There is yet another class of readers, but they exist only imaginarily; for who would spontaneously sit down to the careful study of the Opinion and article, and compare them together? If such a man could be found, and the Judge is right in his allegation, that the article is a gross misrepresentation of the Opinion,—then the conclusion, instead of being unfavorable to the Judge, would be highly honorable, and he would stand acquitted. If I do not deceive myself, the respondent has himself shown, that with any class of readers, the court would not be brought into contempt, nor the public mind injuriously prejudiced against it:

It may be said, that although Soulard's case had been appealed, it might be remanded; and that there were other causes before the court dependent on the same principles, and therefore the power was lawfully exercised. Jurisdiction does not depend on a possibility; it must exist at the time the power is exerted: and as to the pendency of other causes, it is an after thought, but equally destitute of solidity. It is in proof that Soulard's case was what has been termed a test cause, and a decision in it was virtually a decision in all the causes; and the consequence was, that all the causes depending on the same principles were withdrawn. When an opinion is promulgated to the world, the right of discussing it cannot be restrained, because other causes of a similar character are pending: this would amount to a general prohibition of discussion in any case; for there are or may be other causes yet undecided, involving some of the points of the one decided. The right of a criticism is perfect as to the case decided, and depends on no such contingency as that it may relate to undecided causes.

I think it fairly inferrible from the evidence which I shall not stop to examine; because as I understand the answer and the respondent's argument before the House, it is admitted and avowed, that in punishing Mr. Lawless, Judge Peck increased it, in consequence of Mr. Lawless refusing to answer interrogatories. He says, "this declaration that he would not answer interrogatories if they should be propounded, was not only an aggravation of the first contempt, but was a new and substantive contempt, which would of itself have justified the sentence that was passed, and in this light it is considered by the books." Again he says, "and it is true that this respondent, considering this conduct of the said Luke E. Lawless and his refusal to purge himself of the contempt as a contumacious persistence therein, did proceed to pass sentence, &c." And yet this same Judge held this language to Mr. Lawless, just before the sentence, "that being thus before the court, the privilege was tendered to him of purging himself of the contempt, if he thought proper to do so."

Thus whilst the Judge admitted it to be the right and privilege of Mr. Lawless to require interrogatories if he thought proper, his not requiring them, and saying he would not answer them, is turned into a new and substantive crime of itself, justifying the entire punishment awarded. This was a most outrageous act, authorized by no law, and violatory of an express provision of the constitution. The fifth article of the amendments to the constitution, declares that "no person shall be compelled, in any criminal case, to be a witness against himself." Will the respondent's counsel shelter their client by saying that Mr. Lawless was not compelled to answer on oath? If they do, they shelter him by the letter of that instrument, whilst the respondent has violated its spirit. If no man in a criminal case can be required to be a witness against himself; can his case be altered, can he be considered more criminal, for availing himself of the protection of the constitution in refusing to be interrogated? and yet so the Judge considered Mr. Lawless. But the Judge knew better; he says, "the privilege was tendered to him of purging himself of the contempt, if he thought proper to do so." It is one of the clearest principles of law and common sense, that a personal privilege may be waived, without the incurring guilt, in waiving it. The law affords an accused party a shield, by which he may protect himself: if he waives the shield, he does it, according to Judge Peck, at his peril of being adjudged guilty of a new and substantive crime. I appeal with entire confidence to the court, against a doctrine so preposterous and absurd.

I am aware that Blackstone, in his 4th Commentary, 287, says, "But if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is thus clearly guilty of a high and repeated contempt, to be punished at the discretion of the court." If Judge Blackstone meant to apply this doctrine to a summary proceeding for a libel amounting to a contempt, I deny the proposition to be law here, and it is not I apprehend supported by any judicial decision in England. It is an inquisitorial power, inconsistent with the provision

of the constitution of which I have already spoken, and is at war with every idea of civil liberty. The position is correct only when applied to civil cases, as against officers of a court, who may be required to answer as to matters not involving any criminality; and in such cases, where the party being ordered by the court to make disclosures not affecting him criminally, obstinately refuse to do so. The case of Oswald, 1 Dallas, 334, puts this proceeding on its true grounds. Mr. Lewis said, "It had been asserted that the court were about to compel Mr. Oswald to convict himself of the offence with which he was charged; but the fact is this, that it was incumbent on the person who suggests the contempt to prove it by disinterested witnesses, and then indeed the defendant is allowed by his own oath to purge and acquit himself, in spite of all the testimony which can be produced against him. It appears clearly, therefore, that Mr. Oswald's being called on to answer interrogatories is not meant to establish his guilt, but to enable him to avoid the punishment which is the consequence of it. The court employ no compulsion in this respect: he may either answer or not, as he pleases; if he does answer, his single oath in his own favor will countervail the oaths of a thousand witnesses: if he does not answer, his silence corroborates the evidence of the contempt, and the judgment of the court must necessarily follow."

McKean, Chief Justice, immediately said, "Your statement is certainly right, and the misrepresentation which is attempted must be the effect of wickedness or ignorance." It is well known to the professional members of the court, that Blackstone's Commentaries, although valuable to a student on his first commencing his studies, for its arrangement and elegance of diction, compared with preceding writers, is not a book of authority, and as Lord Mansfield said was never intended as such by its author. 2d Str. 1183. A rule was made upon one Stanton to answer a complaint for serving a writ, when the plaintiff disowned employing any one: upon his attendance and reading his affidavit, Strange states, that he desired leave to ask him some questions, which the court allowed him to do, but would not swear him to answer such questions; and this is one of the contempts spoken of by Blackstone perverting the process of the court.

It would be a waste of time to go in search of further authorities on this point. We place ourselves on the constitution, and on the broad principles of civil liberty, in denying, that the refusal to answer interrogatories, was either a new contempt, or an aggravation of Mr. Lawless' guilt. The only consequence of the refusal, was an admission tacitly that what Foreman had sworn was true, that Mr. Lawless was the author of the article "A Citizen," and Judge Peck was authorized by Mr. Lawless' tacit admission of that fact, to draw such inferences as it warranted. I insist, then, that Judge Peck, in treating Mr. Lawless' refusal to purge himself as a new crime, or the aggravation of his former one, violated his duty, to the oppression of Mr. Lawless.

It will probably be urged by the respondent's counsel, that Mr. Lawless, by a simple denial under oath, that he did not intend to misrepresent the Opinion, and had not been influenced by bad motives, could have satisfied the Judge, and terminated the case. I answer, that no interrogatories having been shown to him, and the Judge not having stated what he required to be answered, Mr. Lawless could not foresee the nature and extent of the interrogatories. But there is another and more decisive answer. Mr. Lawless believed, as he tells us on his oath, that Judge Peck had usurped a jurisdiction not vested in him by law: he owed it to himself and to his profession to withstand what he honestly believed to be an arbitrary proceeding, and a high-handed stretch of power. He had been openly reviled by the Judge, as being the author of a false, malicious, libellous, and calumnious attack on his Opinion. His feelings had been harrowed up and outraged. He chose to take his stand on his rights as an American citizen, and to make no apology when he was conscious he had done no wrong. And if

Judge Peck, in the judgment of this court, proceeded illegally, then is Mr. Lawless not only irresponsible for not answering, but he must be justified and commended.

I shall hasten to a conclusion, and propose to inquire whether, taking the facts collectively into consideration, Judge Peck has acted under the influence of bad motives. The mind can only be ascertained by external signs; and generally speaking when an illegal or criminal act has been done, the indications and accompanying circumstances afford safe criteria from which to form an opinion.

If the illegality of the proceedings of Judge Peck, in the case of Mr. Lawless, has been made out; if that illegality has been shown to be great and flagrant; then I insist, that of itself, it furnishes very strong if not controlling evidence, of a bad mind and an evil intent. To suppose Judge Peck ignorant of the provisions of the judiciary act, and of the constitution of the United States, would be an imputation that he does not merit. If he knew either, he has deeply transgressed, and it would seem to follow that he must have done so from vindictive feelings.

There are many facts in the case which are irreconcilable with the conduct of a judge intent only on discharging his judicial functions with impartiality, integrity and dignity.

The rule he dictated and caused to be entered against Mr. Lawless, evince that he had predetermined the offence and the punishment also. It appears from the deposition of Mr. Bates that the Judge was deaf to all advice. Mr. Bates suggested to him the policy of permitting the proceeding to pass off as easily as possible: the Judge gave him promptly to understand that his course was taken, and although he did add that he was prompted by duty, I must be allowed to consider this as a mere pretext to cover a fixed and settled design in spite of all remonstrances, and all consequences. He refused to hear Mr. Magenis, on the rule against Mr. Lawless, argue on the facts of the case, to show that the article written by Mr. Lawless did not misrepresent the Opinion; on the ground that the point had been argued and decided in Foreman's case. How it had been argued, the evidence shows. Mr. Lawless was constantly interrupted by the Judge, who allowed himself during the argument to utter denunciations against the article, as false, malicious, and calumnious; and Mr. Lawless was compelled to desist from further arguing the question, before he had gone through. Mr. Lawless was entitled to be fully heard, and the pretext that the question had been decided in another and distant case, is indicative of a precipitancy and impatience to get at his victim, inconsistent with impartiality and judicial decorum, and of a mind under the influence of malignant feelings. In a case involving the highest interests of a citizen, a judge regardful of his high duties, would have willingly listened to argument to convince him of the innocence of the accused. Immediately on the conclusion of the argument, without taking time to cool or to deliberate, without consultation with himself on his pillow, he proceeded to deliver an Opinion, which for vehemence, intemperate abuse, and bitter denunciation of the accused, stands unparalleled. Mr. Lawless, whose lacerated feelings had compelled him to withdraw, was forthwith re-summoned, and sentenced to a suspension of his profession for eighteen months, and to imprisonment in the common jail of St. Louis for twentyfour hours. The offence charged on Mr. Lawless had no relation to his professional character: it involved no dishonesty, moral turpitude, or unfitness in the performance of his trust as an attorney or counsellor. He ought not to have been punished with more severity than any other citizen charged with the same offence. If Judge Peck had been solicitous only to vindicate the authority of the court, and set an example to deter others, a moderate fine would have answered every purpose. This obvious course, after admonition too from a judicious friend, was disregarded: to glut his vengeance nothing short of the utter ruin of his victim could satiate him. I beg the court to ponder and reflect on the enor-

mous disproportion between the punishment and the offence. Mr. Lawless' motives for writing the article he has stated to the court; he has on his oath disavowed any intention to misrepresent the Opinion; he has in the same manner declared his belief that he did not misrepresent it. He made the same disavowals to Judge Peck himself on arguing Foreman's case, when the Judge knew him to be the author of the article; and yet, he was arrested in the exercise of his profession, and he and his family were deprived of the honest means of gaining a living. He is cut off as unworthy of exercising an honorable profession, and as unworthy of public confidence. His imprisonment I cannot but consider as a refinement in cruelty; it was not intended as a punishment for his delinquency, but as a mark of infamy and disgrace. If all these considerations do not satisfy the mind that the respondent must have acted from bad and vindictive motives, then nothing short of positive proof of such designs can convict any man.

Here, I must recall the attention of the court to the superadded punishment, for the refusal to answer interrogatories. It is in my judgment a heavy item in the amount.

But there are yet other evidences of bad motives on the part of the Judge. It is in proof that there was no pre-existing ill will between Judge Peck and Mr. Lawless, and the respondent's counsel will seize on this fact to vindicate their client from any malice in his proceedings. Let us fairly state the case; Judge Peck had delivered and promulgated to the world an elaborate Opinion, in a test case, in which he had discussed very many most important principles, involving the title to a vast amount of property; he had taken unusual pains and bestowed great labor to perfect his Opinion, and to impart to it every ornament of which a judicial opinion is susceptible. That Opinion was to come in review before the learned Judges of the Supreme Court of the United States; that it might make its due impression there, no pains had been spared; it had been viewed in its gestation both by Judge Peck and his friend Judge Wash with extreme delight; and finally it was launched forth, with high expectations that it might procure for its author a niche in the temple of fame, or a judgeship in a superior court. In these full-blown hopes, Mr. Lawless, in a short analysis, rudely denuded this Opinion of all its ornaments and trappings, and presented it to the public in its mere bones and muscles, laying bare its deformities and errors, truly as we say, falsely as the Judge says. Could anything be more provoking to a vain and a proud man, thus to see all his anticipated honors at once blasted and humbled in the dust? The history of the human mind in all ages and in all countries teaches one uniform lesson. That nonconformity to cherished opinions and more especially open rebellion against such opinions, beget disgust, antipathy and hate. An author, let us suppose him a divine, gives to the world, after great examination and labor, his opinions on certain essential points of theology. He is reviewed, roughly handled, and contradicted, if not exposed. Mark the manner of his reply. A holy indignation seizes on his mind, and he betrays it in angry invective, which to a dispassionate reader savors very much of malice. Have we not all seen scenes like this? and yet perhaps these combatants never saw each other's faces. What then generated these angry and malevolent feelings, but that wounded pride, which is incident to human nature?

This same nonconformity to standard opinions has deluged the world with blood. Change our institutions, and give predominance and power to any one religious sect over all others, and we should speedily see the spirit of intolerance let loose, and the most abominable tyranny exercised over men's thoughts. It is idle then to suppose, that Mr. Lawless' article, innocent and harmless as it is, was not enough to beget deep hate in Judge Peck's mind towards him; whether it did or not, it is for this court to say, upon a review of all the facts and circumstances.

But whilst the advocates of Judge Peck lay great stress on the fact, that the

relations between him and Mr. Lawless were amicable previous to the proceedings against him ; they insist, and Judge Peck insisted throughout his proceedings, and he seemed to take it for granted, that Mr. Lawless in writing the article was guilty both of misrepresentation and malice. Now, what could have induced a change of feeling on the part of Mr. Lawless towards Judge Peck? It may be answered, his decision against Mr. Lawless' clients, the Soularis; and that thereby his hopes and expectations of great gain were disappointed and frustrated. It is perfectly certain that neither of the parties intended to be concluded, by the decision of Judge Peck : the great value of the property in contest, and the intrinsic difficulties of the causes, rendered it certain that the party against whom the decisions was made would appeal to the Supreme Court. Could Mr. Lawless think that Judge Peck's Opinion would have an undue weight with the appellate court? The questions involved were new and intricate, and it would have been folly to have supposed, that an Opinion in the District Court would have weighed a feather. Mr. Lawless then could have had no malicious intention in writing his article ; and he could have had no inducements to misrepresent the Opinion. He wrote the article to keep up the spirit of his clients, and to prevent them selling their claims to adventurers and speculators. And yet in the face of all these considerations, Judge Peck, from the very commencement of his summary proceedings down to this day, attributes to Mr. Lawless the worst and most malicious motives, against truth and reason; whilst he himself is to be held up to this court as perfectly free from passion, malice or any bad designs, in inflicting upon Mr. Lawless the most cruel and degrading punishment, contrary to law, contrary to the constitution and the dictates of justice.

I have, Mr. President, performed my duty and placed before this high court the views of this case which an impartial and attentive consideration have suggested to my mind. The respondent is an entire stranger to me, and it is impossible that I can be prejudiced against him otherwise than by the demerits of his conduct towards Mr. Lawless. It depends entirely on this court, whether one of the judges of our land, shall, under color of his office, trample with impunity on his fellow citizens against law and without mercy. And allow me, Sir, to express my gratification, for the patient hearing which has been extended to me.

The Court then adjourned till 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Tuesday, January 18.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

The Hon. CHARLES A. WICKLIFFE, one of the managers, addressed the court, in behalf of the United States, as follows:—

Mr. President,—To appear before this high tribunal as the organ of the House of Representatives, and in the name of the people of the United States, to demand your judgment against one of their judicial functionaries for a high misdemeanor in office, an offence no less than the violation of the constitution of his country, and the illegal, arbitrary and oppressive imprisonment of his fellow citizen under color of law, is calculated to embarrass advocates more skilled than he who now has the honor of addressing you.

I feel on this occasion an additional cause of embarrassment, owing to the position I occupy in this debate. You have heard already two of my associate managers, (Mr. McDuffie and Mr. Spencer,) the one in presenting the case to you, the other in summing up the evidence. They have left to me, in the field

of argument, a barren harvest to glean. I cannot hope to be interesting. I will endeavor, however, not to be fatiguing to the court. I shall confine myself within the line of strict duty, to the question before the Senate, the guilt or innocence of the respondent. I will not consent to try the case of Soulard: the validity of his claims is now pending before another tribunal, where it will receive justice, if justice has not heretofore been accorded it. I shall not stop to count the number of acres of public domain saved to the Union, arrested from the grasp of dishonest speculation, or wrongfully withheld from the honest proprietors by the Opinion of Judge Peck, pronounced in the District Court of Missouri. With these questions this impeachment has nothing to do; nor shall I be instrumental in presenting topics of discussion before this court, which are, in my humble judgment, wholly irrelevant to the question you have to decide.

There has been something said in the evidence, as well as in the response of the Judge, in reference to the length of time this charge has been permitted to sleep, before it has assumed the present character, not as a substantive ground of defence, I admit, but with a view to produce an impression on the mind of this honorable Court, that other than public considerations have prompted this proceeding. What is the state of fact? In 1826 this outrage upon the constitution and the liberty of the citizen was committed by the Judge. At the ensuing session of Congress, the injured and aggrieved man presented his memorial to the only power competent to take cognizance of the offence. It was referred to the Committee of the Judiciary, at the head of which was a distinguished member of this court. The committee, as the record speaks, requested to be discharged from the consideration of the subject. At the next and succeeding session, nothing appears to have been done upon this subject by the House of Representatives. At the session of 1828-9, the memorial of Mr. Lawless was again submitted to Congress. This was a short and busy session, and it is within my own personal knowledge, that the petition and papers were not examined by the Judiciary Committee. At the last session, another reference of this subject was made to the Judiciary Committee, when it received a patient, impartial, and unprejudiced examination, which resulted in the impeachment now before you. This, sir, has been the culpable delay of this proceeding. We are told by the respondent that this subject had been investigated "by the Committee on the Judiciary, in 1826-7, the Chairman * of which is among the most distinguished legal characters in the United States," (I would say the most distinguished,) and that the committee had decided there was no cause of impeachment, no offence committed by him. I would oppose to this circumstance the judgment of the House of Representatives in voting the impeachment. Neither fact however is worth anything in the formation of your judgments upon the question of guilt.

Mr. President: those who have opposed this impeachment, and the counsel of the respondent, have denounced it as an attack, a vital stab aimed at the independence of the judiciary. I will not admit that there exists in this nation a warmer or more decided advocate for the independence of the judiciary than the humble individual who now addresses you. I look to that department of our government as the city of refuge to the weak, defenceless, and oppressed. Upon its purity, integrity, and intelligence, depend the best hopes of the citizen; and to preserve those, sir, you must call to its aid the affections and confidence of the people. If you permit the judiciary to usurp power, to oppress the weak, you will render it odious, you will make it an engine of tyranny, destroy all public confidence in it, weaken the affections of the people, and then indeed may we be alarmed for the independence and integrity of our courts.

It is not necessary to preserve the independence of the judiciary, in the legitimate sense of that word, that the judges should be permitted to exercise arbitrary and despotic power with impunity. The independence of your judges or

* Hon. Daniel Webster, of Massachusetts.

your judiciary, does not consist in the language of the parchment by which they hold their offices ; and their integrity, and purity, and "authority," if you please, will not be preserved in this free government, by holding them irresponsible for offences such as I hope to prove, by the evidence in this cause, the respondent has committed. The judges, like other functionaries of this government, must be held responsible for their official conduct. They are the servants of the people, who will look into their judicial acts and hold them responsible for malfeasance in office ; and when guilt is manifested, if the constitutional securities for the office are found hostile to the administration of public justice, another and easier remedy will be provided by the good sense of the community. It has been well said by a distinguished man, that we should not be imposed upon by names in this country. Give any human being judicial power for life, and annex to the exercise of it the kingly maxim that "he can do no wrong," you may call him judge or justice, no matter what is the appellation, and you transform him into a despot, regardless of all law but his sovereign will and pleasure.

Mr. President : I do not know that it will be contended by the counsel for the respondent, as it has been on a former impeachment before the Senate of the United States, with great ability and apparent confidence, "*that a judge cannot be impeached for any offence which is not indictable ; that the constitution declares the judges shall be removed from office by impeachment for treason, bribery, and other high crimes and misdemeanors ;*" consequently as nothing less than the commission of some offence which may be punishable by indictment, presentment, or information, comes within the known interpretation of the terms "high crimes or misdemeanors," no act, judicial or otherwise, unless indictable, is impeachable.

I do not agree with this interpretation of the constitution ; and will therefore present you rather the analysis of an argument, than any argument itself upon this subject, leaving the duty of more enlarged discussion to be performed by my colleagues, if this point shall be seriously contended for in the defence.

By the third article of the constitution of the United States, it is declared that the Judges of the Supreme and Inferior Courts shall hold their office *during good behavior*.

I maintain the proposition, that any official act committed or omitted by the judge, which is a violation of the condition upon which he holds his office, is an impeachable offence under the constitution.

The power of impeachment is, by the 1st article of the constitution, exclusively vested in the House of Representatives, and it can only be exerted against public functionaries ; and the Senate of the United States have the sole power to try all impeachments.

The 7th clause of the 3d section of the above article, declares that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States ; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law."

The framers of the constitution wisely limited the punishment which this court may award, fixing a point *beyond* which you cannot go ; but leaving you in the exercise of a sound discretion to make it less than removal from office. They were governed by equal wisdom when they left the official delinquent to answer personally to the offended laws of the State in which he had committed any crime or misdemeanor against their injunctions.

The offence for which an officer may be impeached, might not, in the judgment of his triers, (though deserving punishment,) require the infliction of the severer punishment, that of removal from and disqualification for office. It might not deserve both of these penalties, perhaps neither ; a reprimand, a temporary suspension of his functions and salary, might, in particular cases, be a punishment equal to the official misdemeanor.

If nothing else had been said in this constitution upon the subject of impeachment, who would doubt of the plenitude of power, the nature of the punishment, or the objects upon which Congress could exercise it? But, sir, the members of the convention, as if solemnly impressed with the danger to the judiciary and other departments of the government, resulting from the humanity and mercy of the members of the tribunal for the trial of impeachment; or, perhaps, looking at the dark side of the picture of human nature, believed it possible that the time might come, when a judge or other officer, though stained with the foul crime of treason and bribery, or other high crimes and misdemeanors, would find favor in the sympathies, or cover in the bad passions of his triers, who would blush, however, to pronounce him not guilty in the face of conclusive evidence; but who would, nevertheless, diminish the punishment under the discretionary power in the 1st article, and leave the traitor or convicted felon to disgrace the judicial ermine or official robe. To guard against this possible state of the case, (and, thank God, I regard it only as a possible state of things in this happy country,) the members of the convention intended, by the 6th section of the 2d article, to declare what shall be the punishment to be awarded by the court of impeachment for the enumerated offences of treason, bribery, and other high crimes and misdemeanors; hence they declared that "the President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." This language is imperative; it leaves you no discretion; you cannot stop short of removal from office; you cannot exceed it.

If the construction of the constitution which was contended for in the impeachment to which I have referred, be the true reading of the instrument, and it shall be decided that no offence, no conduct of an officer, unless it be a high crime and misdemeanor, within the technical meaning of these terms, and punishable by some known and existing criminal law, is impeachable, what would be the condition of our government, and especially the judicial department? No matter what was the conduct of a judge in or out of court, if he kept himself without the pains and penalties enacted for the punishment of treason, felony, and vice, in the most degraded of civil society,—no power exists to strip him of the judicial character which he degraded. He would, covered with disgrace and immorality, smile with contempt at your power, and shield himself under the imputed ignorance of the members of the convention.

A few cases will, I think, suffice to prove the fallacy of such a construction of the constitution. Suppose a judge, who is bound to open his court at stated periods for the trial of causes; he fulfils the letter of the law, opens his court at the regular stated terms, but as regularly adjourns, and refuses to hear and decide the causes pending in court. This, sir, would be no indictable offence under any law; yet I am inclined to believe this court would remove him from office for official misconduct, for misbehavior in office, a forfeiture of the condition upon which he held his commission.

Suppose a judge, under the influence of political feeling, (and I wish they were always exempt from it,) shall award to his favorite a new trial, in an important cause, against known law, would this be an indictable offence under any code of laws in force in this government?

Suppose a judge shall forget the dignity which belongs to the station he fills, and to disregard that decorum which should ever regulate the conduct of a judge, in and out of court, shall, while in court, take advantage of his situation, and labor for two hours in pouring forth his abuse and vituperation upon a respectable and unoffending citizen, whom he has dragged before him by the strong arm of usurped power,—in what court would you file your indictment against him, for a high misdemeanor?

I could extend this illustration further, but lest I might be supposed guilty of putting the very case of the respondent, I will desist.

Take the case of the President of the United States. Suppose him base

enough or foolish enough, if you please, to refuse his sanction to any and every act which Congress may pass. This is a power which, according to the constitution, he can exercise. Will it be contended that he could be indicted for it, as a misdemeanor, in any court, State or Federal? Yet where is the man who would hesitate to remove him from office by impeachment? If one of the heads of a department shall so far forget the obligations of his official duty, as to direct his power and patronage, not to the promotion of the welfare of the country, but with the known and avowed purpose of his own personal or political aggrandizement, who would think of finding an indictment in a criminal court of justice against him? Yet who would not remove him from office by impeachment?

If precedent is to have any authority in this court, I consider the question settled by the Senate of the United States, in the trial of Judge Pickering, of New Hampshire. The principal charge exhibited against him, was a disregard of a plain statute of the United States, which makes it the duty of a District Court, before restoration of goods libelled for a violation of the revenue laws of the United States, to the claimant in court, to take from him bond and security to return the goods or to perform the judgment of the court. Upon this charge the Senate found him guilty and removed him from office. He was also charged with intemperance, which, though a misdemeanor, has never been denominated or regarded by the laws of any country a "high misdemeanor."

Mr. President: I shall now proceed to prove Judge Peck guilty of the offence charged in the article of impeachment; and if I do this, I shall leave the law and the punishment to be judged of and measured by this court.

I propose to maintain before this honorable court—first, that admitting the publication of Mr. Lawless, signed "A Citizen," to be a false and malicious misrepresentation of the published Opinion of Judge Peck, it was not a contempt of court, and the District Court of Missouri, as such, had no jurisdiction, power, or authority, to punish it as such.

Secondly, That if the court had power to punish as for a contempt, any false and malicious misrepresentation of a published opinion of the judge of that court, after the cause had been finally determined, then no contempt, in fact, was committed; and the punishment inflicted upon Lawless was a wanton, wicked, and cruel exercise of power, by which an innocent man was imprisoned, attempted to be degraded, and in fact deprived of the lawful exercise of his profession, necessary to the support of himself and family.

In order to determine the question of jurisdiction in the District Court, it will be necessary to present a distinct view of the facts of this case, divested of all those extraneous matters, which, according to my humble judgment, have no connexion with, and should have no influence upon the question under consideration. I mean the facts charged against Lawless, for which he was imprisoned and suspended from practice by this Judge. When you shall see those facts plainly stated, I think I may confidently assert the position, that no unprejudiced man would hazard his reputation as a jurist in saying, that no offence punishable by any law, written or unwritten, in any court, civil or criminal, has been committed by Lawless.

In November, 1825, Judge Peck, as Judge of the District Court of Missouri, pronounced his final decree in the case of Soulard's heirs *vs.* the United States. The complainants appealed from his decision to the Supreme Court of the United States, where the case is still pending. This decree is in evidence before you. Soulard's heirs and their counsel, Col. Lawless, submitted without murmur to the decree, and respectfully pursued the course pointed out by law to correct the errors in it, if any had been committed.

In March, 1826, a long publication, purporting to be an Opinion of Judge Peck in the Soulard case, made its appearance in a newspaper published in St. Louis. About eight days after, Mr. Lawless, over the signature of "A Citizen," made a publication, in which he, in respectful language, points out what seemed to him some of the errors, as well of fact as of doctrine, assumed by the Judge in

that published argument, in support of the Opinion and decree theretofore pronounced, and enrolled in a cause finally adjudicated. I may challenge the most fastidious to point to one sentence, line, or word in that publication, which breathes the slightest innuendo against the integrity or motives of the Judge.

We have proved in this case that the Opinion published is not the same as the one delivered in court; I refer to the testimony of Mr. Hempstead and Mr. Pettis. If Mr. Pettis proved any fact in this cause which was susceptible of clear comprehension, it was that the Opinion which he heard in court was not in all respects like that which was published. With the motives which influenced the Judge to publish this Opinion, or rather essay in support of an Opinion delivered in court, I have nothing to do. They may have been honest; I have no doubt official vanity had its full share. He has avowed his object to have been to operate upon other causes depending before his court, and claims not in suit. He says his wish was to induce the holders of unconfirmed Spanish claims to abandon them. Mr. Lawless was the counsel for most of those claimants. It was not only his undoubted right, but his duty, if he believed the Opinion of Judge Peck to have been founded in error and calculated to injure the claims of his clients, to make the publication he did, with the views avowed by him before this court.

The next thing we hear of this Judge, is at the opening of his court in May, 1826, with a newspaper in his hand; and among his first official acts is an inquiry made of the District Attorney, if he knew who was the editor of the newspaper in which was published the article signed "A Citizen." No man in St. Louis then doubted, nor did Judge Peck doubt as to the real author of the piece signed "A Citizen." True, he could not act on his own convictions in this instance, though it seems he acted upon rumor and general report as to the bad character of these Spanish claims. Mr. Lawless gave him the name of the editor, and proceedings were instituted, which eventuated in the commencement of the prosecution of Mr. Lawless, his imprisonment and expulsion from the bar.

I have thus, Mr. President, attempted to give you a fair and unvarnished statement of the facts. May I not demand of each honorable member of this court to answer me and say upon his conscience, what offence, what crime has Luke E. Lawless committed against the law of the land? Is this act punishable by attachment, admitting the publication to be false? My learned associate (Judge Spencer,) has conclusively shown that the courts of the United States possess no common law jurisdiction. Indeed, that is a question not open for argument; it is *res adjudicata*, 7th Cranch, 32, U. S. vs. Hudson, &c.

If the courts of the United States possess the power to punish contempts by attachment, they do not derive it from the common law. They must derive the power from one of two sources. The judiciary act of 1789, or from what has been denominated in this debate and elsewhere, that inherent power of self-protection which belongs of right to every political body.

The words of the judiciary act are, that the said courts shall "have power to punish by fine and imprisonment all contempts of authority *in any cause or hearing before the same.*"

This the Supreme Court, in the case of Anderson and Dunn, consider as a legislative declaration, that punishment for a contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment. The act itself by the terms, is confined to causes depending in courts; it does not recognize, certainly does not give, the power to the courts of the United States to send their attachment into the country and drag the citizen before a judge to be fined and imprisoned for speaking truly, or falsely, or disrespectfully of some judicial opinion theretofore pronounced in a cause decided, and no longer within their cognizance.

If neither the common law, nor the statute, gave to the Judge the power to punish in this case as for contempt, whence does he derive it?

The respondent's counsel has informed us that he rests his defence for the exercise of this power, upon the following grounds :

1. Immemorial precedent.
2. Upon the power which is inherent in all courts of justice.
3. Upon the exercise of a similar power by the courts of the several States.

This, may it please the court, is a new source for federal jurisdiction in the courts of the nation. This is claiming for the federal judiciary what its champions have not heretofore claimed. This third source of power need only to be stated ; for in its statement is contained its refutation.

4. Admit the Judge did usurp this power in violation of the liberty of the citizen, in utter disregard of his constitutional guarantees, imprison him, deprive him of the means of support, without a trial by jury, according to the principles of the constitution, and the established forms of law ; yet if the Judge *believed* he was in the honest exercise of judicial power, no such misdemeanor as is charged against him had been committed. These, Mr. President, if I mistake not, are substantially the positions assumed by the respondent's counsel in presenting his defence to you.

Sir, I do not assent to this doctrine to the full extent claimed by the counsel. If a good or a bad man shall act as judge, if he shall mistake the plain letter of the constitution, violate law, usurp power, and invade the liberty of the citizen, I would infer a vicious motive ; I would not infer ignorance or honesty in preference. To illustrate my position, if we shall fix upon Judge Peck in this case a palpable violation of the constitution, an usurpation of power by which a citizen was oppressed and imprisoned, the law infers a bad motive ; it is then imposed upon the Judge to prove by testimony that his motives were good, were honest. Were I his judge, he would not escape in such a case by any formal protestation of good motive in his response ; he would not escape by presenting as a peace-offering to the violated majesty of the law of his country, the number of acres of public domain he has saved to the nation by this act of high-handed tyranny. Nor should he wash himself of his guilt by real or affected tears in the presence of the court. I would require higher evidence of good and honest motive, before I could excuse a judge for so flagrant an outrage upon the constitution of his country, and the rights of his fellow man.

Mr. President : I will, with the respondent's counsel, explore the whole field of the common law, the great fountain from which this power is said to flow, and challenge them to the production of one single adjudged case in any book of authority, either in England or America, in which it has been decided by any court, that it is a contempt punishable by attachment, fine, and imprisonment, to speak, write, or publish a criticism, true or false, upon the published opinion of the court, after the cause had been finally decided.

The gentleman's immemorial precedent will fail him, if he confines his researches to the period of enlightened jurisprudence in England. If he will consult the dark and bloody pages of the Star Chamber, he may find instances of cruelty and outrage, which will serve him as a precedent. He may there find patriots and statesmen imprisoned and murdered without crime, at the will and pleasure of corrupt ministers and unfeeling despots ; but nowhere else. In the ruins of that engine of despotism was buried this abominable doctrine now for the first time, and I hope for the last, asserted in this land of liberty and law.

This doctrine of contempt of courts had its origin in the earliest history of English jurisprudence, and was punished summarily, because of the fact that the king himself was present in court, sat with his judges, and dispensed justice to his subjects, and every act of insult was treated as a contempt of the authority of the king, who was regarded as the great fountain of justice. After the prerogatives, or rather the powers of the king became to be parcelled out, and courts of justice established upon a more permanent basis, this power to punish

for a contempt was continued upon the fiction that the king was always supposed to be present in his courts.

As the science of the law advanced, this crime of contempt received its classification by the writers upon criminal law, and we now find it divided, treated, and punished under the following heads :

1. Contempts against the king's palace.
2. Contempts against the king's courts of justice.
3. Contempts against the king's prerogative.
4. Contempts against his government.
5. Contempts against his title.

It is contempts against courts of justice only with which we have to do in this country, and the power to punish which we have alone adopted in the States which have adopted the common law.

What is a contempt of court, punishable summarily at common law ? This question I propose to answer by a reference to the common law itself. By the most approved authors upon criminal law, we are informed, that all affrays, assaults, breaches of the peace in the presence and hearing of the court, insulting language, contumelious behavior to a judge sitting in court, attempts to bribe the witnesses or jurors in a cause, all attempts to prevent an attorney or officer of the court from the discharge of his duty as such, disobedience to an order or process of the court, are contempts of courts, and punishable as such. All acts which obstruct the due administration of justice, positively, fall within the crime of contempt.

It has been decided, I admit, that a man may be indicted, (not attached,) for slandering a judge in his judicial character : 2 Roll. Abridgt. 73.

Formerly, a man might be indicted for a reflection on the sentence or opinion of court as being a slander upon the justice of the nation ; 1 Roll. 245.

But it is now the settled law, that a man cannot be indicted, much less attached, for any scandalous or contemptuous words spoken of, or to a judge, not being in the actual execution of his office. For instance, "to say that such a justice is a fool, a numskull, for making such a warrant, and does not understand the law," &c. is not indictable or punishable criminally. In support of this doctrine, I refer to Hob. 202 ; Moor. 319 ; 1 Vents 10 ; 2 Salk. 698 ; 1 Keble 494 ; 1 Hawkins 64.

Mr. President : it would thus appear, if authorities and laws be resorted to, that Judge Peck, as Judge of the District Court of Missouri, by statute or by common law possessed no power to punish Mr. Lawless for the alleged offence. There is, however, another source of power indicated, and that is called an inherent power which belongs to and is coeval with every court of justice. What then is this inherent power, its extent, its limits ? What are the subjects of its jurisdiction ? We admit, Sir, that every body politic must necessarily have the power to protect itself when in the actual exercise of its functions ; to remove all who attempt by force, noise, or otherwise, to hinder, delay, or impede its operations, by calling to its aid the means necessary to remove the impediment which is attempted to be thrown in the way of the discharge of the functions with which it has been clothed by the people ; and when we admit this principle, do we not admit all and everything which can be claimed by authority, or sustained upon principle ? This right of self-protection, of self-preservation, in public bodies, can be claimed or maintained upon no other principle than the same power is claimed and exercised by individuals. If a man assaults me, I have a right, in self-defence, to resist ; if he invade my domicil, I have a right to remove him. If this inherent power is extended beyond what I think are its plain and palpable limits, to what offence in society may it not reach ? It will be made to overreach the constitution, and then every man will hold the tenure of his liberty, profession, and property, at the discretion of every petty judicial tyrant who may scourge and curse society with his outrages upon the liberty and property of the citizen.

The Judge is the party aggrieved; he is the accuser, the witness, the law-maker, the juror, judge, and executioner. He settles the law, prescribes the punishment, and enforces it upon his unhappy victim, from which there is no appeal, and for which there is no corrective power. This horrid principle, and its consequences, are exemplified in this very case; for the Judge refused to sign a bill of exceptions, because, from his omnipotent judgment there was no appeal. Sir, this power cannot exist in any body of magistracy in this government of law. It is at war with the very spirit and genius of our free constitution.

Mr. President: I put the question then directly to the Senate of the United States, is it unlawful to punish a citizen for a decent and respectful criticism upon the judicial opinion of any court after the case has been finally decided? If such publication be unlawful, can the offender be punished by attachment at the will of the judge who feels himself aggrieved, or his legal vanity insulted? This is the question at last you have to decide. The judgment of this court, the highest in the nation, will be looked to as binding authority; and it is meet that all the consequences of an affirmance, should be weighed before that opinion is pronounced.

My poor imagination will not enable me at this time to paint in their true colors, the evils which will follow in the wake of such a decision. We have been laboring under a most fatal delusion upon the subject of our constitutional rights and guarantees, if we are to be told by this high tribunal, that there is one department of our government, the judiciary, exempt from free, open, and public investigation; one department which can shield itself from responsibility to public opinion, by this impenetrable armor, the power to punish for contempts. Principles may be rivetted upon us, the chains of our slavery forged by the opinions of our courts, and the voice of complaint silenced; the language of indignant remonstrance stifled, and the press, that great palladium of public and private liberty, completely muzzled. I cannot believe that a doctrine so frightful, so destructive to the best hopes of the patriot, will find favor in this honorable court.

I have said, Mr. President, that no case can be found in which it has been decided by any respectable court, that a publication in a newspaper or otherwise, of a criticism upon the published opinion of a court, after final decision, has been treated and punished as a contempt of court. The respondent has referred us to the cases upon which he relies as justifying him in this exercise of power. I have looked into these cases, and state to this court that in every one of them, English and American, where the proceeding was for a contempt of court, a cause was pending in court, in which it was alleged and charged the contempt was committed. I will not detain this court by a reference to, or a particular examination of them, at this time.

The only authority which I shall read to the court, is the report of two cases decided in the District Court of Pennsylvania; a report of which is contained in the Portfolio of 1801. The first case is *Hollingsworth vs. Duane*. Hollingsworth had instituted suit against Duane, in the District Court of the United States, for a libel. A plea in abatement to the jurisdiction of the court was filed; verdict was rendered for the plaintiff upon the matter of fact only which was pleaded in abatement. By agreement the other matters consequent upon this finding were left open for further proceedings. Duane made a publication reflecting upon the court, the jury, and the adverse party, after the finding of the jury, and before any other steps had been taken. He was attached for a contempt. His defence was placed upon the ground distinctly before the court that the publication related to no cause depending before the court; that it referred solely and exclusively to the issue which had been tried. The court sustained the proceeding distinctly upon the ground that the publication related to a case pending in court. It is nowhere insinuated by the counsel, or the court,

that the proceeding against Duane for the contempt, could or would have been sustained if no cause had been pending. [Here the case was read.]

The case of Caleb B. Wayne in the same book, was for a publication relating to the same cause, but upon the other side of it, abusing Duane. After the court had fined and imprisoned Duane, Mr. Dallas and Mr. Dickerson, who had been counsel for Duane, moved for a rule against Wayne. I suppose they wished to see if the rule would "work both ways." Their motion was granted, and a rule issued against Wayne, but it was entitled the United States *vs.* Wayne, and a motion was made to quash it upon the ground that it should have been entitled Hollingsworth *vs.* Duane. Numerous authorities were cited to prove that in every case for a contempt of court of the character charged, the first process must be in the name of the suit pending, and not of the government; and this motion was sustained by the court. [Here the case was read.]

These cases, Mr. President, clearly illustrate the position that a cause must be pending, or a publication reflecting upon the judgment of the court, the conduct of the parties, jurors, or witnesses, is no contempt of court. I could swell this list, and fatigue the Senate with cases illustrative of the same principle; but it would unnecessarily consume their time.

It is contended that the respondent is protected by the principle which we here admit, that there was a cause pending, not Soulard's, but other causes involving the same principles as were decided in that cause, and that in truth there was a case pending in court, therefore the publication signed "A Citizen," was a contempt of the District Court of Missouri. Is this in fact true, and does the consequence follow contended for? Soulard's case was then pending in the Supreme Court of the United States. If the publication signed "A Citizen" be a contempt of any court, it was, and must be, of that court in which the case was pending; for the reason assigned why publications relating to causes pending in court are contempts of court, is, that they tend, and are calculated to prejudice the tribunal in the decision of the cause, to deter the court from impartial action on the subject matter before it. This rule then would have subjected Lawless to an attachment for a contempt of the Supreme Court, before which the cause was then and is yet depending. Indeed, he is still liable to be punished by that court, if this doctrine of contempts be sound. His former conviction and punishment in the District Court of Missouri, would not be a good plea in bar to a proceeding by attachment in the Supreme Court, for publishing the article signed "A Citizen." We should then be presented with the strange spectacle of punishing twice for the same offence, a contempt of the District Court of Missouri, and also of the Supreme Court. This principle would require editors of newspapers, and all others who may feel it their duty or right to canvass the doctrines promulgated by a published judicial opinion, to possess not only omniscience but omnipresence in judicial science. How is a man to know, when he is about to speak, write, or publish anything at war with a judicial decision, that there is no other case in the same State upon the docket of one or more of the courts, depending upon the same principles of the one decided?

Every editor of a newspaper must not only be a lawyer, but he must be a lawyer in every court, comprehending the questions depending in each and every case in those courts. No matter what the case decided, or how long it may have been decided, if there be in *any* court a cause or causes pending, he is liable to be attached and punished by each and every court in which such causes are pending.

Sir, I would illustrate my idea by a reference to a state of facts which at this time exists. Ten or twelve years ago, the Supreme Court of the United States, in the case of Green and Biddle, decided a statute of Kentucky, called the occupying claimant law, unconstitutional. The whole State was convulsed and shocked at that opinion. Loud and bitter were the denunciations against it. Mr. President: I do not know but by speaking of that case here, that I may not be subjecting myself to the pains and penalties of the law of this Missouri

Judge ; perhaps I may be protected by the occasion and place, when I say it seems to me that that high tribunal erred "In the assumption of doctrine and fact" in that case. At this time, other cases are pending before that court, involving the same questions as were decided in the case of Green and Biddle : if a citizen of Kentucky were to publish a criticism (and there have been many published and spoken too) upon that opinion, he would be liable to be called before the court, and punished for a contempt of its authority. The publication, whether true or false, relating to a pending cause, does not change the law, though it might mitigate the punishment.

This latter ground is a mere subterfuge, an afterthought of the respondent. The rules against the printer and against Lawless, evidence clearly that the court did not proceed upon this ground that there was a pending cause in court upon which the publication was designed or calculated to operate. I shall therefore dismiss it from my further consideration.

The Judge himself has distinctly stated, in his address to the House of Representatives, pages 30 and 37, the grounds upon which he punished Lawless. It was, says he, "*for scandalizing the court.*"

Mr. President : I am here reminded of one authority relied upon by the respondent, which I have not before noticed, and which deserves a more minute examination, as it seems to be the leading case of the Judge. It is the case of the King *vs.* Almon, as it is found in a book containing the decisions and opinions of Chief Justice Wilmot. I have examined this case with attention, with a view to understand the facts as well as the opinions of the learned Judge ; for it is nothing but his opinion, found in the rubbish of his office after his death, and printed by his son, in a book to sell. It never was delivered in court, or even honored with a newspaper publication, in the life time of the Judge.

In 1776, the Attorney General moved the Court of King's Bench for a rule against Almon, as the publisher of a pamphlet or letter concerning libels, in which it was alleged the Court of King's Bench, and particularly the Chief Justice, Lord Mansfield, had been grossly libelled. At this time the proceedings of the King *vs.* Wilkes was pending in that court, and the letter of Almon also alluded to the proceedings of the court, and the conduct of the Judge in that proceeding.

This case then of Almon, if it be authority at all, was a proceeding for a contempt committed in a pending cause.

When this opinion of Judge Wilmot shall be more particularly examined by this court, I am inclined to believe that, with me, you will be led to the conclusion that this is one of those "immemorial precedents," from which the power to punish Lawless was derived ; and that Chief Justice Wilmot was one of those distinguished sages of the law, by whose light the Judge says he was guided.

Justice Wilmot, in this opinion, treats of contempt of courts under two heads ; 1st, contempts of the power of the court ; 2d, contempts of the authority of the court. By power, I understand him to mean the coercive action of the court upon persons or things within its cognizance. By the authority of the court, he says he means that deference and respect paid to courts and to their opinions, arising from a confidence in the justice and integrity of the tribunal, the homage and obedience rendered to the court. This I understand to be the idea which the respondent attaches to his own authority, as sole Judge of the District Court of Missouri.

Chief Justice Wilmot proceeds to maintain the power to punish for a contempt, publications reflecting upon the judges or their opinions, upon the plea of necessity—the tyrant's plea in every age. It is necessary, says this learned jurist, to exert this power to deter men from offering any indignities to courts of justice, and to preserve their LUSTRE AND DIGNITY. And this seems to be the opinion of Judge Peck, this Lord Chief Justice of Missouri !

Justice Wilmot says, "libelling the court, is imputing to the king a breach of

his coronation oath, in which he swears that he will administer justice to his people, &c. The courts derive their authority from the king ; and when they are libelled, the king is libelled." This, sir, is a miserable and contemptible fiction, a quibble by which to maintain a power in courts which did not belong to them. Nevertheless, Judge Peck still further runs the parallel between himself and his illustrious antitype in judicial usurpation. *He* tells us, by the documents before this court, "that he was justified in all that he did, from his sense of the indignity which had been offered to the court and to the United States, which that court represented !" This is not only a fiction, but, at this time of day, consummate vanity, not to say folly, in this District Judge. That Lawless had offered an indignity to the United States, because he dared to question the soundness of the opinion of one of its most inferior judges, is a position which can but excite the ridicule and contempt of every one who hears it stated.

Justice Wilnot proceeds, in further illustration of the principles upon which attachments are issued by courts for contempt. They are, says his Lordship, of a more enlarged and important nature. This power is necessary to keep a BLAZE OF GLORY around the judges and the courts, to deter the people from attempting to render them contemptible in the eyes of the public. These, Sir, are the abominable principles promulgated in this remnant of Justice Wilnot, which are invoked by the respondent to justify his conduct, to legalize this oppression of an American citizen. You are called upon to sanction the exercise of a power, that the judges of this country shall, by the terrors of the law, surround themselves with a blaze of glory. You are called upon to justify this dispenser of justice in a provincial court, for this high-handed act of insult and injury to the laws and to the citizen, in order that he may preserve his lustre and dignity, and surround his judicial majesty with a blaze of glory, to deter the people of Missouri from investigating his official conduct, or questioning his judicial infallibility.

I hope, for the sake of offended justice, for the sake of the violated constitution of my country, that the lustre and dignity, the blaze of glory which this gentleman has attempted to create for himself, at the expense of the liberty of the citizen, will be finally extinguished in the sober, but indignant judgment of this court.

Mr. President : I have thus attempted to demonstrate the first position which I advanced, that the District Court of Missouri had no jurisdiction to proceed by attachment against Mr. Lawless for a contempt of court, for the publication of the article signed "A Citizen."

I propose now to show, in the second place, that admitting the jurisdiction in the case stated, there was, in fact, no contempt, no misrepresentation of the Opinion of the Judge as published. I do not intend to fatigue the Senate with an elaborate investigation of the whole of the eighteen specifications. This cannot be necessary after what has been said by the manager, (Mr. McDuffie, who opened this impeachment,) and especially after the laborious and triumphant examination of Mr. Lawless, whose explanations, I am sure, must be satisfactory to this honorable court.

The publication of Mr. Lawless, when fairly read and impartially examined by a candid and unprejudiced man, cannot be construed into disrespect, either of the Judge as a man, or of his Opinion as a court. It imputes in terms, no corrupt or bad motives ; it insinuates no depravity of heart or uncommon frailty of intellect ; its language is decorous, respectful. If libellous ; if it be a wilful, malicious misrepresentation, these ingredients are matters of inference ; they do not appear upon the face of the publication, when compared with the Opinion. But I deny the correctness of this inference, and no man who was not under the influence of passion, or some worse feeling, would ever have construed or tortured this publication into a contempt of court.

I have, Mr. President, spent much time in the examination of the Opinion of the Judge, and the article published by Mr. Lawless, and my mind has arrived

at this conclusion : that everything which is ascribed to the Opinion by the article, and further, that the imputed assumptions were necessary to enable the Judge to pronounce the Opinion which he did in the case of Soulard.

The first article in the "Citizen" is in these words :

"That by the ordinance of 1754, a sub-delegate was prohibited from making a grant in consideration of services rendered or to be rendered."

Judge Peck admits, in his Opinion, pages 63 and 73, that the Lieutenant Governor of Upper Louisiana exercised the functions of sub-delegate. It is proved by the evidence in Soulard's case, by papers A. K. and L. in the appendix. The position is, that a sub-delegate (*i. e.* for Upper Louisiana,) was prohibited by the ordinance of 1754. What says the Judge upon that subject, page 66?

"If, then, this ordinance (1754) was to be made the basis upon which the right to confirmation in this case should be determined, the claim could not be confirmed on the ground that the concession was not made upon a sale for money, and at the reasonable value of the land; but was made in consideration of public services, a consideration unknown to the ordinance, except in the case of an informer as authorized in the 7th and 8th sections, where lands are authorized to be adjudged in moderate quantities to those who shall give information of them as being occupied without title. This is the only *species* of service for which this ordinance authorizes a concession. This is the only case in which a sub-delegate is made the judge of the value of services. He is not made a judge of the value of services of the nature of those upon which the concession in question is alleged to have been issued."

Page 63. Again: "Had the Lieutenant Governor of Upper Louisiana his appointment as sub-delegate from the Viceroy or President of the Audiencies? or had he a sub-delegation from one so appointed? It has been proved on behalf of the petitioners that he had not," &c.

The complaint is here made, that Mr. Lawless concealed the fact, that the Judge had decided the ordinance of Spain, of 1754, never to have been in force in Upper Louisiana. It is true he had so decided; but he decided further, that admitting it to have been in force then, if this ordinance was to be made the "basis" of the concession to Soulard, still the claim could not be sustained, because the sub-delegate or rather the Governor of Upper Louisiana performing the functions of a sub-delegate, was not appointed in the mode required by the ordinance of 1754; consequently, a sub-delegate in Upper Louisiana could not make a grant for services rendered, or for services which were to be rendered in consequence of the grant. He says, the consideration of public services was unknown to the ordinance. If the Lieutenant Governor as sub-delegate, derive no authority under the ordinance; if "the consideration of public services was unknown to the ordinance," the conclusion must be inevitable, that a sub-delegate in Upper Louisiana, was prohibited by that ordinance from granting land for public services rendered, or to be rendered.

The second specification, if possible, is still more palpable, in accordance not only with the spirit, but the very letter of the Opinion. It is in these words: "That a sub-delegate in Upper Louisiana, was not a sub-delegate as *contemplated* by the ordinance of 1754."

The plaintiff's counsel had contended in the argument and proved that the Lieutenant Governor of Upper Louisiana exercised the functions of sub-delegate: the Judge admitted it. He had also contended that the royal order of 1754 was in force in Upper Louisiana; the Judge in his Opinion responded whether it was in force or not, "according to this evidence, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the *contemplation* of the ordinance of 1754." I refer to the printed Opinion of the Judge, page 63. The only difference *here* is, Lawless used the terms "as contemplated;" the Judge used the words, "within the contemplation;" and this is the false, libellous, and malicious misrepresentation for which Lawless was imprisoned.

Mr. President: I shall, in the remainder of the articles to which the attention

of the Senate is invited, do no more than read the specification in Mr. Lawless' publication, and the words of the Opinion. I shall make no comment upon them, as I do not wish to detain the Senate longer than to-day, or insult their understanding by attempting to prove what must be self-evident.

The 6th specification is in these words: The Judge was in an error in assuming "That O'Reilly's regulations were, in their terms, applicable or ever were in fact applied to or published in Upper Louisiana."

The Opinion at page 68, reads—"It would appear that the policy apparent upon the face of O'Reilly's regulations extended itself to the province of Upper Louisiana." The regulations of O'Reilly were made for the entire province. "The Judge says he did not decide that O'Reilly's regulations were in *their terms* applicable to Upper Louisiana; but he decided that they were *made* for the *entire province*, Lower as well as Upper Louisiana. Will any member of the Senate point out to me the difference?"

In the 8th specification, Mr. Lawless said that the Judge assumed "that the limitation to a square league of grants to new settlers in Opalouzas, Attakapas, and Natchitoches, (in the 8th article of O'Reilly's regulations,) prohibits a larger grant in Upper Louisiana."

The Judge said, in his Opinion, at page 68, "upon what reason is it to be believed that the Governor General intended to authorize grants of land in Upper Louisiana upon principles different from those upon which grants were to be made in every other part of the province? Upon what reason were grants of land to be limited in quantity in Natchitoches, Attakapas, and Opalouzas, and unlimited in Upper Louisiana? And what policy dictated the limitation of grants in the latter places to 800 arpents, (which we find in the 9th and 10th sections of Gayoso's regulations and in the 1st section of the regulation of Morales,) if before these regulations there was no reason for limitation? Was not the extension of settlement and cultivation of soil as much to be encouraged by the distribution of land in Upper Louisiana, as elsewhere in the province? Why in Upper Louisiana should grants have been made without regard to the means of the cultivator, or without regard to any cultivation whatever, when these particulars were to be attended to with strictness in every other part of the province? The regulations of O'Reilly were made for the entire province. It would appear that the policy apparent in O'Reilly's regulations, did extend itself to the entire province of Upper Louisiana."

I pass on to the 11th specification. Lawless says it seemed to him the Judge erred in assuming, or deciding, if you please, "that though the regulations of Morales were not promulgated as law in Upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, he must be presumed, from the official station which he held, to have had notice of their terms."

What is the language of the Opinion upon this subject, at page 75? I will read it. "In answer to that portion of the argument on behalf of the petitioners which denies the force of law to the regulations of Morales in Upper Louisiana, for their supposed want of promulgation, it is only necessary to remark *that such a publication* is proved, as must have brought them to the knowledge of the ancestor of the petitioners. The official station which he held does not permit us to believe that he could have been ignorant of the forfeiture to be incurred by a failure on his part to comply with the commands contained in these laws. It is therefore unnecessary to decide, &c."

In page 20 of his response to the article of impeachment, he admits, in so many words, that he had decided the point as charged in the 11th article. Nevertheless, in the same paper, the Judge pronounces this specification to be a gross and palpable misrepresentation.

I shall notice but one more of these eighteen articles, and that is the thirteenth.

It had been contended by the counsel of Souldard, that the confirmation by the Governor General or Intendant, of concessions made by the Lieutenant Governor of Upper Louisiana, although not in conformity to the regulations of

O'Reilly, Gayoso, or Morales, furnished an inference in favor of the granting power of the Lieutenant Governor.

To this argument the Judge, in the Opinion, page 74, responded: "That the Governor General who exercised a legislative power, generally, and particularly for the distribution of land, should feel himself authorized to dispense with the observance of any of the provisions of his own laws, is not strange; such a dispensing power is incident to the legislative department of every government, &c." In relation to the deposition of the royal domain, the Governor General and the Intendant successively represented to some extent the power of the king."

You have here fairly stated, Mr. President, the argument of counsel, and the answer to it by the Judge. And what is his answer when translated into plain English? It is this, that, although the practice existed as contended for, and proved in the cause, it did not alter the question. He regarded it, and referred it to the exercise of a legislative power by the Governor General, to his representing to some extent the power of the king; consequently, it furnished no inference in favor of the power of the Lieutenant Governor to make concessions for services rendered. What says Mr. Lawless in his 13th specification? "That it seemed to him that the Judge erred in assuming that the complete titles produced to the court made by the Governor General or Intendant General, though based on incomplete titles, not conformable to the regulations of O'Reilly, Gayoso, or Morales, afford no inference in favor of the power of the Lieutenant Governor, from whom those incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees."

Is this a false, malicious misrepresentation of the Judge's Opinion upon this point? In his response in May last, he declared it to be such, when in February preceding, in his opinion pronounced in the case of Chouteau vs. United States, a copy of which is in evidence before you, the Judge admits that he had so decided in the case of Soulard, and that he erred in attributing this exercise of the power by the Governor General to his legislative powers, to his kingly prerogatives, and retracts the error, for the suggesting of which he had imprisoned Lawless, and suspended him from practice for eighteen months.

Mr. President: I will detain you no longer upon this branch of the subject. The whole eighteen articles are alike true, and clearly susceptible of demonstration. The managers who will succeed me, will supply any defects which may exist in the illustration which I have given of the verity of everything contained in the publication, adjudged by the court to be false, malicious, and libellous.

We arraign before you a Judge who has exerted a power to deprive a citizen of his liberty, for an alleged offence over which he had no jurisdiction, and if he had, he imposed a cruel and disgraceful punishment, under color of law, upon an innocent man, the Judge acting as accuser, witness, judge, and executioner. Do you require us to prove anything more? Does not the law infer an evil and wicked intent? Was he not under the dominion of bad passions, which propelled him to an act so at war with the constitution and laws of the land, and so destructive to the personal rights and liberty of the citizen?

The universal principle which pervades all the acts of human agency, is that from an illegal, oppressive and wrongful act, the law infers a bad motive. The man who slays his fellow man, in execution of an unlawful act, is guilty of murder, and the inference of law supplies the place of express malice.

Mr. President: If the managers in this case shall be held to the proof of bad motive and wicked intent of the Judge, in thus invading, under the color of law, the rights of a citizen, in my humble judgment that proof is abundant, is ample; and all that can be necessary is a fair and candid statement of the facts, to arrive at a conclusion unfavorable to the respondent.

The first circumstance to which I would call your attention, is that mass of evidence under which the table of your secretary now groans, introduced by

the respondent in this cause, to prove the immense amount of public domain which he has saved to the United States, from the lawless grasp of those unrighteous and fraudulent land claimants. He tells us, that to preserve the interest of the government, and the dignity and purity of the court from the peccations and contaminating influence of those claimants, it was necessary that he should surround himself with all the terrors of the law. He presents himself before you as the judicial champion of the endangered rights of the United States, counting the number of acres of land which you have gained by this act of his, and almost in direct terms offers to buy off his impeachment.

That I may not be charged with ascribing to him a motive which the evidence before the court does not warrant, I refer you to his own language, to which I can give no other interpretation.

Mr. Wirt. What do you refer to?

Mr. Wickliffe. I refer to the Judge's address to the House of Representatives, and will read the passage. "Judge Peck is perfectly aware of the purposes to be answered by his removal from office; and, therefore, is not at all surprised at the pertinacity with which it has been sought for the last four years. Whether these purposes are such as the interests of the United States call upon them to countenance, by ordering further proceedings in this case, is a question for others, not for Judge Peck."

What purposes, and what interests did he mean? The answer is plain. He means to tell the House of Representatives, that if I am removed those Spanish claimants will get their lands; and if they do, it will affect your interest, your pecuniary interest. If I am removed for this outrage upon the constitution, no other judge will be found pure, honest, and intelligent enough, to look these claimants in the face and decide against their claims.

I trust in God, that day is far distant, when an American Congress, when the Senate of the United States will be willing to barter the principles of the constitution for dirty acres of land. The principles of human liberty are too firmly fixed in the American bosom, too strongly secured by the safeguards which are placed around them, to countenance usurpation upon the rights of the humblest individual who treads the soil or breathes the atmosphere of the United States, because of pecuniary advantage to the government. The freedom of speech, freedom of the press, the personal liberty of the citizen, are worth more to the government than all her lands ten times told.

One other apology for this proceeding against Mr. Lawless is, that he is in the habit of insulting judicial tribunals, and treating them with disrespect.

Proof is attempted upon this point. Judge Carr, a Circuit Judge of Missouri, has been interrogated by the respondent. He is of opinion that Mr. Lawless' manner in court is unfortunate; that he enters upon the argument of his client's cause with great zeal and earnestness; that, on one occasion he was compelled to tell Mr. Lawless that unless he desisted, he would punish him. This distinguished jurist could not recollect the particular trial on which this occurred. His defect of memory upon this point, however, was supplied by another of defendant's witnesses, who stated it to have been on the trial of the unfortunate slave, the particulars of which we have from the judge himself. This judge had, by a decision which every tyro in the law would denounce as absurd and erroneous, permitted the confessions of a poor slave, extorted by the repeated torture of the lash, to be given in evidence to the jury, in consequence of which a poor, innocent, and friendless African was sentenced to corporeal punishment. Mr. Lawless was his counsel. He saw a human being without crime against law, by the ignorance or something worse of the judge, sentenced to severe punishment. As an advocate, as a man, how must he have felt? How would you have felt, placed in Mr. Lawless' situation? I can answer for myself. So help me God, it would have taken more than a threat from this judge to have silenced me. And forsooth because Mr. Lawless manifested some temper, and some indignation at the conduct of the judge on this occasion, he is a fit subject for

the vengeance of Judge Peck, whose judicial infallibility he had dared to question.

The respondent has raked porter-cellars for the private and friendly conversation of Mr. Lawless, who, smarting under a deep sense of the personal injury inflicted upon him by this cruel and unmerited punishment, is heard to exclaim that every man ought to feel his, Lawless's, case as his own; that he cared nothing about it then, for he had Peck where he wanted him. I quote the language of the witness. And, sir, is it criminal for a man who had been imprisoned, whose character had been assailed, whose standing as a lawyer had been degraded by the infamous sentence of a judge exercising usurped authority, to speak of it in the language of modest complaint? I say, with Lawless, every citizen ought to feel it to be his own case. There is great wisdom and public virtue in the remark quoted by my colleague, (Mr. McDuffie) that that government was the best which regarded an injury to the humblest of its citizens as an injury to the whole nation.

This honorable judge is not content with heaping upon Lawless, when he was led a prisoner before him, every epithet of vituperation and abuse, under the name of abused justice; and under the protection of its ermine, which he stained, he has pursued him through the House of Representatives to the bar of the Senate; and in every sentence of his response proclaims him a slanderer, a libeller, a foul calumniator, and makes the charge of perjury against Lawless, in his evidence before the Judiciary Committee. I have referred to these facts to exhibit the present state of exasperated and vindictive feeling of Judge Peck towards Mr. Lawless. They do manifest to my mind most clearly the temper of mind, the personal, vindictive motive with which the prosecution was got up against Mr. Lawless, and by which it was consummated.

Mr. President: if we confine our investigations to the facts and circumstances which belong to the procedure in court, we shall have much, very much—enough to prove that Judge Peck acted under the influence of passion, of intemperate and vindictive motives. We shall be satisfied that he was avenging, under color of law, that which he regarded as a personal injury and insult. The dignity of his court, the purity of the judicial tribunal, and the offended majesty of the law, were but the shallow and flimsy pretences for his conduct.

The respondent has proved that Mr. Lawless was a man of irritable temper, impatient of contradiction, particularly when deeply interested for his client in court. Judge Peck knew this. Now mark the deportment of the Judge upon the trial of the rule against the printer. Lawless had undertaken to appear as counsel for Foreman. No man can doubt for one moment that Peck believed that Lawless was the author of the "Citizen." No man can doubt, but the whole object of the proceeding against the printer was to reach Lawless, and that Peck had designed this at the first moment when he read the article. It was still possible that he might be baffled in this his desired object, unless by some act toward Lawless in court, he could irritate him, and cause him to commit some offence which would, *per se*, be a contempt, or disclose himself as the author of the publication.

The Judge is represented by his friends to be mild, placid, and patient on the bench generally.

When Lawless in his character of counsel is attempting to prove, that the publication was a fair and correct representation of the Opinion, it was the duty of the Judge to have heard him patiently, to have treated him respectfully. Did he do it? On the contrary, Lawless was interrupted at every step. In the course of these abrupt, rude, and I call them vulgar interruptions, Lawless was betrayed into an unconscious admission, that he was the author. The Judge was seen to smile. Ah, sir, believe me, it was that spirit for vindictive revenge that bade him smile. He had then the evidence in his possession; his course was taken, and his victim was in his power. This colloquy, of which Judge Wash speaks as having been invited by Mr. Lawless' manner of argument,

ensued, and what was that colloquy? When Mr. Lawless would point to a portion of the Opinion as sustaining his publication, after he had explicitly declared that the author of the "Citizen" had no intention to misrepresent the Opinion of the Court, he was told, and repeatedly told, "but, sir, you say so and so in your publication;" "this is false;" "that is libellous;" "this is a wilful misrepresentation;" "that is calumnious." The placidity of this mild and amiable Judge began to leave him. Here he and Mr. Lawless changed characters. Lawless was mild, patient, and remarkably subdued; according to the evidence; the Judge was angry, impatient, and boisterous. Rely upon it, his object was to force Lawless to commit some act in the presence of the court, which would enable this infuriated Judge to inflict instant punishment. He was too impatient to wait for the *slow* progress of attachment. In this he was disappointed. Lawless sat down evidently embarrassed, unable to conclude his argument, and the Judge acted out the farce with the printer, delivered no Opinion upon the question against him; he reserved his phials of wrath to pour them out upon the devoted head of Lawless.

Lawless is brought into court to answer for this libel. He and his counsel appear. Foreman, the printer, had been discharged upon purging himself of the contempt. No anger, no passion, no excitement, or in the language of the Judge's witnesses, no animation extraordinary were exhibited by him at the close of the proceeding against the printer. When Mr. Magenis, the counsel of Lawless, was proceeding in opposition to the rule, to prove that the article signed "A Citizen," was a fair and true representation of the Opinion, he is stopped by the Judge and told, that the court had decided on the rule against the printer, the publication was false, was libellous, and he would not hear argument in behalf of Lawless upon that point. What right had the Judge to deny to Lawless, who had for the first time been put upon his trial, a hearing by himself and counsel upon the matters of fact which were in evidence? The Judge says he had decided that question against the printer. Lawless was no party in that trial, was not concluded by it, and could not be deprived legally of his constitutional right of being heard by his counsel, upon all the facts from which his guilt or innocence was to be deduced.

This point was, however, adjudged; yes, sir, and as it related to Lawless, was prejudged by his Honor, Judge Peck.

And I pray to be informed if he had not also decided the law of the case, the question of jurisdiction, and the question whether a publication in a newspaper concerning the published Opinion of the Court, delivered in a cause which had been finally decided, was or was not a contempt of court, upon the rule against Foreman? Why not also close the argument on these points? They were questions of law, not of fact; and, therefore, argument upon them might more appropriately have been forbidden. No, sir; his vanity could not sustain the insult, which he imagined was offered to it whenever this perfect and beautiful monument of judicial fame which he had erected to himself in the newspapers, was touched by the rude assaults of vulgar criticism, or the severer shocks of legal argument.

If the Judge had decided the question of fact before Lawless was put upon his trial, if he prohibited his counsel from proving the truth of his publication, for which he was then arraigned, why did his Honor, upon a question previously decided, not mooted at the bar, consume near two hours of his time, commenting upon the article, paragraph by paragraph, in a strain of unparalleled abuse and personal vituperation of Mr. Lawless? He had not so demeaned himself on the case of the printer; the facts had all been then discussed, and he had decided them. They had not again been referred to in the argument of Mr. Lawless' case. Sir, the impartial and candid mind will have no difficulty in responding to these questions. The Judge sought this occasion to empty the accumulations of his gall upon an unoffending man, upon a man who had committed the flagitious outrage of questioning, in respectful language, the infallibility of this Missouri Lord Chief Justice.

The language employed on the occasion by the respondent, was unbecoming the solemnity of a court, and disgraceful to the judicial ermine. His whole deportment evinces clearly the motive to have been unworthy, selfish, and vindictive. It was personal revenge, and not the dignified vindication of the laws of the land which prompted the proceeding, and marked its character throughout. It was a base and disgraceful prostitution of the purposes of justice, to subserve the worst and meanest of passions, offended vanity.

I will neither detain nor insult the Senate with reciting the language of the Judge on this occasion. It is in evidence before you, and I leave you to make your own comments upon it.

The declaration by the Judge, that if the author of the "Citizen" lived in China, he would have his house blackened as emblematical of the baseness of his heart, needs no comment from me. He dared not adopt his Chinese law into his criminal code; he could not cause Lawless' house to be blackened; he, nevertheless, strove to blacken his reputation, by consigning him to the walls of a jail, the usual receptacle of common felons, and this to preserve the dignity and authority of this august tribunal, this petty district court of a province. Would not a pecuniary fine have answered all the purposes? Was the offence so great; was the libel so apparent; was the public or private character of Lawless so debased, that nothing but incarceration in the common jail would appease the angry vengeance of this judicial despot; for nothing else can I call him or ever consider him? Sir, I know not the gallant bearing of the citizens so well in other sections of the Union as I do in the west. There is not a high-minded or an honorable man in the valley of the Mississippi who would not sooner submit to the decision of a court taking half his estate, nay all, than to a judgment which consigns him to imprisonment in the walls of the common felon's jail. Startle not then at the strong language used by my colleague, (Mr. McDuffie,) expressing to you his indignation at this outrage; it is the language of all who love freedom for freedom's sake.

Mr. President: censure is attributed to Mr. Lawless for not answering interrogatories, and thereby purging himself of the contempt, and this is relied upon by the respondent as a new and substantive contempt, certainly a great aggravation of his original contempt. Suffice it to say, that it is the privilege and right of the defendant in attachment to demand interrogatories, that he may answer; it is not the right of the court to propound them, and compel an answer. Lawless declined the exercise of his privilege, and he has given you under oath the reasons for it. He believed that Judge Peck had no jurisdiction; that he had prejudged the case; and that he was determined to do no act which might be construed into an acquiescence in the course which the court had determined to pursue.

When asked by the Judge if he desired interrogatories to be filed, he replied promptly, decidedly, and firmly, "that he did not, and if they were filed, he should not answer them." His manner and attitude, Judge Carr thinks, were disrespectful to the court, and his tone of voice was offensive. It had not that soft melody in it I suppose which sycophants use when courting power; or that humble cadence when cowards bend to oppression's sway.

Of what was Lawless to purge himself?—Judge Peck had decided the publication to be libellous, false, and malicious; he had decided that he had jurisdiction; Lawless was admitted to be the author; he had stated to the court that the author had no design or intention to misrepresent the Opinion of the Court. Why then tender interrogatories? Why add this insult, by affecting to pursue the forms of law? The Judge had been admonished by his friend, Bates, to desist. He promptly declares that his purpose was fixed, and nothing should prevent him from pursuing the course which his sense of duty pointed out. Lawless saw and knew from the first, that he had been selected as a victim to appease the indignation of his accuser, witness, judge, and executioner; and that a tame submission to answer interrogatories would but give the more solemn-

nity to this mock trial. And if he felt indignant at the offer, if he manifested it in his reply, it was nothing more than a man "who had the honor of being an Irishman," would feel and express. Yet for this act of gallant bearing against usurpation and tyranny, he was, in the eye of the Judge, guilty of a new and substantive contempt, certainly an aggravation of the one for which he was doomed to suffer. Had Lawless submitted himself to answer interrogatories, he would not deserve the protection of the constitution of his adopted country; he would have forfeited all the noble sympathies of his fellow-citizens; and have been, what he is not, a fit subject upon which offended judicial pride might seek its malignant vengeance. He would have dishonored and disgraced the country of his birth, and that of his adoption.

One other fact which must strike forcibly the mind of all, is the length of time for which Col. Lawless was suspended from practice in the District Court. From the evidence you learn the amount of business which had been entrusted to him professionally in that court. In less than eighteen months, certainly not more, the law under which that court took cognizance of land causes, expired. The suspension of Lawless is made to equal the time, if not to exceed it. Eighteen months certainly took him beyond the time when this court could exercise any judicial functions. Thus Lawless was deprived of the profits of his professional labor, and his clients' interest sacrificed. Was not the twentyfour hours of incarceration punishment enough? Did the Judge wish not only to disgrace the husband and father, but deprive the wife and child of their means of support for eighteen months, perhaps longer? The lawyer who shall be imprisoned, suspended from practice for eighteen months, and tamely submits to it, will find but little favor with the public when he attempts to resume his practice.

There is, sir, one other circumstance of no small magnitude in ascertaining the *quo animo* of this Judge, which deserves to be mentioned at this time. The Judge declares to you that in all that he did he was governed solely by a desire to preserve the dignity and purity of the court; that he punished Lawless because of a publication which related, and was calculated and intended to influence the Judge in the trial of the cases then pending in court. Where was this jealous vigilance for the purity of courts, this firm determination to put down all publications relating to controversies depending in his court, when his friend, Judge Lucas, his witness in this cause, a party in a cause pending in that court, (being a controversy about Spanish claims,) and one of the counsel adverse to the claim of Soulard, published an essay in a newspaper pending Soulard's case? In which publication he denounced the whole of these Spanish claims as fraudulent and void. The Judge knew of this publication; why did he not attach Mr. Lucas for a contempt? This was a publication by Lucas calculated and intended to influence the public mind against claims whilst they were pending in court. Indeed, it formed, I have no doubt, the text book for the Judge's Opinion; yet no proceeding is instituted against Lucas. No harm is done; this was a fair exercise of the freedom of the press. After the case of Soulard was decided, the Opinion of the Judge published, and, to use the respondent's own language, which was "an extinguisher of the last hopes of these land claimants," the publication of Lawless, mild and respectful in its language, appeared. It questioned the soundness of some of the assumptions in that Opinion. Then it was that the lustre and dignity of this august judge was insulted, and the pure streams of justice polluted by this foul calumny upon the intellect, not the motive of the Judge—then it was that the blaze of glory so essential to the judicial character was dimmed. The two cases differ in this: Mr. Lucas' publication was before the cause was decided; Lawless' was after. Mr. Lucas' was adverse to the claims, and met the approbation of the Judge. Mr. Lawless' was favorable to the claims, and met the disapprobation of his Honor. Mr. Lucas escaped punishment; Lawless did not.

Mr. Wirt inquired of *Mr. Wickliffe* where was the publication of *Mr. Lucas*?

Mr. Wickliffe. It is, or a part thereof, in evidence in this cause; is copied

into the printed argument of Lawless, from which I will read it for the information of the court and counsel. [Here the same was read.]

Mr. Wirt. But where is the original paper?

Mr. Wickliffe. Gone, I presume, where Lawless' would have gone long since, but for the conduct of Judge Peck, out of existence and from the memory of its author.

Mr. President: I have attempted to prove to you that there existed no power or jurisdiction in the District Court of Missouri, to punish this act of Lawless by attachment. I think I have demonstrated that the publication of Lawless was true, and the laws of the land permitted it.

I have endeavored to tear the veil from the conduct of the Judge, and expose his motives in their true light. You will now decide whether he be a fit person to lecture the Congress of the United States, and teach the nation the value of the liberty of the press, and what that liberty is? He tells you that "it has been from time immemorial, and ever will be the perpetual decantatum on the lips of all libellers." He tells you that it must be restrained. Courts of justice have their ideas of the true liberty of the press. Liberty of the press, of speech, and the trial by jury, are but the hobbies of political demagogues. That its licentiousness must be restrained, &c. What power, let me ask, shall attempt this daring deed? The executive cannot do it; Congress has no power; both combined dare not do it. They once tried it, but went unto that politician who shall again attempt to muzzle the press, or regulate its exercise. The attempt to do it has recently cost one monarch his throne, and lighted all Europe in a blaze—and we are now gravely debating in the American Senate, the power of a district judge over the freedom of the press. If the press is to be regulated, and its licentiousness restrained, and its abuses punished, in the name of high Heaven, confide the power anywhere sooner than in the unbridled discretion of a weak or wicked judge. The liberty of the press, whatever it is, is protected by the constitution, is connected with the liberty of man, and must not be and cannot be separated from it.

Its tendency to licentiousness is better borne than any attempts to restrain it by any department of this government. I have been taught to believe that the freedom of the press "consists in the right to publish truth with impunity, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals." It is better to bear with its licentiousness than endanger its usefulness by legislative or judicial restraints. It is the sensitive plant in the garden of freedom; touch it by the rude hand of power, and it withers. How much has it done for human liberty in this hemisphere? What is it now doing for the cause of freedom in the other? What country can be enslaved with a free press? Tyrants of every grade fall and cower beneath its powers; and shall we permit a district judge, the least of our judicial corps, to fetter and bind this mighty engine of freedom in his judicial meshes? With a press free and unshackled, my country will retain her freedom. With it she has nothing to dread from the rude assaults of power, or the more slow approaches of corruption. Usurpation by force or fraud will meet exposure, so long as we protect the freedom of the press.

Mr. President: if, by any calamity, this sacred charter, the constitution of my country, should be doomed to the devouring flame, and power were given me to save one clause, and but one, I would rescue from the consuming element, *that* which declares "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech and of the press." This clause preserved, the rest, Phoenix-like, would spring into full life.

If this clause in the constitution be preserved and administered according to its letter and its spirit by all, and upon every department of this government, at that last sad hour, when bid by Him who rules all things, to take leave of the fleeting concerns of time, I shall die, cheered with the hope that my beloved country has no cause to dread the oppressor's rule or the tyrant's scourge.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Wednesday, January 19.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

Mr. MEREDITH, one of the respondent's counsel, addressed the court in behalf of the respondent, as follows :—

An honorable manager, in one of those incidental debates, which have so frequently arisen in the progress of this case, took occasion to speak, with an emphasis that all may remember, OF THE TREMENDOUS POWER OF IMPEACHMENT.

Yes, Mr. President, it is a tremendous power! If we turn to the country where it may be said to have originated,—if we look at its exhibitions in English history, we shall find many a melancholy instance, to illustrate and confirm the truth of this remark. We may there see, how often, in the blindness of its fury, it has confounded the innocent with the guilty. We may number the illustrious victims it has offered up, to the relentless spirit of persecution. We may measure the blood, the patriot blood it has poured out in libations to the demon of party. We shall find recorded there, examples of oppression, of cruelty and foul injustice, which will force us to exclaim, It is indeed a tremendous power!

In our own country too,—our own free and blessed country, with all the benignity of her institutions, with all the guards thrown about the citizen, by her constitution and her laws, this power of impeachment is still a tremendous power. It speaks in the name, and with the awful voice, of the people. It can call to its assistance all the influence and authority of the government. It can enlist in its service the most powerful and exalted talents,—learning, and genius, and eloquence, quickened and inspired by the love of fame. It can kindle around its victim a blaze of passion and prejudice, which may dim for awhile the sober light of truth. And though it cannot peril that victim's life, it can put him to as exquisite torture as any which the executioner has power to inflict. Day after day, it can hold him up a public spectacle for scorn and detestation. A single, unprotected man,—it can pour down upon his head, taunt, and ridicule, and reproach, and bid him submit in reverential silence. Or should he give token of a wounded spirit, it can tell him, that the tear which anguish forces to the eye, is the tear of dissimulation. Yes, Mr. President, seeing what we have seen, and hearing what we have heard, too truly may it be said, that here, even here, the power of impeachment is a fearful, an inexorable, a tremendous power. But in this unequal conflict, there is yet strong hope for the innocent. Suffer for awhile he may, all the agony of these tortures; but his accusers are not his judges. In the tribunal that is to pass on him, he sees the collected justice, as well as the collected wisdom, of his country. That tribunal, he knows, will banish from its presence, all prejudice and false excitement, and turning from those delusive lights which serve only to mislead and betray, will look at the great question of guilt and innocence, by the steady and unclouded light of truth. Holding up this light, then, though perhaps with a presumptuous hand, before this honorable Court, I ask you to follow me in the argument that I purpose to offer, and which I trust I shall be enabled to offer as becomes the dignity of the subject, no less than the dignity of the tribunal before which it is to be discussed.

The propositions which I shall attempt to establish, are these;—

1st. That the District Court of Missouri has a general power to punish contempts.

2d. That the case of Luke E. Lawless was a case of contempt proper for the exercise of this power.

3d. That having adjudged it a contempt, the court was legally warranted in punishing it as it was punished.

And lastly, that if the court had not the power, or if having it, the case was

not a case proper for its application, still the act did not proceed from the evil and malicious intention with which it is charged, and which it is absolutely necessary should have accompanied it, to constitute the guilt of an impeachable offence.

1. When I say that the District Court of Missouri has a general power to punish contempts, I am of course understood to speak of that court, in common with all the judicial tribunals of the general government, and of them all I assert, that their power in this respect, is co-extensive with the power of all other courts. It would be strange if it were not so, it would indeed be strange, if the courts of the United States, at least equal in dignity and authority, and exercising in many respects a larger and more important jurisdiction, should be found to possess a less extensive power, to enforce obedience and command respect, than the State judicatures.

And yet this is the position assumed by the honorable managers who opened the impeachment, and strenuously defended by his two honorable associates, who have followed in the discussion. The argument perhaps will lose nothing of its force, by being thus syllogistically repeated. The courts of the United States possess no common law jurisdiction in criminal cases: the power of punishing contempts, as it is exercised in England, and by our State tribunals, is a criminal power derived from the common law; and therefore, the courts of the United States can have no jurisdiction of contempts, except that which is expressly given to them by legislative enactment.

If this be so, if we are to look to the statute book as the sole source of the authority of the federal tribunals in regard to contempts, then indeed it is true, as it has been said, that their power is greatly inferior to that of the State courts. But can it be believed, that Congress meant to circumscribe it within the narrow limits of the act of 1789? By that act, power is given to punish by fine or imprisonment all contempts of authority *in any pending cause or hearing*. If this is to be construed as a limitation upon the general power;—if no other contempts can be summarily punished, than those committed in relation to a cause actually depending at the time, it is easy to imagine a variety of cases, cases too of the most ordinary occurrence, in which the administration of justice might be disturbed, and interrupted, and its highest officers insulted, with impunity. But such illustrations are unnecessary. It is manifest that the whole of the 17th section of this act is supererogatory. It enumerates powers, which, without its aid, would undoubtedly have belonged to the courts created by the law, as incidents to the general grant of judicial power; as for example, the right to grant new trials, and to administer oaths and affirmations. The power to punish contempts, is as necessarily incidental to the general grant, as either of these. If they could have been exercised without the aid of this section, so might the former. And in enumerating it with them, the language used is that of description merely, and not of restriction. Such is the construction given to this section by the Supreme Court of the United States in the celebrated case of Anderson against Dunn, reported in 6th Wheaton, 227. Speaking of the general power of all courts, “to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution,” they add, “it is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend. On the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.”

It is unnecessary to dwell upon this authority, because the honorable manager, as if fearing the extent of his own conclusion, has himself admitted, that independent of, and notwithstanding this act of Congress, the courts of the United States have a rightful power to punish contempts of particular descriptions, and especially those which in any manner obstruct or impede the course of justice. But this power, he adds, unlike the general power claimed by the English courts, and those of many of the States, is not derived from the common law, but stands upon the dangerous principle of necessity. Now without advertising to the generality of the exception, let me for a moment inquire on what authority it is made? Why is the right of punishing one class of contempts deduced from the common law, and that of another class from necessity? Why, looking as the honorable manager seems to look, to the punishment as the test, does he call that a criminal power which inflicts fine and imprisonment upon one contempt, because it does so inflict it, and that not a criminal power, which punishes another contempt precisely in the same manner? If, for example, an individual, by a gross misrepresentation of a judicial opinion, in a particular case, attempts to weaken the public confidence, and impair the authority of the court,—or seeks to influence the public mind in favor of undecided causes depending upon the same facts or principles;—if such an individual is punished by fine or imprisonment as for a contempt, it is, says the honorable manager, the exercise of a common law criminal power, and therefore in a court of the United States, a glaring and monstrous usurpation. But if another individual shall speak disparagingly of the same opinion in the presence of the court,—or interrupt its proceedings in any other manner, even for a single moment, and for this contempt he is punished by fine or imprisonment, or both, this is not the exercise of a criminal power derived from the common law, but stands altogether upon the ground of necessity. Is it not as necessary, let me ask, to keep the streams of justice pure and undefiled, as it is to prevent their obstruction? Is it not quite as necessary to preserve the authority of courts in the confidence and respect of the community, as to protect them from momentary disorders, which are removed with the individual who causes them, and which can produce no lasting or dangerous effects upon the administration of public justice? Why inflict punishment summarily in the one case, and in the other wait the dilatory movement of an indictment, giving to the libeller only a better chance of effecting his purpose? There can be no foundation in reason or authority for the exception. Independently of legislative grant or restriction, the power in every supposable case flows from the source, and reaches to the same extent.

That source, Mr. President, is not the common law. The right to punish contempts is the right of self-defence; it is the power of courts to preserve their own existence, and to make that existence a blessing, not a curse to the people;—it is a power to vindicate the dignity and authority of the laws, to secure their administration from disobedience, and their ministers from insult. It is a power, therefore, coeval with the first foundation and institution of courts; it results from the first principles of judicial establishments, because it is necessarily incident to the exercise of their most ordinary functions. It is a power that sprung into being with the creation of the first judicial tribunal, and is found to exist, wherever there are courts of justice, in every civilized country, whether governed by the common law, the civil law, or any other particular code.

If this be so, and it is the language of every authority upon the subject, it is useless to inquire how far, and under what qualification, the position assumed by the honorable manager is maintainable, that the courts of the United States have no cognizance of crimes and offences at common law. In the very case, indeed, in which it is supposed that the Supreme Court have settled this doctrine, and decided, that the Circuit Courts of the United States cannot exercise a common law jurisdiction in criminal cases, they are careful to distinguish cases of contempt, as not within the prohibition. I refer to the case of the

United States *vs.* Hudson and Goodwin, 7 Cranch 32, in which the opinion is thus concluded;—"Certain implied powers must necessarily result to our courts of justice from the nature of their institution. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess power not immediately derived from statute. But all exercise of criminal jurisdiction in common law cases, we are of opinion is not within their implied power." It follows, therefore, that in the opinion of the Supreme Court, the punishment of a contempt is not the exercise of a criminal jurisdiction in a common law case.

If it were, how does it happen that we find it constantly exercised by courts that have confessedly no criminal jurisdiction? In what courts are offences of this kind more frequently punished, than in Courts of Chancery? In Admiralty Courts also,—in Orphan Courts, proceeding according to the rules of the civil law,—in Appellate Courts, none of which pretend to a criminal jurisdiction, this power is constantly exerted. It would be in vain to look for the precedent of an indictment for a contempt; and yet a criminal offence, not indictable, but still tried and punished by a court having no criminal jurisdiction, are the strange anomalies with which the argument on the other side has to contend.

Again, Mr. President, if this be the exercise of a criminal jurisdiction derived from the common law, from what source do legislative bodies derive it? Are they, either in England or in this country, vested with common law criminal jurisdiction? Yet both in England and this country they exercise the power as broadly and unquestionably as Courts of Judicature. Do they look to the common law for it? No:—they consider it as an implied, inherent power in all legislative bodies;—as necessary to their usefulness, nay to their very existence, and as undoubtedly belonging to them as to courts of justice. Speaking of this power as one of the privileges of Parliament, Lord Ellenborough, in the great case of *Burdett against Abbot* (14 East's Reports, 137) says, "that it seems at all times to have been, and necessarily must be inherent in the two houses, independent of any precedent." "The right to protect themselves against injuries and affronts offered to the aggregate body," he adds, "is an essential right necessarily inherent in the supreme legislature of the kingdom. The right of self-protection implies as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument, that the House of Commons must be and is authorized to remove any immediate obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection; it must also have the power of protecting itself from insult and indignity, wherever offered, by punishing those who offer it. Can the High Court of Parliament, or either of the two houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two houses of Parliament in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavors to resort to the place where Parliament is holden? And would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and insult? The necessity of the case,

therefore, would, upon principles of natural reason, seem to require, that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shows that they have in fact possessed and used."

In this case, the contempt consisted in a publication which the House of Commons adjudged to be libellous. Throughout the whole argument of counsel and of court, it is assumed, that such a publication, reflecting upon the proceedings of a court of justice, would be treated and punished as a contempt; and it is argued that if the right existed in courts, it existed in the same degree in the House of Commons; that as it regarded both, it stood precisely upon the same ground; that the power at all times had been, and necessarily must be inherent in courts of justice and legislative bodies; that it was an essential right, necessary to the effectual exercise of their important functions; and that their degradation and disparagement in the estimation of the public by means of false and libellous publications, was as much an impediment to the efficient discharge of these functions, as any actual obstruction whatever.

In this country, too, Mr. President, the same power has been frequently exercised by the Legislatures of the State and General Governments, and asserted upon the same great conservative principle. I pass by the various cases which have occurred in the State Legislatures, and confine myself to the instances in which this power has been exercised by Congress.

Looking to the journal of the House of Representatives, I find that in 1795, two persons, whose names were Whitney and Randall, were punished by imprisonment for a contempt upon that body, in offering a bribe to one or more of its members. There seems to have been no question in this case, either as to the power, or the propriety of exercising it.

In 1796, the House of Representatives treated a challenge, sent to one of its members, as a contempt.

In 1800, the editor of the *Aurora*, a newspaper printed in Philadelphia, was attached by the Senate of the United States for a contempt in publishing a "false, scandalous, malicious and defamatory libel" upon that body. I need not detail the proceedings in that case: they are upon your journals. But although it met with strenuous and powerful opposition at every stage, there appears to have been no doubt suggested of the power to punish a libellous publication upon either of the two Houses of Congress, as a contempt. The editor having failed to appear upon the attachment, a warrant was issued for his commitment, but the session ended before it was served, and the proceeding was not afterwards revived.

Again, Sir, in 1818 the House of Representatives once more exercised this power, in the celebrated case of John Anderson, who was charged with having offered a bribe to one of the members. A warrant was issued, and the party was arrested and detained in custody during the whole investigation, which terminated in his being adjudged guilty of the contempt.

Now let me remind the honorable managers, that these were all cases of *consequential* contempts. In neither of them, was there any actual obstruction to the course of legislative action, but the power exerted was the power of protection from insult and indignity. From whence was it derived? From the common law? was it regarded as a criminal power known only to the common law? If it had been, Congress would undoubtedly not have exercised it. No, Sir; look into the debates upon the last case, and you will find that those who vindicated the authority of the House, placed it where Lord Ellenborough placed it; that they claimed it as an inherent power,—a power vested, by their very creation, in all legislative bodies, as it was admitted on all sides to be vested in every judicial tribunal. This case of Anderson, as it will be recollected, gave rise to much discussion in the House. By many, the power was disclaimed, except in cases of contempts committed in the presence of the House. But the attempt thus to limit the doctrine utterly failed. One of the

honorable managers, with his accustomed strength and eloquence, triumphantly vindicated the authority of Congress, and proves conclusively, that the right did not stop at mere self protection ; that it was not limited to the removal of actual impediments to the due course of legislative proceeding ; but that it extended to every case affecting the purity and dignity of the legislative body. He described it as "a moral, legal power," resident as well in legislative as judicial tribunals, and depending for its exercise on discretion. He took the broad ground, and succeeded in maintaining it, by a majority of more than two to one.

This case did not end here. Anderson brought an action for false imprisonment against the sergeant at arms of the House of Representatives. He pleaded as his justification the Speaker's warrant ; and the great question of the authority of that House to punish contempts as breaches of privilege, was considered upon a writ of error, by the Supreme Court. One of the honorable managers [Mr. Spencer] has said, that the question then discussed, was purposely narrowed down by the pleadings, to a case of *direct* contempt. It is true that the counsel for the defendant, advertng to the special plea, which did not set out the particular circumstances constituting the offence, seem to have considered it unnecessary to resort to the doctrine of *consequential* contempts. But the court reviewed the whole subject, and vindicated the power of the House, not only as it regarded offences committed in its immediate presence, but those also, which, as in the case they were then considering, reflected upon the dignity and purity of the body, wherever perpetrated. From whence did they deduce this power ? They admitted that it was not to be found in express terms, in any article of the constitution, nor in the general grant of judicial or criminal power, but they decided, that it existed in all legislative bodies by implication from the powers expressly granted, to the same extent, and upon the same principles, that it was universally acknowledged to belong to judicial tribunals. In other words, that it was an inherent power, essentially necessary to the legislature as well as to courts of justice, and without which they must inevitably sink into utter contempt and inefficiency.

We have then legislative and judicial authority for repudiating the notion that this is a common law criminal power ; or that the right to punish one species of contempts is inherent, and therefore may be exercised, while the right to punish another is derived from the common law, and therefore is prohibited to the courts of the United States. There is no such distinction, nor is there any necessity for it.

With these precedents on the file, I confess, Sir, that I was a little surprised to hear it asserted by one of the honorable managers, that the respondent had exercised in this case, a power denied to all other public functionaries. It has never been denied to the legislative department of the government ; but on the contrary, as I have shown, has been repeatedly exercised to its utmost extent by both houses of Congress. It never has been claimed for the executive. It has indeed been asserted by the soundest constitutional lawyers, that the power of protecting not only the executive, but all the other officers of the government, from insult or violence, though nowhere given in express terms, is still one of those implied powers, which Congress may fairly exercise. But until thus exerted ; until called into action by the legislative voice, it lies dormant with many other powers both express and implied. It is true, Sir, that it has been once acted upon, in the memorable sedition law, to which the honorable manager has so often adverted. I am not called upon to maintain the policy or wisdom of that law ; it may have been an ill-timed and imprudent measure. But why is it upon this occasion so often referred to ? Is it to illustrate the temper of the people of this country ? Is it to prove, that they desire to see the high and responsible officers of the government exposed to every species of insult and indignity, without the means of redress ? Is this the temper of the people of the United States, Mr. President ? Was this the reason of their op-

position to the sedition law? What were the objects of that law? It gave to the courts of the United States jurisdiction in cases of libel against certain officers of the government. How stood the law of libel at that day? The English law of libel was then the law of this land; the sedition act ameliorated that doctrine; it allowed the truth to be given in evidence in justification, and made the jury the judges of the whole question of law and fact. And yet it was condemned by public opinion. Why? Because it was considered as intended not for the support of the government, but for the support of a political party. Sir, I deny that any fair inference can be drawn of the real feeling and opinion of the people of this country upon this subject, from the reception which this law then met with. The opposition which it excited was the opposition of party spirit, heated to an intensity of violence, that I trust will never again be witnessed. To prove this, to show that there is no such reckless indifference for the reputation and dignity of public men in this country, let it be remembered, that the law expired with the party who had made it, in 1800. Four years afterwards an indictment was found in the Supreme Court of the State of New York against a printer by the name of Crosswell, for a libel against the President of the United States. How was that case tried, Sir? By the mild, just and humane provisions of the sedition law? No; by the stern and rigid principles of the common law. The defendant was denied the privilege of giving the truth in evidence as a justification. The jury were told that they were the judges only of the fact of publication, not of the intention with which the libel was written.

[Here Mr. Spencer, one of the managers, begged leave to make an explanatory statement. I had the honor, he observed, to be at that time Attorney General of the State of New York, and the indictment was preferred at my instance. On its coming in, I tendered in writing to the defendant the liberty to take out commissions and examine witnesses in any part of the United States. They neglected to avail themselves of this permission, and not a single witness was produced. When the trial was moved at the Court of Oyer and Terminer, an application was made to put off the trial, but not on the fact of the written tender. The presiding judge very injudiciously said, "if witnesses were here, I would not hear them." But it never was intended to deny to the defendant, the liberty of giving the truth in evidence.

Mr. Meredith resumed.]

I thank the honorable manager for his explanation. I spoke of course from the printed report of this case given to the profession as it was said, "by a person of great legal eminence, on whose accuracy and judgment the utmost reliance" might be "placed." I have the book before me, Mr. President, from which it appears, that an application was made by the defendant at the circuit to put off the trial of the cause on affidavit stating the absence of a witness, by whom he expected to be able to prove *the truth of the charge* set forth in the indictment. This application was refused, and I presume it was then that the "injudicious remark," quoted by the manager, fell from the judge. The judge charged the jury, that the law laid down in the case of the Dean of St. Asaph, (as reported in a note in 3 Term Rep. 428) was the law of the State of New York; that it was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication was true, or false, or malicious; that the only questions for their decision were, first, whether the defendant was the publisher, and second, as to the truth of the inuendoes. If they were satisfied on these two points, it was their duty to find him guilty. A motion was made for a new trial, and argued before the Supreme Court; and in the summary of the argument of the Attorney General and his associate counsel, I find that after objecting to the sufficiency of the affidavit, they contended that "if the witness had been present, his testimony could not have been received, because the law is well settled, that on an indictment for a libel, the truth cannot be given in evidence; and this rule of law," it is added, "rests upon the most solemn grounds, notwithstanding the popular and captivating impression

of the contrary doctrine. The patriotism of the English nation has never considered it as hostile to their liberties ; and in England it is admitted, that personal rights and freedom of discussion are as well secured and protected, as in any country." I quote the very language of the report in which the honorable manager is also stated to have further argued, that although the jury have the *power* in criminal cases to decide the law as well as the fact, there is a distinction between power and right, and that in the case of libel, the jury had no *right* to judge of the intent, because the intent is a question of law. These doctrines were combated by the illustrious Hamilton, in an argument of the most powerful and matchless eloquence ; and it is somewhat remarkable, that this much reprobated sedition act was invoked as declaratory, in that part of it, which allowed the truth to be given in evidence, and as a high authority of the sense of the nation, as to the antecedent law. Thus, Mr. President, do I find this case reported, and I have the more particularly referred to it, for the purpose of showing how far I was justified in the remarks interrupted by the honorable manager.

So much, then, Sir, for the sedition law, and the inference attempted to be drawn from it. I believe better things of the people of this country. I require stronger proof to convince me, that they can be gratified in seeing their public functionaries the prey to every vulgar libeller. This is not the freedom of the press as they understand it ; if it were, it should be bound down with fetters of iron. No, Sir, in the most violent times, they have put the seal of their reprobation upon this terrible liberty of the press, and have never demanded more than that, in which its true freedom consists, the right of publishing with impunity truth, with good motives and for justifiable ends, whether it respects government, magistracy or individuals.

The Court then adjourned till 12 o'clock to-morrow.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Thursday, January 20.

The managers, accompanied by the House of Representatives, attended.

James H. Peck, the respondent, and his counsel also attended.

Mr. MEREDITH, one of the respondent's counsel, further addressed the court in his behalf, as follows :

Having thus attempted to show that the courts of the United States have as general a power to punish contempts, as any other courts of record, I shall proceed to a review of those authorities, which I think will be found to maintain these two propositions ;—

1st, That a publication, whether true or false, calculated in any manner to influence the judicial decision of any pending case, is a contempt.

And, 2dly, that the misrepresentation of an opinion tending to impair the public confidence, either in the integrity or intelligence of a court, and thus to lessen its authority, is also a contempt.

Blackstone having divided contempts into *direct*, which openly insult or resist the powers of the courts, and *consequential*, which tend to create a general disregard of their authority, puts a number of examples under each head ;—“ Some of these,” he says, “ may arise in the face of the court, as by rude and contumelious behavior ; by obstinacy, perverseness or prevarication ; by breach of the peace, or any wilful disturbance whatever. Others in the absence of the party,” that is, not in the presence of the court, “ as by disobeying or treating with disrespect the king's writ, or the rules or process of the court ; by perverting such writ or process to the purposes of private malice, extortion or injustice ; by *speaking or writing contemptuously of the court or judges acting in their judicial capacity ; by printing false accounts (or even true ones without proper per-*

mission) of causes then depending in judgment; and by anything in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority is entirely lost among the people." (4 Black. Com. 285, 286.)

Both the propositions which I announced, are thus supported by the authority of this writer, with whom, Hawkins and other elementary authors will be found substantially to agree. But I pass at once to adjudged cases; and the first that I beg leave to refer to, is 2 Atkyns Ch. Rep. 469. The contempt complained of was a libel, published in two of the public newspapers, upon one of the parties to a chancery suit, and several of the witnesses. The libellous paper, after alluding in terms of respect and approbation to the decree of the chancellor, animadverted rather harshly upon the conduct of the two defendants, executors of the complainant's husband, and reflected also upon the witnesses, who were styled "affidavit men." Lord Hardwicke, of whose high judicial character it is needless to say more, than that for the period of twenty years, during which he presided in the court of chancery, not one of his decrees was reversed; who was by no means what is called a prerogative lawyer, but on all occasions stood between the power of the crown and the rights of the subject;—this learned, humane and upright magistrate, who illustrates the brightest period in the judicial history of England, thus speaks of the doctrine of contempts: "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced." After admitting that the publication must not only be a libel, but a contempt of the court, he goes on to prove by an examination of the paper, that though artfully written, it contains defamatory matter; and that though perfectly respectful to the court, it is highly offensive to parties and witnesses. He then observes, "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties, who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons, before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their character." After referring to several cases of contempts, he mentions the case of Captain Perry, who printed his brief before the cause came on. "There was nothing," says he "reflecting upon the court. The offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel. But the contempt of this court, was prejudicing the world with regard to the merits of the cause, before it was heard." In conclusion, declaring the publication to be a contempt, he committed the parties, according to the common order of the court in similar cases.

Upon this authority, it may be remarked in the first place, that the cause to which the libellous publication referred, seems to have been decided. The paper itself begins, "*This cause, which has been long depending in Chancery here, was at last determined on Wednesday the 3d instant, by the Right Honorable the Lord High Chancellor.*" But even supposing the decree to have been an interlocutory one, and the case still to have remained for further proceedings, it is clear that the pending of the suit did not affect the judgment of the court in the slightest degree. Of the three "sorts of contempt," spoken of by the chancellor, the two first may be committed without any reference to a pending cause. The court is more likely to be "scandalized," in relation to a case determined, than to one still in progress. And if the second class of contempts consists only in "the abuse of parties who are concerned in causes" *still depending*, they are included in the third sort, and two divisions would therefore have been all that

was necessary. The second class undoubtedly refers to parties in causes terminated. Let this be as it may, however, the doctrine of the case is clearly this, that all publications, defamatory of the court itself, or calculated to influence the public mind in questions to be judicially decided, are libellous contempts.

The next case, Mr. President, to which I beg leave to refer, is Pool against Sacheverel, reported in the 1st Peere Williams, 676. It was a bill brought touching the real and personal estate of one Sacheverel deceased, whose daughters by his first wife, the plaintiff Pool had married; and the question was, whether the defendant, who before had been Sacheverel's maid servant, was legally married to him. In the Spiritual Court it was adjudged to be a good marriage, and that sentence was affirmed by the delegates. But the daughter still claiming a moiety of the real estate, a trial at bar was directed by the chancellor in the Court of Common Pleas, where the marriage was again found. *Afterwards* the plaintiff's father, to whose fair and innocent intention the Lord Chancellor bore witness, published an advertisement in a newspaper, offering a reward to any person who would come forward and disprove the second marriage. It was moved that Pool should be committed for this contempt; and the matter being considered "of great moment, concerning on one side the liberty of the subject, and on the other the preservation of evidence from subornation and corruption," was referred by the Master of the Rolls to the Lord Chancellor, who having twice adjourned it, at length pronounced the advertisement to be a high contempt against "the justice of the court, and the justice of the nation," which, however strong the impressions or inclinations of the court, from its knowledge of the unblemished character of the individual, demanded punishment. And the party, though he offered to pay costs to the other side, was "for example's sake," ordered to stand committed.

It was among other objections, urged by the counsel for Pool, that "the matter was over:"—that by the sentence in the Spiritual Court, affirmed by the delegates, and by the subsequent trial at bar in the Common Pleas, the validity of the second marriage had been finally determined, and that, therefore, the advertisement could produce no effect upon the case. But the chancellor replies, "it is not over: for suppose on the reward offered, a dozen affidavits should come in, proving what is desired may be proved, this would probably induce the court to grant a new trial, and might overturn all the proceedings which have hitherto passed." Now undoubtedly at the time of publishing the advertisement, it could scarcely be said that there was a cause depending:—the question of marriage, three times solemnly decided, might well have been considered as at an end;—there was no motion for a new trial made or intended, and the advertisement standing by itself could have had no influence upon the decree to be pronounced. Yet the mere possibility that the rights of parties might in any event be prejudiced, was sufficient to render the publication a contempt. So long as there is the slightest chance of the cause being reviewed, it is considered as depending. Apply this authority, in this view of it, to the case of Souldard. At the time of the publication, it is true that the cause was depending upon appeal, before the Supreme Court of the United States; but the possibility of its being remanded to the District Court of Missouri, for further proceedings, was quite as strong, as that affidavits would come in, in consequence of the advertisement, and a new trial be moved for, in the case of Sacheverel.

The next authority which I adduce is a decision of Lord Chancellor Erskine in *Ex parte Jones*, 13 Vesey, p. 237. Whatever may have been his opinion upon the doctrine of contempts, while a popular leader in the House of Commons, for I have had no opportunity of reading his letter, referred to by one of the honorable managers yesterday, he in this case decided, that to defame the proceedings of a court, or to attempt to excite a public prejudice in favor of one side or the other, in a pending cause, or in any other manner to

“taint the source of justice,” was a contempt. Delivering his opinion many years afterwards as a member of the House of Lords on the writ of error in the case of *Burdett against Abbott*, he adverted to this case, and said, “I myself while I presided in the Court of Chancery, committed for a contempt in a case in which a pamphlet was sent to me, the object of which was by partial representation, and by flattering the judge, to procure a different species of judgment, from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a court or not, must, *like every other tribunal*, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again.”

I come next to the case of *Hollingsworth against Duane*, decided in 1801, by the Circuit Court of the United States for the third circuit under the then existing organization of the Federal Judiciary; in which court, William Tilghman, afterwards Chief Justice of Pennsylvania, presided;—a judge distinguished not more for the extent and variety of his legal acquirements, than for his probity, temper, candor and urbanity. The case was this. *Hollingsworth* had sued *Duane* for a libel. The defendant pleaded in abatement to the jurisdiction of the court, that he was not a subject of his Britannic Majesty, as described in the declaration, but a citizen of Pennsylvania. Upon this plea, followed by a replication and rejoinder, the only issue put to the jury was whether the defendant was an alien or a citizen. The jury found his alienage. There was a doubt at the bar, whether if the jury found for the plaintiff, they ought not to proceed to assess the damages; but it was agreed that no prejudice should arise from the omission, if that should turn out to be the correct course of proceeding. It being afterwards so ascertained upon authority, it was agreed that a *venire de novo* should issue, and that on such new trial, the question of alienage should be considered as settled by the former verdict, and the jury merely assess the damages. The day afterwards a publication appeared in the *Aurora*, of which the defendant was editor, referring exclusively to the trial upon the plea of citizenship, and reflecting indirectly upon the court, the plaintiff (*Hollingsworth*) and the jury. A rule was obtained on the defendant to show cause why an attachment should not issue against him for a contempt:—cause was shown, and the rule made absolute. Thereupon an attachment issued, and the defendant being brought in upon it, and declining to answer interrogatories, was ordered to be imprisoned for thirty days, and to pay the costs of the prosecution.

In arguing the rule to show cause, the counsel for the defendant contended that this summary mode of trial should never be resorted to, except in cases where it is *absolutely necessary* to the attainment of justice. He attempted to distinguish contempts, thus calling for the immediate interference of the court, and those which are merely *consequential*; and argued that it was not “essentially necessary to the ends of justice, that contemptuous words, or libellous publications, not any ways impeding the cause, and pronounced, or printed out of the view of the court, should be punished in this manner.” He contended, that although the law in this country seemed to be otherwise, and it appeared to be settled, that defamatory publications, pending a trial and relative to it, are punishable as contempts, yet that in the case he was considering, the publication was *after* the trial;—referred only to what had been done; anticipated nothing, and could have no influence in the future stages of the controversy. But notwithstanding this argument, the result of much research, and urged with great zeal and eloquence, the court *immediately* made the rule absolute. Yes, Sir, with “most indecent haste,” to use the language of one of the honorable managers [*Spencer*] as applied to the respondent, “without reposing on their pillows,—without giving themselves time to cool,” no sooner was the argument concluded, than the opinion was delivered. Let the language, too, which the court thought fit to use towards the defendant, be compared with that of the re-

spendent, which has so astonished and offended the judicial delicacy of the same honorable manager. "Each of the judges," says the report, "entered into the history of the trial, and pointed out *the gross falsities and unprincipled tendency of the publication.*" And again, "they were indeed sorry to find that any man *should be so lost to decency and truth*, as to publish to the world, and in the face of so many witnesses of the *falsity*, such flagrant calumnies upon the administration of justice." I beg, Sir, that these phrases, with those that may be noted in other cases subsequently to be examined, may be remembered, when we come to consider the language of the respondent, to which so much exception has been taken. Of the case itself, little need be said. It asserts the doctrine of contempts, to its fullest extent. The cause, it is true, was considered as still depending; but the publication will be found to relate exclusively to the matter decided by the first trial, and which, by agreement, was never afterwards to be brought in question. Yet still looking to the possible influence it might have upon the assessment of damages, or regarding it as "scandalizing the court," and reflecting upon the party, his witnesses, or the jurors, *in reference of course to the case decided*, it was held to be a contempt, and dealt with in the way I have mentioned.

The next, Mr. President, is a case of great celebrity,—a leading case upon this subject, which underwent legislative examination and approval, and was considered the settled law in Pennsylvania, until the passage of the act of assembly in relation to contempts in 1804, nearly twenty years afterwards. I allude to the case of Oswald, reported in 1 Dallas, 319, and determined very solemnly in the Supreme Court of Pennsylvania, when Thomas McKean was Chief Justice,—the most learned and distinguished lawyer of his time, and who, in the language of his successor, "could not be supposed to have favored constructions unfriendly to true liberty, or unwarranted by the genuine sense of the constitution."

Oswald, who was the editor of a newspaper, had admitted several anonymous pieces against Andrew Brown, the master of a female academy, for which Brown brought his action for a libel, in the Supreme Court. The day before the return day of the writ, Oswald published, under his own signature, an address to the public, in which, adverting to the suit instituted by Brown, he intimated an opinion that he had been urged to it by his (Oswald's) political enemies, among whom was Dr. Rush, "whose brother is a judge of the Supreme Court." After remarking that the doctrine of libels is a doctrine incompatible with law and liberty, and that Brown's action was a direct attack upon the rights of the press, he adds this paragraph, "Enemies I have had in the legal profession, and it may perhaps add to the hopes of *malignity*, that this action is instituted in the *Supreme Court of Pennsylvania*. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empanelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel on certain memorable occasions, and hope I never shall be a sufferer, let the blast of faction blow with all its furies."

Several days after the publication of this address, *Lewis* moved for a rule to show cause why an attachment should not issue—which was granted. On the return, the defendant moved that the rule might be enlarged, so as to give him a reasonable time to prepare for his defence; but this request was peremptorily refused. The argument of Oswald's counsel then commenced, and although a very brief one, as reported, it was interrupted three several times by the *replies* of the Chief Justice. I beg that the tone and manner of these interruptions may be compared by the honorable managers, with those which have been so much censured in the case of *Lawless*; and that at the same time, they will mark this, among other passages in the opinion of the court, and candidly say, whether the language of the respondent in describing the offence of libel is not quite as consistent with their notions of judicial decorum. "And here I must

be allowed to observe, that libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, *it is more dark and base than that of the assassin, or than his who commits a midnight arson.* It is true that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy and reproach. But the attacks of the libeller admit not of this consolation. The injuries which are done to character and reputation, seldom can be cured; and the most innocent man may in a moment be deprived of his good name, upon which perhaps he depends for all the prosperity and happiness of his life. To what tribunal then can he resort? How shall he be tried, and by whom shall he be acquitted? It is in vain to object that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antidote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity has been given to vindicate, which has been employed to defame him; for many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the *malicious and malignant author* rests in the *dishonourable security* of an anonymous signature. But shall such things be transacted in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—No!”

The rule to show cause having been made absolute, a dialogue ensued, which I beg leave to quote in further illustration of the judicial manners of that day, and again invite a comparison with the deportment of the respondent.

“*McKean, C. J.* Will the defendant enter into a recognizance to answer interrogatories, or will he answer *gratis*?”

Oswald. I will not answer interrogatories. Let the attachment issue.

“*McKean, C. J.* His counsel had better advise him to consider of it.”

On the next day, the defendant's counsel, in reply to the Chief Justice, who again asked, whether he would answer interrogatories or not, requested that they might be reduced to writing, before he was called upon to determine.

“*McKean, C. J.* Is that your advice to him? He must *now* say, whether he will answer them or not: they will be filed according to the usage of the court, and all just exceptions to them will be allowed.

Bankson. He instructs me to declare that he will not answer interrogatories;” and he then began to urge that *there was no contempt committed; but was told by the Chief Justice that as that point had been determined, it was not now open for argument.*

I beg that this may be noted, when gentlemen complain that the respondent having decided, after solemn argument upon the rule against the printer, that the article signed “A Citizen” was a contempt, refused to hear another argument precisely upon the same question, in the rule against Lawless.

The judgment of the court was thus pronounced by the Chief Justice:—“*Eleazar Oswald,* having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of England, think, that without this power, no court could possibly exist, nay, that no *contempt* could indeed be committed against us, we should be so truly *contemptible.* The law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt. But some difficulty has arisen with respect to our sentence; for on the one hand, we have been informed of your circumstances, and on the other we have seen your conduct: your circumstances are small, *but your offence is great, and persisted in.* Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.”

The defendant was then sentenced to pay a fine of ten pounds and costs, and to be imprisoned for one month, *and was ordered into immediate custody.*

There were obviously two grounds, upon which the judgment in this case proceeded. One undoubtedly was, that the publication tended to "corrupt the source of justice," by prejudicing the public, from whom the jury to try the cause were to be summoned, with respect to its merits. The other was, "scandalizing the court itself," and dishonoring the administration of justice, by hinting suspicions of the integrity and impartiality of the judges. Who can doubt, looking to the reasoning of the opinion, that if the case had stood upon the latter ground alone, and the imputation had been a general one, without reference to any particular, depending cause, the result would have been the same?

Mr. President, this case does not rest alone upon the authority of the Supreme Court of Pennsylvania. Let us pursue its history. At the next meeting of the Legislature, Oswald presented a memorial, in which he complained of the proceedings against him, and called upon the representatives of the people to determine whether the judges had not made themselves proper objects of impeachment. This memorial gave occasion to a discussion, which is reported in a note to Oswald's case, but with which, distinguished as it is by great learning and eloquence, I will not trouble the court. I commend it to all those, who doubt the compatibility of the proceeding by attachment with the true liberty of the press. After hearing evidence in support of the charges, and the arguments of several distinguished members, the following resolution was adopted: "Resolved, that this House having, in a committee of the whole, gone into a full examination of the charges exhibited by Eleazar Oswald, of arbitrary and oppressive proceedings in the justices of the Supreme Court against the said Oswald, are of opinion, that the charges are unsupported by the testimony adduced, and consequently, that there is no just cause for impeaching the said justices."

Here then, Mr. President, we have the proceedings of the Supreme Court, in Oswald's case, fairly brought before the Legislature of the State, thoroughly investigated, maturely considered, and solemnly sanctioned. And it is worth while to remark, that although the memorial charged the judges with oppressive and tyrannical conduct, and it is to be presumed that everything which passed upon the trial was in evidence before the Legislature, yet the question was debated and decided upon great constitutional grounds, without any attempt to patch up a case of impeachment, out of a few unguarded expressions, or a little more impatience of manner, towards the accused, and his counsel, than they might have desired. Even they who most decidedly disapproved of the exercise of power in that case as unconstitutional and dangerous to the liberties of the citizen, had the magnanimity to acquit the judges of any corrupt views, and to ascribe what had been done to an error of judgment, which they candidly acknowledged was no ground for an impeachment.

The decision in Oswald's case was in 1788. A few months afterwards, a convention was assembled to revise the constitution. That convention is represented by a distinguished contemporary as composed of men, eminent for their patriotism, learning and integrity. They were not strangers to Oswald's case; but although, with full powers to correct the errors, or prevent the repetition of any abuses that might have been practised under either a correct or erroneous construction of the then existing constitution, we find that by a studied alteration of the phraseology in the 9th section of the constitution and bill of rights of 1776, they placed the power of their courts of justice in regard to contempts, beyond all doubt and controversy.

After a long interval, another case occurred in Pennsylvania, to which I next beg leave to call the attention of this honorable Court.

Thomas Passmore having a claim upon a policy of insurance against Pettit and Bayard, entered into an agreement with them and other of the underwriters, to refer the subject to arbitration, under a rule of court in an amicable suit to

be instituted by Passmore against Pettit and Bayard. In this agreement, *no power was given to choose an umpire* : but in entering the action, the counsel for Passmore endorsed on it another agreement, *which was signed, however, only by himself*, authorizing the arbitrators, in the event of their differing in opinion, to call in a third person. An award was returned in favor of Passmore, signed by one of the arbitrators and the umpire who had been selected by both. A judgment was entered upon the award, by an agent of Passmore's counsel, who was absent, under a warrant of attorney contained in the original agreement ; and a *feri facias* was issued and actually levied. Exceptions were then filed by Pettit and Bayard to the award, and a motion made to set aside the execution, which prevailed, leaving the question on the award still open. In this state of things, Passmore set up, at the public coffee house or exchange, a placard, in which, using very abusive epithets, he charged Pettit and Bayard with designedly keeping him out of his money, and attempting to prevent the other underwriters from paying their proportions of the loss ; and also charged Bayard with swearing before one of the city aldermen, "to that which was not true," by which he was enabled to delay payment still longer ; concluding by offering a premium to insure the solvency of Pettit and Bayard for four months. Some short time afterwards, Dallas, on the part of Pettit and Bayard, obtained a rule against Passmore, to show cause why an attachment should not issue for a contempt. This rule, after argument, was made absolute. Interrogatories were then filed, in the answers to which, Passmore swore, "that to the best of his judgment and belief, there was no action depending in the Supreme Court between himself and Pettit and Bayard at the time when the paper was set up at the exchange—that it was torn down immediately, and before any person could have read it—and that in what he did, he had not the most distant intention to prejudice the public mind in his favor, or to treat with disrespect the judicial authority of his country." The court, notwithstanding, sentenced him to pay a fine of fifty dollars, and to an imprisonment for thirty days.

I have stated, Sir, the substantial parts of the paper, complained of as a libel. Upon reading it, two things are perfectly manifest ; that it did not, in the slightest manner, reflect upon the judges, or even allude to them, and that there is no reference of any kind to a pending suit. Why then was it considered a contempt ? Because it was a gross and scandalous libel, in the language of Lord Hardwicke, "upon parties concerned in a cause," and was calculated, therefore, to deter the citizen from seeking his rights through the medium of a court of justice. Mr. Passmore, however, smarting under the punishment which his own misconduct had brought upon him, presented a memorial to the House of Representatives, upon which an impeachment of the judges of the Supreme Court took place. A great number of witnesses were examined, and many attempts were made by the managers, to give a color to their case, by proof of what they contended were departures from judicial propriety on the part of the court. One was an intimation from the Chief Justice, that if Passmore would make an apology to the party he had injured, it would influence the court in mitigation of his sentence ; another, that the answers to the interrogatories were an aggravation of the offence ; and a third, that the counsel for Passmore was frequently interrupted in his argument, by the court. These interruptions were in proof by every witness examined to the transactions in court. One of the witnesses gave the following as characterizing the whole of them ; "Mr. Levy, that would do, if your client had not confessed the fact ; but it is not relevant, as he has done so." Mr. Levy himself testified, that he was interrupted several times by the court, but adds, "that these interruptions are usual, when counsel advance doctrines, founded on fallacious grounds." The impeachment was urged with great zeal by the managers, aided by counsel ; but the judges were acquitted. Now, Sir, let me make a single remark upon this case, thus established as an authority, by legislative sanction. The offensive paper had no relation to any depending cause ; it can scarcely indeed be said that there was any.

It is true, that the counsel for the judges contended, that the case was still *sub judice*; but they went further, and argued upon authority, that if it had finally terminated, still the publication was a contempt. But whether the cause was pending or ended does not seem to have entered into the consideration of the court. Nor ought it to have done so. It is an ingredient only in one class of contempts. In those which relate to the character and dignity of the court, or to the feelings and reputation of parties, witnesses or jurors, it is wholly unnecessary. Indeed attacks upon jurors and witnesses, which have been invariably held and punished as contempts, are most generally, if not always, made after the cause is terminated by verdict. And a court may be as grossly libelled, and the administration of justice as much dishonored, by a publication reflecting upon their conduct generally, as in any particular case. The necessity of the actual existence of a suit, *as a test*, depends altogether upon the nature of the contempt.

Let me next refer the court to the case of Freer, mentioned by one of the managers, and reported in 1 Caines, 513.

Freer was brought before the Supreme Court of New York, upon an attachment for a contempt in publishing remarks on a trial, tending to prejudice the public mind against the court. A motion for a new trial was pending, and the publication was also regarded as designed to intimidate and influence the court in deciding on it. In either of these points of view, as to the first of which the pending motion was obviously immaterial, the court held the publication a contempt, and punished it, although the party upon interrogatories disclaimed all intentional disrespect. Kent, Chief Justice, says, "publications scandalizing the court, *or* intending unduly to influence and overawe their deliberations, are contempts which they are authorized to punish by attachment; and indeed it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority." It cannot be doubted, that if in this case no new trial had been moved for, the publication would still have been held a contempt, as "scandalizing the court."

I come now to the case of Baptist Irvine, in the Court of Oyer and Terminer of Baltimore, in 1808. I have the record of this case before me, by which it appears that a person by the name of Tonlin was indicted, *cum aliis*, for an assault and battery, which was committed in the printing-office of a newspaper called "The Whig," of which Irvine was the editor. The indictment was tried, and a verdict of guilty returned against the defendant; but no fine had yet been imposed, when Irvine published a number of remarks upon the trial, charging the witnesses with perjury, and the jurors with corruption. A rule to show cause why an attachment for a contempt should not issue, was moved for by the public prosecutor, founded upon the affidavits of ten of the jurymen, and the two witnesses aimed at in the publication; and after solemn argument it was made absolute. Upon the return of the attachment, the party declining to answer interrogatories, was sentenced to an imprisonment for thirty days, and to pay the costs of the proceeding.

It was strenuously insisted on by the counsel for Irvine, that by the laws and constitution of Maryland, the doctrine of *consequential contempts* was utterly inadmissible;—but that even according to that doctrine as it prevails in England, the publication in question was not a contempt, because it did not reflect upon the court, but merely upon the witnesses and jurors, who had discharged their functions, and never could again be brought in contact with the case. That the defendant had a right, therefore, to remark upon their conduct; and if such remarks were not sustained by truth, the publication was a libel, to be proceeded against in the ordinary manner. But the court, looking to the protection which they owed to witnesses and jurors, who might be deterred from their duty if exposed to imputations like those contained in the publication, and thus the administration of justice be impeded, considered the case as falling within their legitimate power. The cause, it is true, was terminated, or at all events,

nothing remained but to fix the fine ; *but there were other cases still to be tried, depending preiis ly upon the same facts and testimony*, the decision of which might be influenced by the publication. And this was an argument urged by the counsel for the state.

The case, in every point of view, Mr. President, is a very important one, and its application to that which we are considering obvious and intimate. I pass from it, however, for the present, and come to that of Dandridge, reported in 2 Virginia Cases, 408.

The record exhibits the following facts :—Dandridge had executed a bond to the mayor and aldermen of Williamsburg, upon which a suit had been instituted against Basset, as one of his sureties. A verdict was found for the defendant; but a new trial had been ordered, and the case was therefore still depending in the Superior Court of the city of Williamsburg. It seems that in the course of the trial, Semple, a judge of that court, made some remarks to which Dandridge took exception, and, meeting the judge on the steps of the court house, after the hour arrived to which the court stood adjourned, but before it had proceeded to business, he charged him with cowardice and corruption, *in reference to his opinion at the former trial*. A statement of these facts in writing having been made by the judge, and the affidavits of several persons, who had been present, having been also filed, a rule was made on Dandridge, being present, “to show cause why he should not be committed or fined for his contempt.” Interrogatories were propounded, in the answers to which, Dandridge acknowledged that he had used the offensive expressions charged ;—that his motive was to resent what he considered an unjustifiable attack upon his own character, *and that in what he had said, he alluded exclusively to the opinion pronounced at a former term, in the first trial of the suit upon the bond*. At the instance of the defendant, the case was adjourned to the General Court, where several questions were raised upon the record, and elaborately and learnedly argued. The result was, that the court were unanimously of opinion, that a contempt had been committed, for which the defendant was liable to punishment: what that punishment should be, was left to the judgment of the court, in which the proceeding originated, and to which the case was remanded.

In the argument, several objections were taken to the exercise of the power in the particular case. It was among other things contended, that it ought in principle to be limited to *direct* contempts ; that is, to those contempts which tended to obstruct the administration of justice, and that no contemptuous words, written or spoken of a judge out of court, and particularly during its recess or adjournment, however they might implicate his judicial conduct, could be summarily punished. In answer to this objection, Judge Dade, whose opinion is distinguished no less for its strong good sense than for its learning and research, after having referred to the political character of the judiciary, confessedly the weakest branch of all governments, and to the nature of its duties, exposing it to the passions and resentments of those on whom they operate, as reasons for conferring upon it in all its extent the power in question, adopts the classification of Blackstone, and with reference to those contempts that “demonstrate a gross want of that regard and respect, which when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people,” remarks, that he does not “recognize a single case, which does not derive its authority either from the idea, remote or proximate, of its being disrespectful to, or in derogation of, the dignity of courts, or from that power of self-protection which is necessarily inherent in judicial institutions. When we find attachments issuing for light and contemptuous words used in reference to the writs, process, rules and orders of the courts, it is not because the efficacy of the writ, process, rule or order is impaired by such contumely, but that the dignity and authority of the court is sunk and degraded. It is that the impunity of such conduct may deprive these institutions of the aid of public opinion in carrying into effect their ordinances, and render a resort to force in all cases ne-

cessary;—a condition in which it is probable, that no judicial system could long exist. Nor can it be thought more necessary to defend the outworks and barriers of the judicial authority, in order to give the fullest effect to its legitimate acts, than to protect the system itself from that, which, at one and the same moment, strikes at the purity of the institution, and its influence on society. Judicial independence has been an object of constitutional care in this country. In the origin of this government it was thought expedient to make that department independent, even of the executive and legislative branches, who are not *presumed* to do wrong. And shall it be said that it is wholly unnecessary to make it independent of the passions and prejudices of all who may conceive themselves injured by its legitimate proceedings? Shall a judge be called independent, who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentments of those upon whose interests he has to act, and be reduced to the alternatives of either submitting tamely to contumely and insult, of resenting it by force, or resorting to the doubtful remedy of an action at law? In such a state of things, it would rest in the discretion of every party in court, to force the judge either to shrink from his duty, or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives.” Again he says, “When I find the courts protecting their authority by punishing those who treat with disrespect their process, rules and orders, although that disrespect shall consist in merely using light or contemptuous expressions of them; when I see them committing those who undertake to publish accounts of, or strictures on, cases depending before them; when I see them punishing one who has questioned a juror for his verdict, or a witness for his testimony,—I inquire why this has been done? I find in the case of the process, &c. that it was as effectual for its end and purpose, though spoken of contemptuously, as if received in silence, or treated with professed respect. In the case of the jurymen and witnesses, I do not find that the verdict had been influenced, or the judgment delayed. As therefore the actual authority of the court was not *obstructed*, I perceive no other reason in the above cases for its animadversion, than that its general authority and efficacy was impaired, and its dignity lessened.” Judge White, also, in answer to the same argument, denying the power, and the necessity of its exercise, in cases of verbal or written slander of courts for their judicial acts, observes, “We cannot prostrate the courts of the country at the feet of every disappointed suitor who may happen to lose his cause, or whose conduct may necessarily elicit from a judge observations unpleasant to his feelings, without producing the most fatal consequences. No! destroy the protection which the law now gives to your courts, unloose the hands and tongues of such persons, expose your magistrates to their abuse, contumely and vituperation, for their judicial conduct, without any *immediate* and efficacious means of restraint,—and instead of that happy, dignified and peaceable state of society which we now enjoy, we shall soon find that we have neither laws nor magistrates.”

Another objection strongly pressed in the argument was, that the alleged contempt was not only committed out of court, and during the recess, but had reference solely to the opinion delivered at the preceding term. It is true that the cause itself was still pending; the second trial had not taken place; but the learned judge does not free himself from the objection by a consideration of the influence which Dandridge's conduct might by possibility have upon the ultimate trial. On the contrary, the objection is directly met, and thus answered: “A distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the *prospective past* conduct of the judge, but not for such as touch his conduct. In reason I see but one pretence for this distinction: threats and menaces of insult or injury to a judge, in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment stop here,

a curious consequence may ensue. A man may be attached for *threatening* to do that, for which he could not be attached when actually done. One says of a judge, 'if he renders a certain judgment against me, I will insult or beat him.' For this he may be attached. But if, (the judgment having been rendered) the insult be actually offered, an attachment no longer lies, *because the contempt is in relation to the past conduct of the judge, and to a case no longer pending.* A recurrence to original principles, the only true test, by demonstrating that the weight, authority and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

I would willingly quote more largely from this case, Mr. President, did I not remember the number of authorities which are yet to succeed it. There is not indeed a single line of the opinion to which I have chiefly referred, that I would willingly omit. It is a luminous and masterly exposition of the whole doctrine of contempts, and in its principles, has a strong and direct application to the case we are considering. I have classed it among those cases in which, in point of fact, a cause was actually pending; but it will be seen that like many of them, this circumstance was deemed wholly immaterial, and did not enter at all into the consideration of the court. The case was treated as one of that class which consist in "scandalizing the court itself," and whether the scandal is with reference to the conduct of the court, or to a judicial act of one of the judges, in a pending cause, or in one actually decided and finally terminated, cannot, I repeat it, be a matter of the least consequence. It is obvious that the scandal may be as great in the one case as the other, and its injurious effect upon the character, dignity, authority and independence of the tribunal against which it is aimed equally demand in either case, immediate notice, and summary punishment.

I come however now to another class of cases which afford no opportunity for this distinction; where in point of fact no cause was pending,—the contempt consisting in misrepresentation of judicial acts. The *King vs. Barber*, 1 Strange 444, is one of this description.

"He presented a petition to the common council of *London*, reflecting upon one of the aldermen, and used contemptuous words of this court at the same time. For the petition the court granted an information against him and those who signed it, and for the contempt, an attachment.

"The prosecutor in his interrogatories asks him, *If he did not present the petition, and use such and such words.* And now the defendant moved, that the interrogatory, as to presenting, might be struck out, because it is making him accuse himself of that which will convict him of the libel. *Et per curiam*, He is not obliged to answer it; you may ask him whether, when the petition was presented, he did not say so and so; therefore let that part of the interrogatory be struck out."

[Mr. Storrs, one of the managers, here asked, if it appeared that Barber had been punished for the contempt. Mr. Meredith replied, that he observed it stated in the marginal note, that the case "went no further,—the act of Grace intervening."]

The next case that I beg to refer to, is the *King vs. Almon*, which was an attachment for a libellous pamphlet, charging the Count of King's Bench with having introduced a dangerous and unconstitutional mode of proceeding, with a design to deprive the subject of the benefit of the writ of habeas corpus; and also charging Chief Justice Mansfield with having at his own chambers illegally directed an amendment to be made in an information filed against John Wilkes. This publication was in 1765. The proceeding to which it in part related, was introduced in 1757, with a view principally to the cases of impressed persons, and seems to have been intended as a safer remedy than that afforded by the writ of habeas corpus, which however it did not supersede. With regard to the information, charged to have been improperly amended, it appears, from a reference to the case in 4 Burrow, 2527 (marginal note), to have been tried in 1764,

when there was a verdict of guilty against the defendant, a judgment upon the verdict, and a subsequent proceeding of outlawry, which at the time of the publication, Wilkes was attempting to reverse. So that it is manifest, that with regard to neither subject of the libel, was there a cause pending. Certainly not as it related to the rule of court, which it was the principal object of the publication to reprobate, and with respect to which alone, without any reference whatever to the amendment, Chief Justice Wilmot expressly says, "the attachment ought to go." The opinion, to which I am about to call the attention of the court, it is true was never delivered, the proceeding having been interrupted by a technical error in the titling, of which the counsel for Wilkes availed themselves. But this circumstance does not diminish its authority. It was prepared as the opinion of the court, after two elaborate arguments, and would have passed *in rem judicatam*, but for a mere clerical blunder. It is in vain then for honorable managers to attempt to shake its authority, by speaking of it as an extra-judicial opinion. It has not been so considered in England; but at the bar, and on the bench, has been repeatedly quoted and approved. [Mr. Meredith here read a part of Sir Vicary Gibbs' argument in *Burdett vs. Abbott*, 14 East, 85, before referred to, and the opinion of Mr. Justice Holroyd, in 4 Barnwell and Alderson, 232.] Indeed, sir, it is quite impossible, to read this opinion without being compelled by the strength of its argument, to assent to all the conclusions which it establishes. And I have only to regret, that the fear of wearying your attention, should oblige me to a selection merely of those passages, which I deem most important as bearing upon the present case.

"The power, which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Vent. 1. And the issuing of attachments by the supreme courts of justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the 'Lex Terræ,' and within the exception of the Magna Charta, as the issuing of any other legal process whatsoever.

"I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do,—immemorial usage and practice; it is a constitutional remedy in particular cases, and the judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance of process, or a contumelious treatment of it, or any violence or abuse of the ministers, or others, employed to execute it. But it is said, that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever.

"By our constitution, the king is the fountain of every species of justice, which is administered in this kingdom. 12 Co. 25. The king is '*de jure*' to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath, and sit on the seat of the king 'concerning his justice.'

“The arraignment of the justice of the judges, is arraiging the king’s justice ; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them ; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever ; not for the sake of the judges, as private individuals, but because they are the channels by which the king’s justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all other nations upon the earth.

“In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves. It seems to be material to fix the ideas of the words, ‘authority’ and ‘contempt of the court,’ to speak with precision upon the question.

“By the word ‘court,’ I mean the judges who constitute it, and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or acts of parliament. ‘Contempt of the court’ involves two ideas : contempt of their power, and contempt of their authority. The word ‘authority’ is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power : but by the word ‘authority,’ I do not mean that coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

“Livy uses it according to my idea of the word, in his character of Evander :—‘*Auctoritate magis quam imperio pollebat :*’ it is not ‘imperium ;’ it is not the coercive power of the court ; but it is homage and obedience rendered to the court, from the opinion of the qualities of the judges who compose it : it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands ; that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavor to impair and abate it ; and therefore every instance of an attachment for contumelious words, spoken of a rule of the court (of which there are a great many) is a case in point to warrant an attachment in the present case, where a rule of court is the object of the defamation ; and it would be a very strange thing that judges, acting in the king’s supreme court of justice in Westminster Hall, should not be under the same protection as a bailiff’s follower, executing the process, which those judges issue : it is not their own cause, but the cause of the public, which they are vindicating, at the instance of the public : for I do not think that courts of justice are to take their complaints up of themselves : it must be left to his majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion ; and in this state of the proceedings, they are only putting the complaint into a mode of trial, where the party’s own oath will acquit him ; and in that respect it is certainly a more favorable trial than any other : for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury ; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an indictment or an information : for the court must set the punishment in one case as well as the other ; they do not try him in either case ; he tries himself in one case, and the jury try him in the other.”

“As to leaving such libels to be prosecuted by indictment or information, that juries may judge, *‘quo animo,’* they were written or published; I am as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did, or now does, sit in Westminster Hall; but if to deter men from offering any indignities to courts of justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the court should call upon the delinquents to answer for such indignities, in a summary manner, by attachment, we are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all laws, the safety and security of the people.

“The trial by jury is one part of that system; the punishing contempts of the court by attachment is another; we must not confound the modes of proceeding, and try contempts by juries, and murders by attachment. We must give that energy to each, which the constitution prescribes. In many cases, we may not see the correspondence and dependence which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it; and I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the courts who are to preside over them.

“The constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power, given to the judges for their protection, is prostituted to their destruction, the court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the court will not long survive the authority of it.

“Perhaps it may be said, though attachments are granted for the abuse of officers in the actual service of process, yet never for a libel upon them for what they have done in that capacity; and therefore no argument can be drawn from the practice of issuing attachments in favor of bailiffs abused in actual service, any further than whilst a judge is in the actual execution of his office: but the principles upon which the court proceeds, in granting attachments for abusing bailiffs in the execution of process, and abusing courts for their judgments, must be attended to, in order to find out the difference between the case of libelling a bailiff, and libelling a judge of the court.

“The principle upon which attachments are granted, in respect of bailiffs, is to facilitate the execution of the law, by giving a summary and immediate redress and protection to the persons who undertake it. The law considers it as a contempt of the authority of the court, to abuse and vilify the person who is acting under it. But the principles upon which attachments issue for libels upon courts, is of a more enlarged and important nature,—it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.

“Bailiffs are neither appointed by the king nor the court; a libel upon them terminates only in the defamation of a private individual: it is only telling the people, that a person employed to execute process has abused his authority. But a libel upon a court, is a reflection upon the king, and telling the people that the administration of justice is in weak or corrupt hands: that the fountain of justice itself is tainted, and, consequently, that judgments, which stream out of that fountain must be impure and contaminated.”

I feel, Mr. President, in thus breaking up this masterly opinion into fragments, as I am constrained to do lest I weary you, that I shall impair its force, and do great injustice to its learned and venerable author, of whom, the honorable manager who addressed you on Monday, [Spencer], is the first lawyer

that I have ever heard speak, but in terms of reverence. Of the judicial character of Lord Chief Justice Wilmut, I had supposed that but one sentiment prevailed; and that he was universally regarded, as ranking in the same file with those illustrious men, who, in the brightest period of English jurisprudence, adorned and enlightened the courts of Westminster Hall. In my own poor judgment, sir, I had placed him alongside of Mansfield, Dennison, Foster, and Yates, and never suspected that he could suffer from a comparison with either of them. With these great names, I have hitherto always associated him, and therefore listened with some regret, but more surprise, to the tone with which the honorable manager thought fit to speak of him. He may indeed have erred in the case alluded to. I have neither had time nor opportunity to examine it; but let me ask the honorable manager to point me to the judge against whom error has never been imputed; or to say whether he is content, that a single erroneous judgment should dim the lustre of a well-earned judicial character. Whatever may have been that case, Mr. President, it is vain to deny to Wilmut the praise which his contemporaries bestowed on him, or to regard him less favorably, than as a lawyer of deep, varied and extensive learning, whose opinions are always entitled to respect and confidence.

Nor to those at all acquainted with the history of his public and private life, will the imputation cast upon him by another honorable manager [McDuffie] produce any other effect than astonishment. A more unambitious lawyer, a judge of greater impartiality, sterner integrity, nobler independence, and a more perfect freedom from the spirit of party, is not on record. No judge ever more anxiously sought to place the liberty of the subject upon the surest foundation; and the noble stand which he maintained, in the memorable controversy respecting the legality of general warrants, in which the whole power and influence of the crown were exerted to crush a single obnoxious individual, will forever acquit him from the charge of a leaning to arbitrary principles.

This opinion, then, Mr. President, thus entitled, from the well-merited fame of its author, but much more from the invincible strength of its own reasoning, to the most respectful consideration, is a direct authority to prove that a libellous misrepresentation of the opinion or proceeding of a court of justice, is a contempt of the highest, because of the most dangerous character. And I now proceed to show that the same great principle has guided many of our own courts.

In 1828, the Judge of the District Court of the United States, for the Northern District of New York, of his own mere motion, passed a rule upon John L. Tillinghast, one of the attorneys of his court, ordering him to show cause why he should not be struck from the rolls, for a contempt set forth in an affidavit made by the clerk of the court. From this affidavit it appears, that about eight months previously, Tillinghast, in a private conversation with the clerk in his room at a tavern in Albany, respecting a cause just tried, in which he had been counsel, imputed general unfairness and partiality to the judge, and also admitted that an unfavorable portrait, which, in his address to the jury, he had drawn of a former judge of that court, was aimed at Judge Conkling. The Clerk having cautioned him against the danger of such remarks, which might subject him to punishment for a contempt, and having also admonished him, that he, as an officer of the court, would feel bound to communicate to the judge any further offensive remarks, should he persist in making them, the affidavit goes on to state, that Tillinghast repeated what he had before said, and expressed his indifference as to whether the judge knew it or not. It seems that the clerk did communicate this conversation to Judge Conkling, at what time does not appear, but as I before stated, no judicial notice was taken of it, until eight months afterwards, when the affidavit was filed, and the rule ordered. Tillinghast being called on to show cause, demanded to know the offence with which he was charged, and was referred to the affidavit, which was then ordered to be read. He took exception to the proceeding, which, he contended, ought to have been by

attachment, and the exhibition of interrogatories, but this was overruled; and the court, after a short interval, having stated the reasons which had induced the adoption of this course, and briefly reviewed upon authorities the law of contempt, and the power of courts to punish that offence, not only by fine and imprisonment, but in the case of attorneys, by also striking their names from the rolls, proceeded to inflict that punishment upon Tillinghast, and expelled him permanently from the court.

A report of this proceeding, prepared by Judge Conkling, appeared afterwards in one of the newspapers of Albany, by which it appears, that the contempt punished, consisted alone in the imputation, *made out of court, in a private conversation with a single individual*, of unfairness and partiality; what passed in court, as stated in the affidavit, does not appear to have entered into the reasons of the decision. That these declarations of Tillinghast impeaching the integrity of the court, amounted in law to a contempt, the judge observed "could not be doubted. That Sir William Blackstone, among other instances of contempt, for which the courts of justice are authorized to punish the aggressor, enumerates the following, 'speaking or writing contemptuously of the court or judges, acting in their judicial capacity.' That it was unnecessary to refer to authorities to prove, that the power to punish these offences in a summary manner, belonged as well to the courts of this country, as to those of Great Britain. It had been repeatedly exercised in this and the other States, and rested upon the strong foundation of necessity, &c."

We have here then, Mr. President, a case of verbal slander of a judge, punished as a contempt; not a slander relating to any pending controversy, and punished because of its tendency to prejudice the public mind, or in any other manner to affect a judicial decision; but a general slander upon the justice and integrity of the court, designed to lessen its authority, by weakening the only true foundation of that authority, public regard and confidence. And whether this is done by a direct impeachment of judicial conduct on the ground of corruption, or by such a libellous misrepresentation of the opinion of a court as are calculated to bring it into public odium and ridicule, will scarcely be pretended to make a difference. The effect in either case is the same, and the same principle equally applies.

This proceeding produced a memorial to the present House of Representatives for the impeachment of the judge. It was referred to the judiciary committee, who, a single member dissenting, reported that it was not a case for legislative interference, and thus sanctioned the principle of the decision.

The case of P. H. Darby, to which I next refer, bears a strong and extraordinary similitude in its circumstances, to that which has given rise to this investigation. Darby was an attorney of the Supreme Court of Tennessee, which is an appellate court, and undertook to publish strictures upon an opinion delivered in a cause, in which he had been engaged as counsel. At the time of the publication the cause had actually passed from the Supreme Court, having been sent back to the Circuit Court of Anderson County, for further proceedings. He was notwithstanding struck from the rolls; and one of the principal grounds of the proceeding, as stated by the court, was the tendency of the publication "to excite public indignation against the judges for giving the opinion, and to bring them into contempt." By a statute of Tennessee, an attorney struck from the rolls of the Supreme Court, is disqualified from practising in any court of record in that State. Darby, however, having obtained a new license from one of the Circuit Courts, applied for re-admission into the Supreme Court; and upon this application, which was refused, Judge Haywood delivered an opinion, that commends itself to the approbation not only of every enlightened lawyer, but of every reflecting and well-judging man. "The power" he remarks, "to punish for contempts is so indispensable to the preservation of the authority of courts of judicature, and to both branches of the legislature, that it has been considered by general consent conceded to

them, from times of the highest antiquity to the present day. Blackstone specifying the contempts for which the court may punish in a summary way, enumerates among others, that, by speaking or writing *contemptuously* of the court, or judges acting in their judicial capacities; by printing false accounts, or even true ones, without proper permission, of causes then depending in judgment; and by anything, in short, which demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority is entirely lost among the people."

Again, "the power to punish for contempts is no part of the criminal law: if it were, courts which have no criminal jurisdiction, could not punish for contempts; as the Houses of the Legislature, the Court of Chancery, and this Court. Where the contempt amounts to an indictable offence, as well as contempt of the court, punishment inflicted by the latter is no bar to a prosecution of the former, and *vice versa*. And neither the contemned court, nor the court of criminal jurisdiction is obliged to suspend proceedings till the other has acted. This power itself, from its very nature, must necessarily be independent of all other tribunals. For if it depends upon another whether punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal, *with every one whom his decision offends*. He must quit his business in court, and leave the bench, and travel to inferior courts, and give his attendance upon them, neglecting in the mean time the official duties which belong to his office. The inferior judge may not be disposed to discourage the contempt; the proceedings may not be regular, or legal; they may in the end be set aside and quashed, by arresting or reversing the judgment, and must be commenced again, and the same difficulties again encountered. No one would be afraid to offend; the delay of punishment, and the numerous chances of escaping it, would disarm the expected punishment of all its terrors. Nor would the insulted court ever think of the attempt to cause the infliction of punishment under so many discouragements. No sooner does he get through one set of controversies, than some other dissatisfied suitor assails him with equal outrage, and involves him in others. He must go again and forever through the same routine of vexation and trouble. With such embarrassments to contend against, will he remain upon the bench? He must either quit it, or submit to be directed by men who resort to such means for the attainment of their ends, and become an instrument in their hands for the sake of the rest, abandoning his duties, and resigning the rights of the people. Without power to repress the efforts of designing men, that shall be directed against him because of an unyielding temper, how will the judge be able to uphold his integrity, when interests of the highest magnitude are to be settled by his decisions? When it shall be observed that the most submissive pass unmolested, will not submission at least plead in recommendation of itself? Will it not set before him the perpetual conflicts which he has to maintain in vindication of opinions, in which he has no individual interest, and the unceasing calumnies to which he is exposed for the protection of others, who hardly know the cause why he is so worried? If in so many difficulties, the judge is not furnished with the means of immediate defence and repression, his authority must fall, and the rights of the people with it. For what rights have they but those which the law gives by means of the courts it has instituted? And if these cannot support them, the rights themselves are nominal." "All these conclusions," he goes on to observe in the close of his opinion, "are established by repeated decisions; are indispensable to the existence of courts of judicature; have never been complained of, or restrained, or regulated, in any constitution, or national instrument produced by the struggles of the people against oppression; but on the contrary have been considered as a power in support of the courts of judicature, upon which they depended for protection against the usurpation of prerogative, and therefore were considered as a privilege belonging to the people."

These, Mr. President, are the remarks of an American judge, eminent for the highest qualities that adorn the judicial character. I will not attempt to add to their force or conclusiveness; nor will I delay you by pointing to that, which must be apparent to every one,—the close application of the case itself, to that of Lawless. In both, the offence consisted in a misrepresentation of the opinion of the court; in both the offender was an attorney; from both, the cause, in which the opinion attacked by the publication was pronounced, had actually passed to another tribunal; and it was quite as probable that the case of Soulard might be remanded by the Supreme Court of the United States to the District Court of Missouri, as that the case in Tennessee would again go up to the Supreme Court of that State.

The case to which I next ask your notice, is from New Hampshire. In March, 1812, Freeman, an attorney, in the presence of several persons at a tavern, spoke disrespectfully of the judicial conduct of Chief Justice Livermore;—charging him with arbitrary deportment towards parties, counsel and witnesses, and questioning his legal qualifications for the station which he occupied. For this contempt, Freeman was struck from the rolls, at the following term. He afterwards addressed a memorial to the Legislature, for the impeachment of the Chief Justice:—the transaction was fully investigated; the parties were themselves heard;—the facts appeared, as I have just substantially stated them, and it was *unanimously* resolved, that they furnished no proper ground for impeachment. This case is the same in principle with that of Tillinghast in New York, and like it, has a legislative, as well as a judicial sanction. In both, the offence consisted in *speaking contemptuously* of a judge acting in his official capacity, without any reference to a depending cause. If *verbal* slander of a judge be a contempt, *a fortiori*, should a libel, because calculated to produce a more powerful as well as a more general effect upon the public mind.

I have been just furnished, Mr. President, with two other cases, from Florida, similar to that of Darby. The first is the case of Fry, an attorney of the District Court of the United States, against whom a rule was granted by Judge Brackenridge, to show cause why he should not be punished for a contempt, in publishing an incorrect account of the proceedings of the court, reflecting upon the judge. It appears that after the discharge of the grand jury at a previous term, the foreman handed to the judge a sealed paper, which, having opened, and found to be complimentary to himself, while it censured the conduct of others, who it was alleged were endeavoring to excite odium against the court, he did not order to be filed with the presentments and indictments of the jury, but retained it in his own possession as a private paper. This transaction was, according to the judge's statement, and the testimony of witnesses, grossly misrepresented by the publication; in which he was charged with "pocketing the presentments of the grand jury without permitting them to be seen or read, and threatening the district attorney with dismissal or imprisonment, for simply moving that they might be filed." Fry, having appeared upon the rule, demanded interrogatories, to one of which he answered, "that at the time of the publication, he *believed* the report to be fair, perfect and correct." He was nevertheless suspended from practising as an attorney of the court, fined three hundred dollars and the costs, and committed to the custody of the marshal until it was paid;—the judge remarking, that it was the duty of the party, particularly as he stood in the character of an attorney of the court, to *know* that the report was a fair one;—if he chose to publish what was a misrepresentation of a judicial proceeding upon the statements of others, he did it at his own peril.

The District Attorney, Steele, having participated in the publication, a rule was also granted against him. He appeared, and, like Mr. Lawless, persisted in asserting that the proceeding to which the publication alluded, was not misrepresented: and that if it were, the court had no power to punish it as a contempt. "The publication," says the judge in his opinion, "is aggravated by

the answer of Mr. Steele. He ought to know that contempts are punishable by all courts, where the common law prevails:—*that the misrepresentation of proceedings in courts of justice are invariably considered as offences against the court.* But he ought to know that it is in his case, an offence of a still more aggravated character as a member of the bar; that even if the power be doubtful in the one instance, it is not so in the other. If any one is at liberty to vilify the administration of justice, and to pervert and misrepresent the acts of the courts, so as to excite odium and distrust, the courts may as well be closed, and leave everything to lawless violence, and unprincipled detraction.*

I deem it wholly unnecessary, Mr. President, to say a single word, as to the application of these cases, to that which you are now considering. I hasten therefore to close this review, by a very brief statement, of three cases which have occurred in the State courts of Missouri.

The first was an attachment against Joseph Charless. From the record which is before me, it appears, that on the 10th May 1820, an assault and battery had been committed upon Charless, by Isaac A. Henry and Wharton Rector. Complaint having been made to a magistrate, a warrant was issued on the same day, and the parties were recognized to appear at the succeeding term of the Circuit Court which was to be holden in the ensuing August. On the 17th of May, a publication in relation to the assault and battery, appeared in the Missouri Gazette, of which Charless was the editor. At the August term, an indictment was found against Henry and Rector;—on the 8th of September, Henry pleaded guilty; on the 13th, the court imposed a fine, and on the same day, an affidavit having been made by Thomas H. Benton, that he believed the publication appeared “after a criminal prosecution had been commenced by Charless against Henry, and that the said publication was in some particulars false,” a rule was granted against Charless to show cause why an attachment should not issue for a contempt. He appeared:—interrogatories were filed but not answered, and he was sentenced to pay a fine of twenty dollars and the costs, and to stand committed until the sentence was complied with. The record states that he was committed to the custody of the sheriff, and we have the evidence of Mr. Geyer that he remained for some time in prison, before the fine was paid.

There was then in this case, strictly speaking, no cause depending at the time of the publication, *in the court from which the attachment issued*: the recognizance and other papers not having been returned to, and filed in Court, by the magistrate, until nearly three months afterwards. There is indeed not a single circumstance to show that the publication was considered by the court, as calculated to affect the trial of the indictment. On the contrary, the party had pleaded guilty several days before the rule to show cause was moved for, and the fine was actually imposed on the same day. The affidavit states that the publication was in some particulars false, without showing in what. The interrogatories however warrant the belief that the proceeding did not turn upon the falsehood of the publication as tending to influence a judicial decision of the case, but upon the evil tendency of all such publications in their example, and influence upon the administration of justice.

The second case is that of Patrick H. Ford before the Circuit Court of Missouri. The rule as I find it in the record, is in the following words: “It is ruled that Patrick H. Ford show cause on Wednesday, &c. why an attachment should not issue against him for a contempt by him committed in publishing in a certain newspaper, called the St. Louis Enquirer, of which he is the editor as it is said, a certain false and slanderous article under the editorial head of said paper, dated, &c. in which said publication the said Ford endeavours to

* The opinions in these cases are given at large in the National Intelligencer of 24th August 1824.

bring this tribunal into contempt by a misrepresentation of facts, and by ascribing improper and impure motives to the court, in the decision of a case, *decided by this court.*" This rule then itself shows, that the cause to which the publication referred, was at the time decided. There was no *lis pendens* therefore :—the contempt consisted merely of a libel upon the court, in misrepresenting its decision, and ascribing unworthy motives. Ford having appeared, the record states that the rule was "on sufficient cause shown, discharged." Mr. Geyer states that the party purged himself of the contempt upon interrogatories.

The last case, which ends this long line, that I fear, Mr. President, you may have thought would "stretch out to the crack of doom," is one, in which Mr. Lawless himself was the chief actor. An action for use and occupation had been instituted in the Circuit Court for the county of St. Louis, by Bellissima against McKoy. Mr. Lawless was counsel for the plaintiff, and at the trial, having completely failed to show any title to the property in his client, which he contended, was not necessary in this species of action, contented himself with various objections to the competency and sufficiency of the defendant's proof, which being overruled by the court, were followed by a verdict for the defendant. The cause went up by appeal to the Supreme Court on Bill of exceptions, and having been there argued, the judgment of the Circuit Court was affirmed. A motion for re-argument was made, and on the very day on which it was granted, a publication appeared in the St. Louis Enquirer, containing a statement of the case as decided by the Supreme Court, materially differing from that presented by the bills of exceptions, complaining of the injustice of the decision, and calling upon the Legislature to amend the law as thus pronounced. The language of the publication is unexceptionable :—there are no reflections upon the court, no improper motives attributed, but comparing it with the bills of exceptions, there is a manifest misrepresentation of the facts upon which the opinion of the Supreme Court rested. A rule was at first granted against the printers of the newspaper who purged themselves from the contempt upon interrogatories. A second rule was then made against Lawless, as the author of the publication : interrogatories were propounded to him, and having answered, that he was not apprized until the publication was in press, that a re-argument had been ordered, and that his object in publishing the article "was not to show disrespect to the court, but merely to state without delay to the public, what he considered an erroneous state of law in the country, and which as it regarded the relation of landlord and tenant, could not be too soon amended," he was discharged from the attachment. This was all perfectly proper, and it is only to be lamented, that in the case before the District Court, he was not under the guidance of the same frank and ingenuous spirit.

The contempt in this case consisted simply in misrepresenting the facts upon which the opinion of the court was founded ;—the rule speaks of it, as "a false statement of the case, and the decision of the court." The court is not spoken of contemptuously, but the tendency of the publication undoubtedly was, to create an unfavorable impression of its intelligence ; for if the facts which the statement presented, had been really in proof in the cause, as the reader was led to believe, but one conclusion could have followed, and that directly the reverse of the one to which the court arrived. It was upon this ground then alone, that the attachment issued ; the record does not show that the pendency of the cause, and the effect of the publication upon its final determination, entered at all into the consideration of the Court. A letter from the Chief Justice now before me, containing a brief report of the case disproves such a supposition. The proceeding rested upon the falsehood of the publication ;—upon the fact of a misrepresentation, affecting the judicial character of the court ;—in one word, upon precisely the same consideration, which governed the conduct of the respondent subsequently, towards the same individual.

I have now finished Mr. President a rapid, and I fear a very imperfect

review of the cases upon this subject. Numerous as they are, they might have been greatly multiplied. My object however has been to select those, which would best illustrate the nature, extent, and necessity of this power, which from the earliest times, seems to have been claimed by all courts of judicature. And having done so, may I not confidently ask, whether there is any doctrine in the law, that stands upon surer and stronger foundations? Look back for a moment, I pray you Sir, to this array of authorities;—This uninterrupted stream of precedence traced to the purest sources. Look again at the list of great and venerable names, by which these decisions are vouched and supported, and then answer whether the Respondent was not imperatively bound to follow them. Mr. President, whatever in times of individual or party excitement, may have been thought or said of this portion of the judicial power, by the most zealous champions of popular privileges, no man can doubt, that it still remains, the established and unaltered law of the land. The Respondent was bound so to declare it. *Stare decisis* is one of the most fundamental maxims in our jurisprudence. And constituted as you now are, sitting here as a High Court for the trial of this Impeachment, I am sure I need not remind you, that you are as strongly bound by precedent, as any other judicial tribunal of the Country. That you are not now to legislate, to make a new law for this case;—to overturn for the occasion, established doctrines and principles; but having satisfied yourself that such is the law of the land, as that law has been settled by a long and unbroken series of judicial decisions, you will leave it to be altered, if altered it ought to be, by the only method which the constitution of our country sanctions and directs.

Was the Respondent then warranted in this particular case by the principles which those decisions have so firmly established? Was the publication of Mr. Lawless calculated to influence the judicial determination of any pending case or cases? Was it a misrepresentation of the opinion of the District Court of Missouri, of so gross a character, as to be likely to impair the public confidence either in its integrity or intelligence, and thus lessen the general regard for its authority. If either of these questions can be answered affirmatively, then I speak the language of every authority to which I have referred when I say, that the case of Mr. Lawless, was a case of contempt, calling imperatively for the exercise of the power of the Court.

Before I examine the publication, Mr. President, with a view to these questions, let me ascertain how far the honourable managers, and ourselves agree as to the principles which govern the public discussion of judicial decisions. Where such decisions are not final; where the controversy is still open, either in the Court in which it originated, or upon appeal to a higher tribunal, I do not understand it to be contended that there is any right of discussion at all. The power of the inferior Court, from whose jurisdiction the case has passed, to deal with such a publication as a contempt, is another and a different question, which I may hereafter consider. But—

[*Mr. Buchanan.* The Gentleman has misunderstood us. We contend that in England there are but three cases, where *libel* has been punished as a contempt. Under the principles of the Common law, if the Court chose to exercise the power, they do in that country possess it. But we contend that in the United States, whether the cause be pending, or has been determined, no Court has power to punish a *libel* as a contempt.

Mr. Meredith. I am not now speaking of *libels*, but of publications which are intended or calculated to prejudice the public mind with reference to a pending cause. The propositions are distinct.

Mr. Buchanan. No publication of any kind.

Mr. Meredith. I have then to answer, that such a position can only be maintained by the overthrow of every authority, to which I have referred. I

speak not now of England, but American cases: and I confidently say, that there is not one of them, which hints even a doubt upon the subject.

Where indeed the judgment of the Court is conclusive upon the case;— Where the legal controversy is at an end, and the question of right between the parties is finally and irreversibly settled, I am willing to admit, that any individual in the community, may, if he thinks proper, publish the decision to the world, and subject it to the severest test of fair, candid, and decorous criticism. But where the decision is itself misrepresented; where the reasonings on which it is founded are falsely stated, and the conclusions perverted, with a manifest design to impeach the intelligence or integrity of the Court, such a publication cannot be justified or protected upon any principle which ought to govern a free press. Such a publication is a libel upon the administration of justice, punishable as a contempt, as the honourable Manager himself has just admitted, in England, and invariably punished in this Country also, as the cases to which I have referred abundantly testify.

Is such the character of Mr. Lawless's publication? Did it misrepresent the opinion of the Court, and what were the manifest tendencies of the misrepresentation? These are the questions which I propose next to consider, and they of course lead to a comparison of the publication with the opinion. And that this comparison may be fairly and intelligibly conducted, let me ask your attention to a very fair statement of Soulard's case.

The concession it will be remembered was made in 1796 by Trudeau, then Lieutenant Governor of Upper Louisiana. Its chief characteristics were, 1st, that it was for 10,000 arpents of land; 2dly, that it was granted as a reward for services, rendered by Soulard to the provincial government; 3dly, that it was made, so far as appears from the Petition and proof, without reference to the means of the Applicant; and lastly, that it was a floating concession, and not located or surveyed until February 1804. It will also be recollected that the Act of Congress of 1824 vests the jurisdiction of the Court only in cases of concessions or grants, *legally made by the proper authorities*. The great question in the cause then was, whether Trudeau had authority to make this concession, that is to say a concession for 10,000 arpents of land in reward of services. And the proof of this authority, of course, lay upon the Petitioner. It must likewise be borne in mind, that at the date of this concession, the only law expressly ordained for the grant of lands in Louisiana was that known by the name of O'Reilly's Regulations, which in 1770, shortly after he had taken possession of the Country, he published at New Orleans.

The great object of these regulations undoubtedly was, to regulate *gratuitous* grants of land, in conformity with the policy of the Spanish Government, which seems to have been, to settle the country as speedily as possible with an agricultural population. The cultivation of the soil, and the accumulation of stock, were the leading objects. To effect these it was obviously proper to limit grants, and therefore, while where cultivation was the object, the extent of the grant was directed to be, "according to the means of the cultivator," when the object was grazing it was to be proportioned to the number of cattle, horses, sheep, and slaves, in the possession of the applicant; the grant however in this case never exceeding a league square. In the spirit of the same policy, that is the settlement and cultivation of the country, these grants, were to be made upon the express conditions, that within the three first years of possession, the applicant should clear the whole front of his land, to the depth of two arpents, and should also within the same time, enclose the front. The land was also rendered inalienable by the grantee, until after three years possession, and the fulfilment of the conditions, which if not complied with, the grant was forfeited, and the land reverted to the King's domain. The only other provision which it is necessary now to notice, was that these grants were to be made in the name of the King, by the Governor General of the Province. These Regulations were addressed to the whole province;—the

Governor, Judges, Cabildo and all the Inhabitants being required to observe them.

It will be seen at once, Mr. President, that if these Regulations governed the grants of land, at the date of Soulard's concession, they could not authorize it; that grant being beyond the maximum quantity, and having no reference whatever to the means of the grantee. It was at variance with their whole policy and at once disproved Trudeau's authority in the particular instance. The objects of the Petitioner therefore were, 1st, to free his case from these Regulations, and 2dly, to discover some other source of authority to Trudeau to make the concession. Contending then, that these Regulations were not to be considered as "Laws," within the meaning of the Act of 1824, and that they were wholly inapplicable to *Upper Louisiana*, and had never been considered as in force there, he relied for this authority, of which he was in search, 1st, on a uniform practice and usage from the commencement of the Spanish Government, down to the Cession to the United States, for the Lieutenant Governor of Upper Louisiana to make concessions without restriction as to quantity, and 2dly, upon the laws and ordinances of the Spanish Sovereigns.

To shew the uniform practice, he relied in the first place, upon the testimony of Delassus, who became Lieutenant Governor of Upper Louisiana in 1799, and so continued until the cession, and in the second place upon the recognition of the practice of the Lieutenant Governors, to make concessions not authorised by the Regulations, as shewn by three confirmations, two by the Governor General, and one by the Intendant. And upon these it was argued that the practice thus shewn, in the absence of proof of positive authority, raised a sufficient presumption of such authority to justify the court, no express prohibition being shewn, to decree in favour of the validity of the claim. This proof of the practice, although objected to by the attorney for the government, was admitted by the court. The exception is thus stated upon the Record; "Be it remembered that at the trial of this cause the Petitioners produced as a witness for them, Don Charles Dehault Delassus the last Spanish Lieutenant Governor of Upper Louisiana, who among other things deposed, that confirmations had been had of concessions granted by him as Lieutenant Governor, and by his predecessor Don Zenon Trudeau; to the receiving of which as evidence the District Attorney objected, alleging that the confirmation of all concessions of land under the Spanish authority must be matter of record, and is not susceptible of oral proof: which objection was overruled by the court, and said evidence was received for the purpose of shewing the practice of the Lieutenant Governor to make concessions, and the recognition on the part of their superiors of their power to make such concessions; to which decision of the court, the District Attorney excepts."

Having thus admitted the evidence, the court admitted also the presumption which it raised. What was that? That the Lieutenant Governor had authority to issue concessions. But when the presumption was pushed further, to shew an authority to make concessions unrestricted as to quantity, the court remarks, that although unopposed by evidence raising a different presumption, such authority might be inferred, yet here there was a different and much stronger presumption, arising from the general policy of the Spanish government, as evinced by its own laws. The doctrine of the court in a few words was this. An express authority from the King himself must be shown to authorize the grant of any portion of his domain. Such authority being indispensable to the validity of a grant, may be shewn by positive proof, that is to say, the production of the authority itself; or it may be inferred from circumstances. In this case no such positive proof is offered; but a practice has been given in evidence, from which the presumption of authority arises on the part of the Lieutenant Governor to make concessions. This presumption is admitted. But when it is urged to another conclusion, when it is made use of to shew that the Lieutenant Governor had authority to issue concessions without limi-

tation as to the extent of the grant, or without reference to the means of the cultivator, or exempted from the condition of cultivation, the answer is, that although such practice, with proof of its occasional recognition by the Governor General might, standing unopposed, carry the presumption to that extent, it is in this case met and overcome by the antagonizing presumption resulting from the general law, and general policy of the Spanish Government. It is true that no express prohibition is shewn; nor is it necessary. If the Lieutenant Governor had a power to make these grants, it must have been in virtue of an express authority. A want of such authority deprives him of the power. A prohibition is not required to produce that effect. The authority therefore is to be sought for, and not the prohibition.

With regard then to the practice it was admitted and relied on by the court itself, as presumptive proof, until overborne by weightier presumptions. And with regard to the presumption arising from the complete titles, or the confirmations of the Governor General and Intendant of concessions of the Lieutenant Governor, these also were admitted, but being resisted by the same evidence of the general policy of the Government as manifested by its own laws, were attributed by the court, to the dispensing power of the Governor General exercised in these particular cases.

Dismissing this branch of the argument the Petitioners contended in the second place, that the Lieutenant Governor of Upper Louisiana was authorised to make this concession by the Laws and Ordinances of the Spanish Sovereigns. And to show this authority, they relied upon the Ordinance or Royal Instruction of 1754."

In speaking of this ordinance, Mr. President, I am reminded of an incident in the examination of the principal witness on this trial in support of the Impeachment, to which I must beg leave for a moment to advert, as one among many others, strongly illustrative of the temper and feeling with which his testimony was delivered. In referring to a principal argument on the part of Soulard's heirs, the Respondent in his printed opinion in that case, says, "It is contended on behalf of the Petitioners that *the 81st article of the ordinance of the King of Spain*, became in force in Louisiana immediately on the ratification of the Treaty of Fontainbleau;" and again in another part of the opinion, he speaks of the same ordinance, as "the 81st article of the ordinance of 1754;"—an inaccuracy undoubtedly,—since the 81st article of which he speaks, in a part of the ordinance of 1786, and refers to the ordinance of 1754, which it quotes *totidem verbis*;—but an inaccuracy, wholly immaterial to the case. It will be remembered however with what avidity this trifling circumstance was caught at, and with what dexterity it was used, by the witness, Mr. Lawless, to cast ridicule and contempt upon the Respondent, before this Honourable Court. That a Judge should be so grossly ignorant as thus to confound two distinct and separate laws;—that he should refer to the 81st article of an ordinance, which contained but 14 articles, seemed to excite his utter astonishment; and the blunder was more inexcusable, because the opinion would seem to impute it to the counsel when it belonged solely to the Judge. Now, Sir, how is the fact; with whom did it originate? You will recollect the evidence of the manner in which this ordinance was presented to the notice of the District Court, by the Counsel for Soulard's heirs:—that a mutilated copy was produced consisting only of five or six articles, and that the Manuscript was headed "Extracts from 81st article of the Royal ordinance of 1754." The court was in possession of no other evidence of the ordinance, than that, thus furnished by the counsel, and the error therefore, was theirs, and not his. To prove this, I beg leave to refer to the printed argument of Mr. Lawless in this case, published long before the Respondent delivered his opinion, in which he himself cites "the 81st article of the ordinance of 1754," though in the copy now in my hands, the words "81st article of the," are erased, when, by whom, and for what purpose, he can best explain. The whole affair however is of no con-

sequence, except as it serves to show the disposition of the witness, and the strong feeling under which his testimony was given.

I return to the Ordinance or Royal Instruction of 1754. On referring to it, it will be seen that its great object was revenue arising from the sale of Royal lands. The officers who originated the titles were subdelegate judges appointed by the Vice Roys and Presidents of audiences, with a power of subdelegation in particular cases to others. While the power of confirming these incipient titles was exclusively vested in the audiencias, except in particular provinces mentioned in the 12th article, distant from the seat of the audiencias, and in other provinces not mentioned, but whose situation was equally remote. In such provinces for the convenience of grantees a power of confirmation was vested in the Governors assisted by other officers;—but no such power was given in any state of circumstances to the subdelegates.

It was contended that this ordinance, although anterior in date to the Spanish acquisition of Louisiana, became the law of that Country with regard to the disposition of the Royal domain, from the treaty of Fontainbleau, or at least from the actual possession of Spain under that Treaty. And that if even this were not so, still the ordinance was introduced as law into the province by the proclamation of Count O'Reilly in 1769. That the ordinance being thus in force, the 12th article applied to Louisiana, as a province remote from the seat of the audiencias, and therefore vested in the Governor General, and subdelegates of that Country, all the powers of the Governors and subdelegates therein mentioned.

It was further argued that the word “mercedes” in the preamble to the Ordinance, which in the Spanish language means gifts, vested in the subdelegates a discretionary power to make gratuitous grants of land to any extent, as a reward for services rendered by the grantee. That the Lieutenant Governor of Upper Louisiana was *virtute officii* a subdelegate; and therefore in that capacity, was authorised by the 12th article to make the concession in question.

Upon this part of the case, the court decided 1st, that the Royal ordinances of 1754 was not in force in Louisiana by virtue of the Treaty of Fontainbleau, or by O'Reilly's proclamation; 2dly, That could it be considered as in force, Trudeauau was not a subdelegate within its provision, because he was not appointed by the only appointing power, namely a Vice Roy, or President of an audience. That although he was commissioned Lieutenant Governor of upper Louisiana by the Governor General of the province, such commission did not vest in him the powers of a subdelegate within the ordinances; because the 12th article vests no power of appointing subdelegates in the Governors, but merely clothes them with the same power of confirming the grants of subdelegate *duly appointed*, as had been given in the previous articles, to the audiencias. 3dly, That if the ordinance were in force, and Trudeauau a regularly appointed subdelegate, still he was not authorised to make such a concession, because the great object of the ordinance was revenue by *sales* of the Royal lands. That the word “mercedes” was found only in the preamble, which contained a mere recital of the motives that led the king to make the ordinance. The powers of the subdelegate were to be looked for not in the preamble, but in the enactments of the ordinance; and looking to them it was found, that the only *gifts* which were authorised, were gifts for pasturage, commons to towns, and gifts to Indians for tillage and herding. That if the word “mercedes” in the preamble, was to be at all regarded, and meant *gifts*, it was thus satisfied. If it meant *rewards*, effect was given to it by another provision in the ordinance, by which grants in moderate quantity were authorised to be made, to those who should give information of intrusions without title upon the public lands. And that if it meant *grants* (as it had been translated by the public authorities) it was then satisfied by those articles in the ordinance, which regulated the grant of lands by sale and composition. But that in any view, it could not authorize, nor did any provision of the ordinance authorize such a concession

as that to Soulard,—a concession for 10,000 arpents of land, in reward of services.

I have thus, Mr. President, briefly, but I hope distinctly, presented the two great points arising in the case of Soulard. There were many other views taken by the Bar and the court, which with regard to that portion of the specifications as they have been termed, that I am now about to consider, it is unnecessary to review. It will not I am sure be supposed, that by selecting as I mean to do, some of the more prominent and important of these specifications, I cast suspicion upon the rest. I rely on all of them. There is not one, the misrepresentation in which, is not apparent, upon a fair and candid exposition of the opinion. My course is solely dictated by a desire not unnecessarily to fatigue your attention, already so severely taxed.

As prefatory however to this examination, let me ask whether the peculiar character of the publication, does not of itself serve to shew the intention of the author? It has to be sure, all the outward marks of respect and decorum; but are not these colourable only? If the aim of the writer, was fairly and candidly to discuss the merits of the opinion, to test the accuracy of its reasonings and the soundness of its conclusion, what would have been his course? If his desire was to inform and enlighten the public mind, would he not have given at least an analysis of the opinion? Would he not, though forbearing to state all its reasonings, have at least stated connectedly, in order to state intelligibly, the conclusions of the court? Would he not have deemed it proper, however briefly, to explain the controversy itself, and the questions it had raised, so that the full bearing of these conclusions might be understood? And above all, would he not have given these conclusions, not in his own language, but in the language of the court, or at least have apprised the reader of the fact? This undoubtedly would have been the course of fair and honest criticism. But was it the course pursued? Is this the character of the publication? Is there any prefatory statement of the points involved in the cause? Any analysis? Any reasoning? Is there not, for the manifest purpose of placing the supposed errors of the opinion in bolder relief, a total disregard of all order, connection and arrangement? Conclusion, standing independently in the opinion, the results of different trains of reasoning, artfully jumbled together; and others again disconnected, abandoning the context, and fastening a meaning upon the detached parts? Is this the practice of a fair, honest, candid critic? I pass over the introductory matter, remarking only, that the *humility* of its style is so palpably affected, that it can deceive no unprejudiced man. Who cannot see the imputation intended to be conveyed by these words, "the Judge has *thought proper* to decide against the claim." And the irony in this other sentence, "Judge Peck, in his opinion, *seems to me* to have erred in the following *assumptions as well of fact as of doctrine*?" What was meant by this word *assumptions*? Its logical meaning is the taking those things for granted, which were not, but ought to have been proved. And this I have no doubt was the real meaning of the author.

But let me pass on to the specifications, the first of which is in the following words;

"That by the ordinance of 1754, a Sub-delegate was *prohibited* from making a grant, in consideration of services rendered or to be rendered."

This is stated as one of the conclusions of the opinion. Let us examine its accuracy, and for that purpose recur for a single moment to the argument. The question was whether Trudeau had authority to make the concession. For this authority, *and for no other purpose*, the Counsel relied on the ordinance of 1754. The Court decided that the ordinance was not in force, and that if it were, it would not give the authority sought for. But the Court is here represented as going much farther; as deciding, that the ordinance not only contained no authority, but that there was to be found in it, an absolute *prohibition* against grants for services. Now is this a true or a false representation of the

opinion, in this particular? The mere statement of the two propositions is an answer to this question. He makes the court decide what was not a question in the cause, and declare what was not true in point of fact. But we have been told, that this is a miserable cavil,—a paltry play upon words,—a verbal criticism, that deserves a sneer, but scarcely an answer. “There is no substantial difference,” said one of the honorable managers, “between a want of authority and a prohibition. The author may indeed have used one word, when he might with more propriety have used another; but this is a very common mistake;—the Scotch Irish for example, often fall into it, as when they mean to say, they are under no obligation to do a particular thing, they will tell you, that they have no right to do it.” Why the Scotch Irish should have been particularly referred to, as an authority in this matter, I know not: but I could have furnished the honorable managers with a much more apposite illustration, which indeed I am surprised, did not at once occur to him. Dogberry, that faithful guardian of the King’s peace, that admirable expositor of the King’s English, whose rich and varied vocabulary ought always to be resorted to in cases of emergency like the present, thus uses this very identical word, in the parting salutation which he offers Don Leonato: “Heaven keep your worship—I wish your worship well—Heaven restore you to health! I humbly give you leave to depart; and if a merry meeting may be wished, Heaven prohibit it!”

But, says the honorable manager, it is a mistake to suppose that there is any substantial difference between a prohibition and a want of authority. And so says also Mr. Lawless, *the witness*. But what says Mr. Lawless, *the counsel* for the heirs of Soulard? Why his argument upon the Regulations proceeds entirely upon the distinction between these two terms. It may be true, says he, that these Regulations do not *authorize* the concession to Soulard, but then they do not *prohibit* it; and in the absence of a prohibition, a presumption arises in favour of its legality. The court too expressly recognizes the distinction, but avoids the presumption, upon the settled principle of Spanish law, and indeed of all the feudal constitutions of Europe, that the King has the sole power of parting with his domain. A prohibition, says the court, is not necessary; but an authority must be shown. And yet in the very face of his own argument, thus pressed upon the court, founded upon the very distinction in question, he has gravely told you, at this bar, that he sees no difference in the phraseology, and that when he said a prohibition, he meant nothing more than a want of authority.

But what was the object of this strange misapplication of words? Where, we are asked, is its materiality? Sir, it was most material. Had the author done what, if he intended fairly, he would have done; had he informed his readers, that the court had decided the ordinance not to be in force, perhaps the perversion would have been of little consequence. But this he keeps back;—he studiously conceals the fate of this most vital point in the cause, and leaving his readers to believe the ordinance to be in force, he alleges, that in the judgment the court, that ordinance contains a positive prohibition, fatal to every concession founded on services. In vain then might these claimants hope to find an authority elsewhere;—in vain look to the uniform practice as raising a presumption of authority. That presumption, and all presumptions—that hope and all hopes, were at once destroyed, when they were told that the ordinance on which they had relied, itself contained a positive prohibition. An “assumption” false in “fact,” absurd in “doctrine,” which if the court had really made, ought indeed to have covered it with shame and contempt.

But this is not all, Sir. The ordinance does not only, according to the imputed decision of the court, prohibit grants for services rendered, but for services “to be rendered.” Now I pray, where is there a syllable said, either in the argument of counsel, or in the opinion of the court, about “services to be

rendered?" The object of the writer in this interpolation may be readily imagined. It was merely to increase the number of discontented claimants;—to render the hostile array still more formidable. Look, Sir, to the concessions in evidence, and you will see numerous claims of this description, held by the most influential individuals among the claimants. It is true that if grants for services rendered, were prohibited by the ordinance, the inference might extend the prohibition to the other class of cases. But still, putting it in this way, was to render it more alarmingly striking.

The Judge is next charged, by this publication, with assuming, "that a sub-delegate in Louisiana, was not a sub-delegate as contemplated by the ordinance." What was the argument? That the ordinance being in force, Trudeau, though not appointed a sub-delegate according to its provisions, was still authorized, *virtute officii* as Lieutenant Governor, to grant the concession. Now, what was the opinion of the court? That the ordinance was not in force, but if it were in force, Trudeau was not a sub-delegate within its intention, and therefore *quoad* the ordinance, was not authorized to make the concession. Was it possible to doubt the conclusiveness of this reasoning? Would Lawless, or any other lawyer, have ventured to state the proposition in the precise language of the court, for the purpose of questioning its correctness? What was that language? "According to the evidence," says the court, "the Lieutenant Governor of Upper Louisiana, was not a sub-delegate within the meaning and intention of the ordinance." Here was a plain, intelligible proposition. But to suit his purposes, to cast ridicule upon the court, the writer tortures it into an absurdity by a dexterous change of words, and makes the Judge assert that a sub-delegate within the intention of the ordinance was a sub-delegate every where else but in Upper Louisiana.

The third assumption is, "That O'Reilly's Regulations made in *February*, 1770, can be considered as demonstrative of the extent of the granting power of either the Governor General or the sub-delegate under the royal order of *August*, 1770."

Of this royal order, the court will recollect that nothing was known, but what might be inferred from the preamble to Morales' Regulations. In speaking of the power transferred to him as Intendant, to grant the Crown lands, he says, "which power belonged to the civil and military government, after (or by) the order of 1770." Now O'Reilly's Regulations clothed the Governor General with this power, and in the Governor General were united the civil and military government of the province. Lands continued to be granted, after the date of the order, by the Governor General, in conformity with the Regulations. The court therefore inferred, that there was nothing in the order that repealed them. Now, what is the position attributed to the court? That the prior regulations of *February*, 1770, *demonstrate* the extent of the unknown, subsequent order of *August*, 1770; and that the Regulations of a Governor General control the construction of a royal order. And as the witness himself admits, the dates are italicized, that the reader's attention may be more certainly attracted to the absurdity. Now, where is it said, or even intimated in the Opinion, that the extent of the granting power of the Governor General or sub-delegate under the royal order of 1770, can be considered as demonstrated by the Regulations? In the first place, not a word is said, in this connexion, of the sub-delegate at all. And the provisions of the order are inferred, not attempted to be *demonstrated*, not by the Regulations alone, but by the Regulations as connected with the material fact, that subsequent to the order, lands had continued to be granted under them:—which material fact, the chief support of the inference, the writer takes care to suppress. This inference, let it be remembered, monstrous as Mr. Lawless would represent it, turned out to be perfectly correct, by the subsequent production of the order itself. If then there is here a misrepresentation, and who can doubt it for an instant, we have the acknowledgment of the witness himself, that the absurdity it im-

putes to the court, was one to which he was desirous of drawing public attention. For what purpose? For what other purpose than to excite public contempt?

The Judge is next represented as assuming, "that the royal order of August, 1770, (as recited or referred to, in the preamble to the Regulations of Morales of July, 1799) related exclusively to the Governor General."

I have just spoken of this royal order, and the court have seen that there is nothing in the Opinion to justify this imputation. The Judge looked to it only as affording an inference of one fact; he simply regarded it as the testimony of Morales, that by the royal order the power to grant lands vested in the Governor General as the representative of the civil and military government. This (and it was a mere paraphrase of the language of Morales,) is all that the court said. The Judge did not pretend to say, that the order might not have related to other officers besides the Governor General. But where, it is again asked, is the materiality of this alleged misrepresentation? It is readily seen. The unconfirmed claims in Missouri had all originated with the Lieutenant Governor of Upper Louisiana. There was nothing before the court, which excluded the supposition, that these Lieutenant Governors might have been expressly authorized to do that which they had been in the practice of doing, that is to say, to perform the preparatory acts to the application for a patent. This power of the Lieutenant Governor was perfectly consistent with the power of the Governor General to grant. But if the royal order related *exclusively* to the Governor General, all these preparatory steps,—the memorial, the survey, the order for possession, and so on, were unauthorised. And thus there was no value whatever in any concession issued by a Lieutenant Governor. A conclusion, which struck at the root of every unconfirmed claim.

The fifth assumption is in these words: "that the word '*mercedes*' in the ordinance of 1754, which in the Spanish language means '*gifts*,' can be narrowed by any thing in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money." The meaning of this, as it would strike every reader is, that the Judge, believing that the word *mercedes* meant gifts only, had by construction limited it to a *grant* to an Indian, a *reward* to an informer, and to a *sale* for money. In a word, that that which meant only gifts, meant every thing else but gifts.

The argument of the Opinion is, that the ordinance of 1754 looked chiefly to *sales*, and not to *gifts* of land: that there was no article in the ordinance, which contemplated gifts, except the second, authorizing gifts to the inhabitants of towns for commons and pasturage, and gifts to Indians: that if *mercedes* necessarily meant gifts, which the court however by no means thought, effect is given to it by the *gifts* just mentioned. It may as well be interpreted, as it has been by the government translator, to mean *grants*. But the concession in question was granted as a *reward* for public services. And looking to the ordinance it was found, that the only provision in this respect, was that in the 8th article, which authorized the sub-delegate to reward with a moderate portion of land, those who might give information of the occupation of lands without title. The conclusion therefore was, that there was no authority in the ordinance for the concession.

Now, with this plain and conclusive reasoning before his eyes, the leading counsel in the cause, who must therefore perfectly have understood it, imputes to the Respondent as Judge, unintentionally as he would now have you believe, first, that the word *mercedes* means only gifts; secondly, that gifts means grants; thirdly, that it means rewards; and lastly, that it means sales for money:—that the word, by construction, means every thing but what it truly and literally means.

But it is said that the assertion, that the word *mercedes* means only gifts, is an assertion of the author, and not meant to be ascribed to the Judge. Is it

not presented to the reader, with the rest, as an "assumption" of the Judge? Was it not so intended to be understood? Was it not so understood? Shall a man be allowed to defame in one sense, and defend himself in another? Shall this witness be permitted, after being convicted of a gross mistatement, thus to excuse himself? Suppose he had stated truly that the court had interpreted the word *mercedes* to mean grants, and had applied it to grants to Indians, grants to informers, and grants on sales for money; would there have been any absurdity in this? No. The absurdity consists in ascribing to the court the other interpretation, which he now says he meant should be understood as his own. Is not this a palpable evasion?

Again—why, but to increase the imputed absurdity, are the words "grant to an Indian," substituted for "gifts to Indians," which is the language of the Opinion? Why is "a reward to an informer," depending on a distinct provision in the ordinance, put at all in connexion with the word *mercedes*? Why are "gifts to inhabitants of towns for commons and pasturage," omitted in the enumeration? Why is the Judge made to narrow down this word gifts to a mere sale for money? An absurdity in terms—too striking to escape the most careless reader, and for which there is not the slightest foundation in the Opinion. I repeat emphatically the language of the answer, and say that if this specification stood alone, it would sufficiently show the purpose and intention of the author.

I pass to the eighth specification which is, "That the limitation to a square league of grants, to new settlers, in Opelousas, Attakapas, and Natchitoches (in 8th article of O'Reilly's Regulations) prohibits a larger grant in Upper Louisiana."

To support the concession to Soulard, his counsel had argued, that the Lieutenant Governor of Upper Louisiana was unrestricted as to the quantity of land to be granted. The court answered, that this would be manifestly against the policy of O'Reilly's Regulations, which, looking to the cultivation of the country, had limited the extent of grants to the means of the applicants. That this policy applied as well to Upper Louisiana as to any other part of the province. And that it was not perceived why grants should be limited with this view in Natchitoches, Attakapas, and Opelousas, and unlimited in Upper Louisiana. This analogical reasoning is converted by the writer into a positive "assumption," that an express limitation in one place is an express limitation in another: that the mere limitation to a league square in Natchitoches, Attakapas, and Opelousas, did *per se prohibit* a larger grant in Upper Louisiana; again presenting to the claimants all the terrors of a *prohibition*.

Thus conclude the specifications which relate to the ordinance of 1754, and to the Regulations of O'Reilly. Let me pass to those which are connected with the other ground on which the counsel urged a confirmation;—I mean the "uniform practice." The first I shall notice is the fifteenth in the catalogue. "That the uniform practice of the sub-delegates or Lieutenant Governor of Upper Louisiana, from the first establishment of that province to the 10th of March, 1804, is to be disregarded as proof of law, usage or custom therein."

Upon this subject, I beg leave to refer to the remarks of the Respondent, which the court will find appended to his argument before the House of Representatives. "It is to be observed that at the hearing of the case of Soulard, no law or authority could be referred to, which authorized the Lieutenant Governor to make concessions; the claim before the court was founded upon a concession which he had made. To raise a presumption in favour of his authority to make concessions, proof was offered that it had been the practice of the Lieutenant Governors to make them, and that their concessions had been confirmed by their superiors. This evidence, it will be seen, was admitted by the court for this purpose; and the opinion of the court on this point was not controverted, even by the attorney for the government, who excepted to the Opinion upon the ground that there existed record evidence of this confirmation, and that such

confirmation was not therefore the subject of proof by oral evidence. So in the same bill of exceptions, upon an objection to evidence, the Court decided, that it was not competent for the witnesses to prove matter of law, whether written or unwritten: the latter, because they did not appear to be learned in that science. But so far as the depositions went to show the practice in relation to the manner of making concessions, and the officer by whom made, the court would receive the same, since a presumption of what the law was, in relation to such matters, might arise from such practice. To which decision the district attorney also excepted.

Such were the sentiments of the court, as contained in the record to which Mr. Lawless refers for the evidence of the uniform practice of the Lieutenant Governor, which he says the court disregarded "as proof of law, usage or custom." Such were its sentiments as expressed on the hearing of the cause, and well known to Mr. Lawless; for, as he shows in his evidence, he was the leading counsel, and might be presumed to have argued this question, as in fact he did, and obtained the decision, and knew that the exception was matter of record, at the time he wrote his article.

And in accordance with these sentiments, is the doctrine of the Opinion throughout; it is the basis upon which it rests; for in the absence of the authority under which the officers acted, as well the Governor General as the Lieutenant Governor, the court was driven to the doctrine of presumption, and thought their acts should be sustained by the presumption which arose in favor of their legality, so far as such presumption should be unopposed by evidence of a higher nature.

But the court did not suppose, that a presumption in favour of the legality of the act of the Lieutenant Governor, in making a concession, was to be conclusive, or such as should prevail in derogation of positive written law, or in opposition to a necessary inference of such law; and considered the Regulations emanating from the supreme authority of the province, *prima facie* authorized, and consequently law to the inferior; and that those Regulations, (the several acts of them collectively) evinced an intention, a policy on the part of the Spanish Government, inconsistent with the admission of the legality of the concession in that case.

But what uniform practice was the evidence offered to establish? What uniform practice did it establish? None, except that the Lieutenant Governor had been in the uninterrupted practice of making concessions; and the court decide in the bill of exceptions referred to, that proof of such practice was inadmissible, since a presumption in favor of the existence of a law authorizing it might arise from such practice. The authority of the Lieutenant Governor to issue concessions was not otherwise established than by proof of this practice, and the implied recognition thereof by his superiors, as stated in the bill of exceptions. Now his authority to make such concessions, is no where controverted in the Opinion." I beg leave to call the attention of one of the honorable managers [Mr. Buchanan] particularly to this passage; for it will be recollected that on a recent occasion, he asserted it to be the doctrine of the opinion that the Lieutenant Governor was not authorized to issue concessions. "The whole argument of the Opinion proceeds upon the admission, tacit if not expressed, that the Lieutenant Governor had authority to issue concessions, but denies that he had authority to issue them without limitation as to the extent of the grant, or without reference to the means of the cultivator, or exempt from the condition of cultivation.

There was no evidence, nor does the record show any, that it was the uniform practice of a Lieutenant Governor or sub-delegate of Upper Louisiana, from the first establishment of that province to the 10th of March, 1804, to issue concessions as large as the one in that case, or to issue them exempt from the condition of cultivation; nay, not only may the negative of the existence of any such evidence in the record of Soulard's case be truly affirmed, but the

record of the case of Mackywherry against the United States contains evidence full and satisfactory, that no concession for lands in Upper Louisiana had ever been issued for a quantity exceeding one league square [7056 arpents] during the first twenty-six or twenty-seven years of the Spanish Government, and perhaps more; whereas Soulard's grant was for 10,000 arpents. So that of the thirty-six years of the Spanish Government during which lands are authorized to be granted, the practice of twenty-six or twenty-seven years does not furnish an instance of a grant so large as Soulard's. A uniform practice therefore for this period, as well as the spirit and letter of the Regulations, was against the legality of the concession, and the authority to make it."

The conclusion of this whole matter, Mr. President, then is, that no uniform practice was, or could be shown to authorize this concession. And that the only practice which was shown, was received in evidence, and admitted as a presumption establishing the power of the Lieutenant Governor to *originate* titles, by issuing concessions. The charge therefore that even this practice was disregarded, is utterly unfounded.

The same remark applies to the 10th, 13th and 14th specifications, which relate to the complete titles of the Governor General and Intendant, offered as proof of a recognition of the power of the Lieutenant Governor to issue concessions, not in conformity to the Regulations. The charge is, that these were not referred to. That charge, however, is completely disproved by the first exception, from which it will appear that they were received in evidence against the objection of the district attorney. But further, the Judge is represented as deciding, that they afforded no inference, of the construction put upon their own Regulations, by the Governor and Intendant General:—whereas they were explicitly regarded as presumptive proof of that for which they were offered;—rebutted, it is true, by the other evidence in the cause. And when disposed of, instead of being referred to a *anomalous* power, as is charged, were referred to a dispensing power in the Governor General.

The sixteenth "assumption" ascribed to the Respondent is, "that the historical fact, that *nineteen twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso or Moralez, at the date of the cession to the United States, affords no inference in favour of the general legality of those titles."

You will recollect, Mr. President, that I requested the witness to direct me to the proof in Soulard's case, of this "historical fact," and that he contented himself with referring me to his own printed argument. In that argument I find that Stoddard's Memoir is referred to, and a passage quoted from it to show that in the author's opinion, the Regulations of O'Reilly were inapplicable to Upper Louisiana, and were never in force there. This is the only reference to Stoddard, which in looking over the argument I have been able to meet with; and surely it has nothing to do with the "historical fact," that the Judge is charged with having disregarded. It is a fact, which was not presented to the court either in this mode, or by any other medium of proof. It is not to be found in the record, and therefore it cannot be true that the court disregarded it.

But suppose this book had been produced, could the court have taken judicial cognizance of it? Are books, or chronicles, or "sketches of history" ever admissible to prove particular facts, or particular customs? Camden's Britannia, when offered for such a purpose, was rejected in Westminster Hall;—a book of rather higher authority than these loose notes of Major Stoddard. If such was the fact, there was a higher source of evidence to which the party should have resorted. The archives of the country were open to him;—there the proof was to be found, if the fact existed. I say, then, that the charge thus conveyed has not even the shadow of truth;—the fact was not in evi-

dence;—the proof alleged to have been offered, was not offered, and if it had been, the court was bound to reject it.

The last of these “assumptions” which I shall notice is the 17th, which is stated in these words; “that the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution, *ab intestato*, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations.”

Now, where is the proof that *this* fact was in evidence? We are again directed to the printed argument which refers to a list of six or seven transfers, said to have been taken from the clerk's office. But were the records produced, or any other evidence offered of which the court could take judicial notice? If there was such evidence, why do we not find it in the record? If accidentally omitted, which however is not pretended, why is it not found in some one of the records of the subsequent cases? The conclusion is, that the fact, if it existed, was not brought judicially before the court, or pressed in argument as a ground of inference;—the Opinion therefore is silent with respect to it, whereas the charge would induce the reader to believe, that the evidence of the fact being before the court, the Judge had expressly decided, “that it furnished no inference in favor of those incomplete concessions, or to their claim to the protection of the treaty of cession, or of the law of nations.” A grosser misrepresentation cannot be well imagined.

Having thus, Mr. President, briefly compared some of the principal specifications with the Opinion, I proceed to say a very few words upon the design and tendency of the whole publication. If its true character be such as I have attempted to show, was not the Respondent justified in believing that the misrepresentations with which it teems were wilful and intentional? If it had been the production of a private man, unskilled in legal inquiries, with no very intimate knowledge of the case of Soulard, or of the principles that governed it, it would have been even then strange, that with no other object than truth, such a man should have so marvellously misconceived the doctrine and conclusions of the Opinion. But, that a lawyer, who had devoted his time, and the whole force of his mind to the investigation of the great questions growing out of these land claims—who had been the leading counsel in the case of Soulard—had twice elaborately argued it at the bar, and once upon paper;—that such a man, having the printed Opinion before him, should have thus perverted and distorted it undesignedly, might well have excited in the mind of the Respondent something more than doubt. Was the subsequent conduct of Mr. Lawless calculated to dispel suspicion as to his motives? He now says, indeed, that he meant no disrespect to the court, and he did not intentionally misrepresent its Opinion. Be it so. But why did he not so answer when the interrogatory was directly put to him? He has told you indeed that on the rule granted against Foreman, he did disclaim all intentional disrespect. When asked, however, if he did not make this disclaimer as counsel for Foreman only, he answered that it is true he made it in his character of counsel, but that having unwittingly discovered himself as the author of the publication, the Judge might and ought to have inferred that the disclaimer was made for himself. Why did he leave it to inference? Was it from a feeling of pride? Would not a frank avowal, an unequivocal disclaimer have been more magnanimous? Is the law to yield to the pride of any man? He was, he must have been perfectly assured that a single word would have arrested the proceeding, and yet he refused to give it utterance. Was this the effect of a sudden excitement? No! Mr. Geyer has told us, that it was the course which upon grave deliberation Mr. Lawless had determined to pursue:—that as soon as the rule was granted, he made up his mind, and so instructed his counsel, that in no event would he offer explanation or apology, and that he would not answer interrogatories. And it is fur-

ther in proof, that acting on this fixed determination, when one of his counsel (Mr. Strother) admitted that the Opinion had not been fairly dealt with in the publication, and was proceeding in a tone somewhat apologetic, he was interrupted by Lawless, and requested to desist from further observations. But whether his conduct was designed or not, the court was fully justified, by the circumstances, in believing it to be so. If that belief was erroneous, it was the perverseness and contumacy of the party that led to the error, and strengthened it more and more to the final end of the proceeding.

But let us for a moment suppose that there was no intentional misrepresentation, nay, that there was no misrepresentation at all,—was the acknowledged object of Mr. Lawless, as the author of the publication, a legal and justifiable object? What was that object, as he himself avowed it in his memorial? “To counteract the effect of the Opinion in the public mind;—and this not as it related to Soulard’s case only, but with reference to all the other cases depending upon the same general principles. How was the effect of the Opinion to be counteracted? Obviously by persuading “those numerous land claimants, by whom he (Lawless) was employed as counsel,” that the Opinion could not be sustained:—that its errors and absurdities were too glaring, to induce even a doubt with regard to its fate before the Supreme Court. Thus arraying public opinion against the Opinion of the court, not in Soulard’s case only, but in all the land cases which remained to be tried and decided. Was not this, then, a contempt within the principle of every case that I have cited? Was it not a contempt upon Lawless’ own acknowledgment of his intention? I repeat that it matters not in this view, whether you do, or do not believe that the publication misrepresented the Opinion. You are to look to the effect which the author himself confesses that it was designed to produce. His object was “if possible, to counteract the effect that Judge Peck’s Opinion was calculated to produce on the value of the unconfirmed Spanish and French land titles;” and this object, he adds, “he has, as he believes, to a considerable extent attained.” He might indeed have spoken less modestly of the success of this effort, for it has been clearly shown, that so entirely did the court lose the confidence of the claimants, that at one sweep, one hundred and forty-six cases were withdrawn:—thus defeating public justice,—defeating the great object of the Act of Congress which had created the court, the final determination of these land claims. Can it be doubted, that a publication, with such an intention, is a contempt? “Nothing,” observes Mr. Justice Buller, “can be of greater importance to the welfare of the public, than to put a stop to the animadversions and censures which are so frequently made upon courts of justice. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken; when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method which the law allows, to correct the mistake. But when a person has recourse by writing, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is, to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself.” These are sentiments which have been approved by a long course of decisions, and from which it is impossible for any just and reflecting mind to withhold its assent.

It is vain to say that Soulard’s case was no longer pending; that it had passed from the jurisdiction of the court, and that the Opinion was therefore fairly open to discussion. In Darby’s case, this plea did not avail him. There the cause to which the publication related, had in like manner passed away from the tribunal whose opinion he misrepresented and defamed, and yet he was punished for the contempt. And so in other cases that have been cited. But the influence of Lawless’ publication on Soulard’s case, was not the ground of the proceeding against him. The court looked to the prejudice that it intended, and was calculated to produce, in the numerous cases then actually depending.

As the best proof that such was the view of the court, hear the language of the rule to show cause. "The court being satisfied upon the oath of Stephen W. Foreman, made in open court, that Luke E. Lawless, an attorney and counsellor of this court, is the author of a certain publication over the signature of "A Citizen," &c. it is ordered that the said Luke E. Lawless show cause forthwith, why an attachment should not be issued against him for the false and malicious statement, in the said publication contained, in relation to a judicial decision of this court, in the case of Julia Soulard, widow, James G. Soulard, &c. children and heirs of Antoine Soulard, deceased, against the United States, lately pending and determined therein, with intent to impair the public confidence in the upright intentions of said court, and to bring odium upon the court, and especially with intent to impress the public mind and particularly many litigants in this court, that they are not to expect justice in the causes now pending therein, and with intent further to awaken hostile and angry feelings on the part of the said litigants against the said court." The views of the court are thus plainly disclosed, and the ground assumed is incontrovertible by reasoning or authority. The question always must be whether the publication is calculated to influence the course of public justice; and whether this is its effect upon the case which has given rise to it, or upon other cases pending in the court, is wholly immaterial. The Opinion, it is true, to which this publication related, was the opinion pronounced in Soulard's case; but the doctrines it maintained were general, and applied to the other cases:—this Lawless knew; he acknowledges that he knew it, and the attempt now made is a palpable evasion,—a mere after-thought. There must be a pending cause, say the managers, to which the publication relates, and which is to be affected by it. Be it so. We show a hundred cases, the decision in every one of which it was the avowed object of the author of this publication to influence.

With regard to the tendency of the publication as to the court itself, which is another distinct ground of the proceeding as disclosed by the rule to show cause, it can require no argument to prove that among these land claimants, forming, according to the evidence, a numerous class of the community, the direct effect must have been to excite dissatisfaction and distrust. Deeply interested as they were, the article was admirably fitted to make its impression. It was brief, soon read, and the absurdities it imputed to the court were too glaringly displayed to escape their notice. It is no answer to say, that the antidote was to be found in the Opinion. Can it be supposed that men, discontented and disappointed as these claimants must have been, would calmly set down, and compare the Criticism with the Opinion? Is it not more natural to suppose, that knowing, or strongly suspecting the authorship of the publication, they would rely, without such a comparison, upon its truth and accuracy? One thing however is certain, and is alone sufficient;—the design of the author was to impute error and absurdity to the court, and thus to bring it into disrepute. This was the manifest intention of the publication on its face:—Mr. Lawless has not hesitated since to acknowledge it; and this intention alone would have justified the interposition of the court.

I come now, Mr. President, to the third inquiry,—Whether, if the publication in question was a contempt, the court exceeded its authority in the punishment which it inflicted. That punishment was suspension as an attorney of the court, and imprisonment. The power of a court to suspend, or strike from its rolls, in cases of misbehavior, is not to be questioned. It is incidental to all courts: [*Ex parte Burr*, 9 Wheat. 530.] And there can be no case in which it may be more properly exercised, than against an attorney who has deliberately attempted to bring the court of which he is an officer, into contempt. The honorable managers themselves admit, that for an offence of this kind, an attorney may be suspended, or struck from the rolls; and in the cases of Darby, Tillinghast and Freeman, the power was exercised. But they contend that there is no right to superadd fine or imprisonment. Why? If the

Act of Congress is to be considered as limiting the punishment, then there is no power to suspend or strike from the rolls. But the Act looks only to ordinary cases, and not to contempts committed by officers of courts. And thus it has been seen that in the case before Judge Brackenridge, fine was added to suspension; and in Tillinghast's case, the court expressly claim the power of fining or imprisoning, as well as striking from the rolls, but decline to exercise it. It is surely unnecessary to press this matter further; and I pass therefore to the last inquiry with which I purpose to trouble the Court.

If the publication of Lawless did not amount to a contempt, or if in punishing it, the respondent transcended the limits of his power, did he act honestly though erroneously, or from a malicious intention? This intention is distinctly charged in the article of impeachment, and is essential to constitute guilt. In every code of morals and of law, the criminal mind must accompany the unlawful act. If the act be lawful, all inquiry into the intention is unnecessary;—if it be unlawful, it then becomes proper to consider with what mind it was done. There must be a concurrence of act and intention to make the offence. This is the humane maxim of the law, which must govern this, as it governs all other cases. Although for judicial acts within the proper sphere of their jurisdiction, the wisdom of the law has exempted judges from all responsibility, civil or criminal, before the ordinary courts, yet here, in this High Court of Impeachment, the Constitution has made them amenable. Not, however, for error in judgment—not for unintentional wrong—but for corruption, malice, wilful wrong,—done under color of law. An impeachment for mere error in judgment, is contrary to all the principles of our judicial institutions, as well as to the whole spirit of criminal justice. There must be a wilful abuse of authority;—plain and clear proof of malice or corruption. Is there such proof in this case? Where are we to look for it? Is it to be made out only by inference? Where are the circumstances which justify such an inference?

Has there been so gross and palpable a departure from all precedent, that no imputable degree of ignorance can account for, and which therefore ought alone to be attributed to an evil and corrupt mind? The undisturbed current of decision,—the accumulated precedents of every age,—the authorities with which this case has been loaded and oppressed, answer this question:—decisions not of English courts alone, but of our own courts, in every stage of our political course, under every change of the political Constitutions of the States of the Union—decisions that have passed through the ordeals of impeachments and conventions, untouched and unaltered.

Can the inference be made out, by any proof in the cause, of personal ill will on the part of the respondent to Mr. Lawless? There is no such proof. Will you look for it in the natural temper and disposition of my client? If indeed that temper had been proved to be arbitrary, cruel and vindictive, there might be some color for such an inference. But how differently has he been described to you by those who have known him long and intimately! Sir, the richest consolation,—that which has borne his spirit up, above the storm and tempest of this prosecution, is the suffrage of every witness who has been examined, to a reputation unstained and unblemished—to a disposition full of gentleness and kindness, which has made him many friends, but never lost him one—to a judicial career of irreproachable purity and integrity, against which, until now, complaint has never breathed a whisper.

But it is, I understand, to the particular transaction itself that the honorable managers point for their proof. It is said, for example, that Judge Peck's language was rude, abusive and contemptuous:—that knowing, as he must, Mr. Lawless to be the author of the publication, he presumed to speak of it as a false and scandalous libel. Why, Sir, regarding it as a libel, being about to punish it as a libel, was it at all remarkable, that he should use the appropriate language of the law in defining a libel? How did Chief Justice McKean describe the libeller in Oswald's case? What was the language of the mild

and courteous Tilghman, in addressing Duane? Where are the rules for judicial decorum and politeness? Is a judge, under peril of impeachment, to speak by the card, to measure every word he utters, in describing an offence, lest he may wound the feelings of the offender?

But again—Lawless was frequently interrupted by the respondent, while arguing the rule against Foreman. Why, in the first place, Mr. President, let me appeal to every gentleman accustomed to courts of justice, whether there is anything more common. How natural was it upon this occasion? Mr. Lawless was, it seems, examining the truth and accuracy of the publication, by comparing it with the Opinion, and the interruptions consisted in the judge pointing to passages, which he thought necessary should be noticed. That which serves, however, best to show the character of these interruptions, is the fact attested by several witnesses, that although Mr. Lawless is very irritable, easily moved, and most impatient of interruption, either from the bench or bar, he made, upon this occasion, no such complaint.

We are next referred to the different style of the two rules. The only difference is, that in one it is termed a false,—in the other a false and malicious statement;—a very proper distinction, one would think, between the printer and author of a libel. And with regard to the last rule, it has been seen, that it does not substantially differ from the precedents, as we find them in many of the cases cited.

But, Sir, trespasser as I am, I forbear to waste any more time in noticing objections of this description. These are a sample of the whole;—and it is upon trivial incidents like these, that you are called upon to infer a malicious intention.

Mr. President, I have now done;—leaving much, however, unsaid, lest I quite exhaust the patience on which I have so greatly trespassed. Let me only remark, in closing, that if the liberties of the people of this country are concerned in the firm, incorrupt, and enlightened administration of the laws, it behoves the constitutional guardians of those liberties to protect, with a watchful care, the independence of the judges. If the judicial power of this country shall ever become degraded in public opinion,—its firmness and independence shaken,—its authority contemned,—the spirit of its ministers broken down and humbled,—farewell forever to the liberties of the people. Deep as the respondent's stake is in this cause, it is as nothing to that of his country. It is not his own peril which oppresses him. If he falls, he falls in the honest and conscientious discharge of his duty. But if the independence and rightful authority of the judiciary of the land,—the best guardian of civil liberty,—the sacred ark of the people's safety, be shaken in his fall, bitter and lasting indeed will be his remembrance of this IMPEACHMENT.

The Court now adjourned.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES *vs.* JAMES H. PECK.

Saturday, January 22.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel, also attended.

WILLIAM WIRT, Esq. one of the respondent's counsel, now opened his address to the court, in behalf of the respondent.

[In consequence of ill health, and other causes, Mr. WIRT was not able to furnish the report of his argument, (which occupied three sittings of the court), in season to be inserted here. It will be found in the Appendix.]

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Wednesday, January 25.

The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel, also attended.

Mr. STORRS, of New-York, one of the managers on the part of the House of Representatives, then addressed the Court in support of the impeachment. We have not been able to furnish more than a general outline of the course of his argument.

He said that the question on which the impeachment rested, was whether the Courts of the United States possessed the power of punishing the offence of a general libel on the court, not relating to any cause or matter pending or in a course of judicature before them, by the process of attachment and summary conviction. The case of Souldard had passed into judgment and had gone to the Supreme Court of the United States on appeal when the publication of Mr. Lawless was made. The jurisdiction of the respondent in that matter was ended and the case was no longer pending before the District Court of Missouri. He said,

That before the statutes of Scandalum Magnatum, this was at common law the crime of libel, of the nature of Contempt against the King's Government and Authority :

That the Year Books and judicial records contained no case in which the courts had taken cognizance of it summarily, as for a contempt ; to the time of Geo. III. no judicial proceedings could be found, except in the Star Chamber, which countenanced the inference that the courts possessed such a jurisdiction.

The case of John *de* Northampton, cited by Lord Coke in 3 Inst. ch. 76. from 18 Edw. III. was under the head of Libel, and did not sustain the position asserted by the Respondent's counsel. The scanty epitome of that case from the files of the court, as given by Coke, only showed that an attorney was brought before the Court of K. B. for writing a scandalous letter of the court: and under some process or proceeding not stated, was "committed" and "afterwards found six sureties (*manu captiores*) for his good behaviour." It was highly probable, even from the imperfect abridgment of this case by Coke, that the matter related to some proceeding before the court. The offensive letter was written by J. *de* N. to Ferrers, one of the King's counsel, and the import of the paper was that the judges of the court had too much independence to be swayed by the royal commands; *sc.* "that neither Sir Wm. Scott, chief justice, nor his fellows the king's justices, nor their clerks, any great thing would do by the commandment of our lord the King, nor of Queen Philipe, in that place, more than any other of the realm." The counsel themselves, would doubtless admit that this was rather a bad precedent to show the nature of contempts at this day. It is then said—"praetextu cujus dominus rex erga curiam et justiciarios suos *hic in casu* habere posset indignationem." It was difficult, without access to the files and without a knowledge of the subject matter of the letter itself and the circumstances in which it had its origin, to ascertain whether it related to any matter before the court or not. Lord Coke's epitome of it leaves it doubtful, though it was fairly inferrible that it had some connexion with the business of the court. Further—it is only said that he was *committed and afterwards found sureties for his good behaviour.* All this, and more, might have been then done and may now be done by the Judges of the King's Bench in the case of any libeller, as general conservators of the peace by virtue of their commissions. Whether J. *de* Northampton was committed in the first instance for want of sureties or for trial, or by what process, did not appear. But from the circumstance that he afterwards

found sureties—and of course must have then been enlarged—it was as fair to infer from the brief note of the case given by Coke, that he was committed in the first instance for want of sureties, as that the proceeding was by way of conviction for a contempt. This chapter of Coke treated of the offence of *Libel* only. It contained but two paragraphs. The first paragraph cites the case of *Adam de R.* to show that the offence was indictable at common law; and the other, the case of *John de N.* that libellers may be bound to their good behaviour. If this offence had been punished summarily as a contempt, even during many of the arbitrary reigns before the erection of the Star Chamber, when judges were easily found who held high notions of kingly prerogative and their own dignity, it was remarkable that no better or clearer authority could be found for the exercise of such a power than the slender inference drawn on the other side from this brief and imperfect note of *J. de Northampton's* case in 3 Inst.

It was not credible that Sir Edward Coke had ever intended to cite a grave precedent to show it to be a contempt of court, to say that the judges were too honest and independent to be influenced by the King in the administration of justice. His character and the well-known independence which he displayed, when Chief Justice of the Common Pleas, in his firm and manly resistance to the interference of James I. in several instances with the discharge of the duties of the judges, and especially in the case of *commendams*, would rather lead to the belief that he had taken this opportunity to notice the case of *J. de Northampton*, rather with the view of illustrating the subservience of judges, in former times, to the interests of the King than as settling any point of law. He had stated it so obscurely that it could not be said to give his sanction to any definite position. He had omitted any commentary upon it, merely saying that it was a “*notable*” precedent; and had so studiously and formally extracted from the judgment the remarkable reason given by the court for whatever may have been done, that if the suggestion was not too irreverent and too unsuited to the gravity of the Institutes, it might rather be suspected he had only noticed it with a view to its very obvious bearing on that great point in his own judicial character and conduct—his inflexible independence of the King’s will—which cost him his office at last. It was too well known to repeat here, that on the accusations against him, among which was one for high contempts uttered on the seat of justice, it was one part of the King’s order that he should forbear from riding his summer circuit and that he should employ the vacation in revising and correcting his reports, in which the King charged him with declaring for law many dangerous conceits of his own to the prejudice of his Prerogatives. That great and honest judge, who had so severely discountenanced all complaisance to the King in the discharge of his duties—whose favourite maxim was, that he was a judge in court and not in a chamber—who penned the celebrated letter of the Judges to King James in the case of the *commendams*—who, when the Judges asked the King’s pardon on their knees for that letter, boldly entered into a defence of it, and when the others submissively answered on the insulting interrogatory put to them by the King’s order, that they ought to stay proceedings in all cases which touched the power or profit of the King until he consulted them—fearlessly answered that as for himself, “when the case should be, he would do that which should be fit for a judge to do”—had never inculcated the principle in his Institutes, that to commend the judges for their want of complaisance to the King’s commands was to scandalize the administration of justice.

Nor was any precedent on such a point from the time of Edw. III. entitled to much weight at this day. A late writer had said, in a very interesting sketch of the life of Coke, speaking of this trait in his judicial character, that “had he been inclined to search for precedents of corruption among his predecessors on the bench, by way of authorizing his compliance with the King’s wishes, he would have found many instances well suited to his purposes.

Indeed, *obedience to the will of the Sovereign* was considered, in some sort, *the duty of the judges*, at a time when they held their offices by no safer tenure than the meanest servant of his household."

The origin of the doctrine set up on the part of the Respondent, was to be found in the statutes of *Scandalum Magnatum* and the *Star Chamber*.

The offence was originally *Libel*, and *indictable* at common law.

By the St. 2. R. 2. and 12 R. 2. (*Scandalum Magnatum*) which were said to have been procured by the Duke of Lancaster to shelter his unpopularity, those who counterfeited *false news* of the "prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the *chancellor*, treasurer, clerk of the privy seal, steward, &c. *justices of the one bench or the other*," should be taken and imprisoned, and if *not able to find the author*, should be punished "by the *advice of the council*."

It is said in *Bac. Abr.* that no prosecutions were brought on these statutes for a hundred years; and it was more than a hundred years from their enactment, when in the 3 H. 7. the Court of Star Chamber was erected, or rather when its jurisdiction and the constitution of the court were re-modelled. The trial by jury was unknown in that court, and the St. 3 H. 7. authorized the great state officers who were appointed to sit there, to punish offenders "*after their demerits*," and "*in like manner and form, as they should and ought* to be punished if they were thereof *convict* after the *due order of law*."

This court from that time took to itself a summary jurisdiction in cases of Libels and words derogatory of the King's Authority and Government as offences at common law or in the Statute. Until long after its abolition, no case could be found in which it was asserted by any judge or crown officer, that any other court could exercise a summary power, as for a contempt, over an offender for a general libel on the judges or the administration of the "King's justice," not relating to any matter pending or in hearing before the court. The Court of Star Chamber took upon itself the jurisdiction of such cases as *libels*, under the names of *Contempts* of the King's *Prerogative*, *scandalizing the public justice*, the *King's courts*, &c.

There were but few early records of that court, and those which remained of its proceedings and practices, after it was re-modelled by H. 7. and H. 8., have come down to us rather as historical proofs of the enormous oppressions which marked some of the most tyrannical reigns in English history. Before the time of *Eliz.* the books furnished a very scanty account of this court. But in her reign, its jurisdiction in cases of *Contempts* seems to have been fully established.

One of its earliest cases, in *State Trials*, (Vol. i. p. 1270) was a prosecution against Sir Richard Knightly for *contempt of the Queen's Proclamation*. His offence consisted in encouraging the printing of Puritan books—of the Brownists; and he had put up a press in his house for that purpose. The press was seized by a warrant from the Earl of Derby; and Camden says (*note*, St. Tr. p. 1271,) that he had "a pretty round fine" laid on him in the Star Chamber.

The cognizance of offences of this character seemed to have been at that time so rarely meddled with by the ordinary courts by indictment, that when John Udal, another Puritan, was brought before the court at the Assizes, after the jury had found him guilty on a prosecution founded on a St. of 23 Eliz., and there had evidently been some doubts of the propriety of his conviction under that statute for publishing the books complained of, which seemed to be a *libel on the bishops* only rather than of Popish tendency, he prayed the court to "stay the sentence notwithstanding the verdict," for several reasons—and,

"1. It seemeth that my case is not esteemed felony by the judges of the land, seeing they do usually sit in the *High Commission Court*, where the printing and dispersing of the same and such like books are usually inquired after, as *transgressions of another nature*." 1 St. Tr. 1298.

So, in 1613 (2 St. Tr. 766) Mr. Whitlock was brought into the Star Chamber, for giving a private verbal opinion, as a barrister at law, against the crown. This offence was styled a "*Contempt of the King's Prerogative*."

And in 1615, (2 St. Tr. 1029) Sir John Hollis and others were prosecuted in the Star Chamber for *traducing Public Justice*.

In 1618, (*ibid* 1059) Mr. Wraynham was punished there for slandering Chancellor Bacon.

Mr. S. read from these cases several passages from the arguments and speeches of the Judges, to show the ground on which they assumed jurisdiction in such cases and that it was on the Stat. *Scandalum Magnatum*, and as for *libels* and contempts of the *King's Government*.

Sir E. Coke said, "the statute hath made a sharp law against such as speak *scandalous news* of the Chancellor, Justices of the King's Bench, &c." This was said in Mr. Wraynham's case.

In Mr. Hollis's and Mr. Lumsden's case, he said, "the St. of the 1st and 2 R. 2. is, that he that doth raise *false news* between the king and his nobles shall be imprisoned for the space of a year. I think fit that Mr. Lumsden's imprisonment should be for a year, and afterwards, until he *produce his author*."

So in Wraynham's case, it was clear that Ch. J. Hobart considered the Star Chamber as taking cognizance of the offence as a common law crime. He cited several old cases to show it to be so, and particularly Welch's case in 8 Eliz. for saying that Judge Catlyne was an unjust judge; who, he said, was "indicted as for an offence at common law;" and he gave the words of the *conclusion* of the indictment, as a sort of indication of the *nature* of the *crime*, saying that "it was *in magnum contemptum Dom. Reg. ac curiæ suæ*," &c. And Mr. S. said that it was no doubt by this kind of association of words, that the word *contempt* had been since attached by some to general libels and scandals on the judges, after the Star Chamber was abolished. This word had slipt into so much of the reasoning of the Judges in the Star Chamber, and been so mixed up with the proceedings for libels and scandals there, that some have since applied the reasoning of those judges in cases of libel to cases of contempt for words and general libels on courts in later times.

In the 5 Charles I. this jurisdiction of the Star Chamber was so well established that the King was about to proceed in that court against Sir John Elliot, for saying in the *House of Commons* that "the *Council and Judges* had all conspired to trample under foot the liberties of the subject," and exhibited an information in that court in 1629 against him and others. This proceeding was prudently dropped and on an information against them in K. B. it was said by the Court that for such criminal and contemptuous offence the members of parliament were punishable out of parliament in the K. B.—so little vestige of liberty then remained to the People of England. 3. St. Tr. 294.

This engine of oppression continued a little time longer. In the same year, *Waller Long* was prosecuted in the Star Chamber for "a great and presumptuous *Contempt against his Majesty*," for serving in parliament, and thus absenting himself from the county of Wilts, of which he was the sheriff. Mr. Long was one of the members of parliament who fell under the King's displeasure. 3 St. Tr. 234.

So after Mr. Stroud, Mr. Long and others had been committed, all the judges were assembled and divers questions were put to them by order of the King, and among others "4. Whether if *one* parliament man alone shall *resolve*—or two or three shall covertly conspire to *raise false slanders and rumours* against the Lords of the *Council and Judges*, not with intent to question them in a legal course or in a parliamentary way, but to blast them, and to *bring them to hatred of the people*, and the *government* into *contempt*, be *punishable* in the *Star Chamber*, after the parliament is ended?"

"The judges resolved that the same is punishable out of parliament," &c. 3. St. Tr. 238.

Sedition seems not to have been at that time a *distinct substantive offence*, indictable as such. The King's counsel admitted in the argument on the Habeas Corpus in Mr. Long's case, that "no indictment was ever seen made" for it;

and the assertion of Mr. Long's counsel that "sedition is not any determined offence within our law," and that there was "no crime in our law called sedition," went uncontradicted through the argument. The King's counsel said that sedition was a "special contempt." Sir John Elliot and the rest were accused of *sedition speeches* in parliament, and the warrant for the commitment was for "*Notable Contempts*." The offence was treated in the Star Chamber as of the same nature with that of scandalizing the public justice, the King's Judges, Chancellor, &c. 3 St. Tr. 328, *et seq.*

So, Richard Chambers was in the same year brought into the Star Chamber for seditious speeches before the Council Board. The information charged the offence as a "*slander upon* (his Majesty's) *just Government*." He was fined 2000 pounds. 3 St. Tr. 330.

Dr. Leighton's case. 3 St. Tr. 335.

Case of the Earl of Bedford and others, (*ibid* 390) for "a false, seditious and pestilent discourse," published by them with intent "to raise false scandals and seditious rumours" against the King and his Government. Bishop of Lincoln's case, (*ibid* 770) and Dr. Bostwick's case, (*ibid* 755.)

Mr. Storrs examined these cases at large, and said that it was clear that up to the time of the abolition of that court, the jurisdiction claimed by the respondent was in England, exclusively a creature of the Star Chamber—the summary process in such cases was contrived there upon the St. of Scandalum Magnatum or without any law, for the purpose of reaching offenders and depriving them of trial by jury. The crime, if any thing, was a State Offence.

By these and other usurpations or abuses of its powers, that court finally drew to itself the exclusive jurisdiction in all cases of libel and established at last an *imprimatur* over the press.

If this was not so, it was remarkable that before and during the known existence and history of that court and until more than a century after its abolition (for he should insist that John Almon's case was the first which gave any colour for supporting the respondent's proceedings) no case could be found in which any Court of Law in England had summarily punished, as for a contempt, any general libel upon them, not relating to matters pending before them and actually in the course of judicature.

Among the largest class of cases of which the Star Chamber took jurisdiction before its abolition, were those of what was since indictable as sedition, libel and various other offences classed in the elementary books under the head of *Contempts* against the King's Prerogative, his Courts, his Government and his Title.

Mr. Storrs then read certain parts of the Statute of 16 Ch. I., abolishing that court, as illustrative of the illegal and unconstitutional practices and usurpations which that act of parliament was designed to extirpate, and said that all crimes punishable in the Star Chamber as offences at common law, devolved on the Court of *King's Bench*, as the court of general criminal jurisdiction. Blk. Com. lib. iv. ch. 19;—not the forms of the Star Chamber, its secret proceedings, its informations—its punishments of loss of ears and brandings in the face and the whole train of judicial enormities which had grown up there—but to be proceeded against according to the course of the common law, by indictment or information and trial by jury.

A general scandal on the Judges was the offence of *Libel*, and reverted as such to the courts of law. The Star Chamber itself did not take jurisdiction of it as a *contempt* of the *judges* or the particular *court*, but as a contempt of the *King's Government*, and a State offence. It was not punished as a *contempt* of the *Star Chamber*, but as a *general offence* against the *King*. It came back to the courts as the substantive crime of Libel, and no more. See observations of Lord Camden. 19 St. Tr. 1069.

So the Star Chamber took jurisdiction of abuses by the *officers* of other courts in the execution of their offices—cases which Mr. S. admitted were punishable as

contempts by the courts, by attachment—but on the abolishing of the Star Chamber, the power to punish these offences also came to the King's Bench, even when committed against other courts; and *Hawkins*, who wrote in the time of Queen Anne, speaking of the abuse of process, says: "the court which awarded it, may punish such offences in such manner as shall seem proper, by *attachment*, &c. as well as the *King's Bench*, which has a general superintendency over all *crimes* whatsoever, (as the *Star Chamber* had also formerly) but commonly leaves offences of *this kind in relation to causes in other courts*, to be punished by such courts to which they more immediately belong." H. P. C. lib. 2. ch. 22. sec. 2.

Mr. S. then read from 8 St. Tr. 164 (*note*) the observations of Roger North, upon a *rule* made by the King's Bench against a book reflecting upon the government, in which it seems that the court assumed the *imprimatur* over the *press*, as having devolved on that court by the abolition of the Star Chamber. Roger North says: "At length the experiment of the *rule* was made; but, I think, it *went no further*, nor was the printer taken up for any contempt of it; but it was enough—the *rule* itself was showed, and, as I said, made a great noise. I do not remember much agitation about the reason upon which the court of K. B. took this authority of making a provisional order upon them; but it seems grounded on that law which takes away the Star Chamber; for it is therein declared, or the judges have resolved, that all jurisdiction which the Star Chamber might *lawfully exercise*, rested by law in the court of K. B.; and it is well known that the S. C. made provisional orders as well as punitive decrees, to obviate great offences; and that *some*, as Hales allows, may be *engrafted* into the *usage* of the *common law*, &c." North then says, that "without doubt the point was controvertible; for it might be said on the other side, true—but then *each court must follow the nature* of their proceeding, viz. the King's Bench, by *indictment* or *information*," &c.

It was true that many other offences known in the Star Chamber as well as libel, had come to the courts of law, or been engrafted upon the general criminal code and become substantive crimes. *Hawkins* has classified many of those which were treated as Contempts in the Star Chamber, under the head of Contempts against the King's Prerogative—Person—Government—Title—Courts. H. P. C. Book I. Chapters 21, 22, 23, 24. He says,

"Other positive *misprisions*, more immediately against THE KING, seem reducible to *Contempts* against his Palace or Courts of Justice; against his Prerogative; against his Person or Government, and against his Title."

In the 21st ch. he treats of Contempts against the King's Courts. After speaking of striking in the courts, rescue, and other disturbances, he says;

"Sect. 7. And not only those who are guilty of such *actual violence*, but also all those who *disturb* such Courts by threatening or *reproachful* words to any judges *sitting in them*, are guilty of a high misprision." He then illustrates this by several cases.

"Sect. 8. Also all who *reflect* on the *justice* or *honour* of those high Courts seem to be *indictable*. &c.

"Sect. 11. And he who speaks contemptuous and reproachful words to the judge of such a court *in execution of his office*, is *immediately finable* by such judge, or, as some say, may be indicted," &c.

"Sect. 12. It was *formerly* holden that a man might be indicted for a *slander* of the JUSTICE OF THE NATION, by *reflecting* on a *sentence* given in any court, *ecclesiastical* or *temporal*; whether directly, as where one said that such a *sentence* given by the High Commission Court was against law; or obliquely, as where one said that such a *sentence* was just, but that the *testimonies* on which it was founded were false, or the affidavits equivocateing."

"But it seems to be the better opinion *at this day*, (*Qu. Anne*) that a man cannot be indicted for any scandalous or contemptuous words spoken of or to such *officers*, not being *in the actual execution of their offices*," &c.

“Sect. 14. And not only those who disturb the administration of justice by direct contempts offered to the King’s Courts, but also all such as are guilty of any injurious treatment of those persons who are under the immediate protection of those courts, are highly punishable,” &c. ;—as parties, jurors, &c.

“Sect. 15. Also all who endeavour to stifle the truth and prevent the due execution of justice, are highly punishable,” &c. ;—as, dissuading witnesses from testifying—advising prisoners to stand mute, &c.

In this chapter Hawkins was treating of contempts which are indictable as contempts of the court, or as of that nature; though Mr. S. admitted that many of those enumerated by Hawkins were punishable summarily too—perhaps all of them. Yet it was remarkable that Hawkins, who was a very accurate lawyer and whose work is highly distinguished for its method, clearness, accuracy and precision, and who wrote so soon after the revolution in England, should not have included in this chapter a general libel on the court as an indictable CONTEMPT, if it was then supposed by the court to have been so in regard to matters not pending in the Court. He had scrupulously confined his definitions of contempt to scandals of or to the judges sitting in the courts or in the execution of their offices (which includes causes pending) and to that class of contempts which disturb the courts or their process, parties, jurors &c. in the actual administration of justice.

He had classed the “spreading of false rumours,” &c. and charging the King with a “breach of his coronation oath,” (on which Mr. Justice Wilmot afterwards laid much stress to support his opinion in Almon’s case) in the 23d chapter, under Contempts against the King’s Person and Government.

By the abolition of the Star Chamber and the revolution, the people of England were relieved from the tyranny under which they had so long suffered. The press was set free—the acts of the government were open for free examination, and even Mr. Hume admits that the People of England acquired from the time of the Revolution, the full liberty of freely investigating the conduct of all the public functionaries. We participated in these privileges ourselves. “More than all,” says one of our most eminent statesmen, “the revolution in England had done good to the general cause of liberty and justice. A blow had been struck in favour of the rights and liberties, not of England alone, but of descendants and kinsmen of England all over the world.”

Indictments for libels came into common use again immediately after the abolition of the Star Chamber; and if the judges had thought that they had the power of exercising summary jurisdiction for libels on themselves in matters which had passed out of judicature, the counsel for the Respondent would have been able to find some case in which such a power had been exercised or claimed. So far from this, even the “tumultuous Scroggs” dared not to assert it; yet no judge’s conduct was ever more freely censured by the press and among all classes of people, than his. He carried matters too in his court after the Restoration, with as high a hand as any judge has done at any period of English history. In 1679, his “speech” in the K. B. “occasioned by many libellous pamphlets against Public Justice,” was reported (7 St. Tr. 702). He had bound over Richard Radley to his good behaviour, (as J. de Northampton had been in Edw. III.) and to appear in the K. B. for saying of him, to one Raylett, “If you think to have the money you have overthrown me in, go to Westm. Hall, to my Lord Scroggs, for he has received money enough of Dr. Wakeman for his acquittal.” After Ch. J. Scroggs had delivered a characteristic tirade against the “boldness of men’s pens and tongues,” and the “lies and libels” on the Judges which abounded, Mr. Justice Jones said that the case before them was “a matter of scandal against a great judge, the greatest judge in the kingdom in criminal causes, and it is a great and an high charge upon him. And certainly there was never any age, I think, more licentious than this in aspersing governors, scattering libels and scandalous speeches against those that are in authority; and, without all doubt, it doth become the court to show their zeal in suppressing it,” &c.

"I am very confident (upon my knowledge of the integrity of my lord and the rest of my lords the judges that were there, for there were all the chief judges and almost all my brothers,) that that trial (Dr. Wakeman's) was managed with exact justice and perfect integrity by them;" and Mr. Justice Dolben said, "I am of that mind, truly; and am very glad we have lit upon one of the divulgers of these scandals. I was present at that trial, and for my part, I think the scandal to my Lord Chief Justice was a scandal to us all that were there."

We should have expected to find that this court at least, had proceeded summarily as for a contempt in a case so clear, if such a jurisdiction had been tolerated at that time in a matter not then in judicature. But instead of summary process, they bound over Radley and he was afterwards convicted at law and severely fined. Yet Ch. J. Scroggs said, when the court bound him over, that such libellers should know that "the law wants not power to punish a libellous and licentious press," nor he "a resolution to execute it;" and he gave with great force and ability, the best reasons for the execution of the law. "If once causes come to be tried with complacency to popular opinions, and shall be insolently censured if they go otherwise, all public causes shall receive their doom as the multitude happen to be possessed; and at length, every cause shall become public, if they will but espouse it; at every sessions the judges shall be arraigned, the jury condemned, and the verdicts overawed, to comply with popular noise." Mr. S. said that he admitted the full strength of these remarks, which had been so much better and more eloquently enforced by the Respondent's counsel in the present case; and if they had been able to produce a case within a century from the time of the abolition of the Star Chamber, in which any English Court had applied them to a case of summary conviction for a general libel, it would have been a great authority in favor of the Respondent. But Almon's was the first case in which that process had been started, and this reasoning was applied by Scroggs himself, in Radley's case, to the offence as an indictable crime.

In Sir Francis Burdett's case before the House of Commons in 1810, a committee had collected every instance from the *books*, that could be found to give color to the exercise of such a jurisdiction by the Courts. 8 St. Tr. 49.

They found but five reported cases before 1765.

J. de Northampton's case, 3 Inst.

Jones' case, 1 Strange, 185.

Barber's case, *ibid.* 444.

Lady Lawley's case, 2 Barnadiston, 43.

The case of the printer of the Evening Post, 2 Atkyns, 469.

They also cited Jones' case from 13 Vesey, 237 (1806) and the case of Almon from "Wilmot's Opinions," with several others from the *files* of court.

Jones' case (1 Strange) was for treating "the *process* of the court contemptuously; and there were, besides, indications of a rescue. The jurisdiction in that case was not disputed.

Barber's case is very scantily reported. It seems to have been connected with or mixed up with some other matter pending before the court. There was a "*prosecutor*" in the matter, and an "*attorney*" who copied the interrogatories, and Strange was of "*counsel*" in the case. The whole matter reported was on a point relating to the *settlement* of *interrogatories*. The case was noted by Sir J. Strange only for the purpose of showing that *on interrogatories on attachment*, a party shall not be bound to *answer what may convict him of another crime*. No more of the facts are given than what related to that point, and it would be quite unsafe to supply facts from conjecture at this period of time, to help out deductions from cases stated from the short notes of a lawyer, many of which are too obscure to be understood at all, and who has informed us himself that he prepared his notes anew, in consequence of floating copies that had got abroad, that he might more accurately state the points "actually adjudged." There was no judgment in Barber's case, and we know no

more of the facts than what was barely enough to make the point understood which came up on settling the interrogatories.

Lady Lawley's case was for publishing a paper "reflecting upon the proceedings of the Court," but whether relating to any matter pending or not, does not appear.

Every case produced by the Committee from the files of the court before 1765, appeared to have related to proceedings pending in court or its process.

Lawson's case; 11 Anne, for speaking "disrespectful words of the Court of Queen's Bench upon his being served with a rule of that court."

Hendale's case; 12 Anne, "for speaking disrespectful words of the Ld. Ch. Justice of the Court and his warrant."

Lamb's case; 6 Geo. I. for "contemptuous words concerning a warrant from a judge of K. B."

Bolton's case; 9 Geo. I. was of the same character.

Wilkins in 6 Geo. I. and Dr. *Colebatch*, in 9 Geo. I. were punished on attachment for libels in K. B., but whether in relation to matters pending is not stated; nor does it appear from the Committee's report whether Wyatt also, who published Dr. Middleton's pamphlet, and Dr. Middleton (9 Geo. I.) were attached for libels on the Court, or what the libels were. But the case of Dr. Middleton is clearly the same with that of the King against Wyatt, reported in 3 Modern R. 123, which the Committee have not noticed. Their report states only that it was for "passages reflecting upon a proceeding" of the Court. But in *Modern*, it is stated to have been a libel on a *Doctor of Divinity*. It would not be gravely contended on the other side that the K. B. ever claimed to exercise summary jurisdiction by attachment for libelling the learned Doctors of the Universities; and the cases of Wyatt and Dr. Middleton were, doubtless, a libel on one of the *parties* in the Court of K. B. and not on the court itself. It appears too, from the report in *Modern*, that the case against Dr. *Colebatch*, in 9 Geo. I. related to the same matter. The same case is partially reported in *Fortescue*, 210.

Mr. S. said that it was clear on the face of the report that most of these cases collected by the committee from the *files*, related to matters *sub judice* or the process; and he had no doubt that if the facts could be accurately ascertained, all of them would be found to be of that class of contempts. And the principle on which the jurisdiction rested in cases of process fully showed the limit of the power. It was confined to cases of actual obstruction of the process, which prevented its service or to contemptuous and insulting language before the function of the officer or the writ was completed. Therefore in 1 Brod. and Bing. 24, (*Adams vs. Hughes et al.*) where one having *been showed* the writ, and *served* with a copy of it, collared and shook the Sheriff, Vaughan moved for an attachment for a "contempt of the process of the court." The court desired a further affidavit, to show more fully "in what respect or degree the acts of violence complained of obstructed the due execution of the process." No further affidavit being produced, the court said that "no case was (there) shown to the court which disclosed any such obstruction of their process as to call for that summary mode of punishment." So, in 4 Moore, 147, *Myers vs. Wills* (1820) the defendant tore the copy of the *capias* in pieces, and threw it at the officer; yet it was held "not to amount to a contempt of court, for which an attachment might be granted." See *marginal note*.

In the case from *P. Wms.* 676, *Pool vs. Sachererel* (1720) the cause was still pending in the Court of Chancery, when the offensive publication was made. Yet even in that case, the Master of the Rolls considered it a "matter of great moment, concerning, on the one side, the liberty of the subject," and ordered it to be moved before the Lord Chancellor. (Ld. Ch. Parker, to whom, when Ch. J. of K. B., *Hawkins* had dedicated his work.)

A bill had been filed on behalf of the plaintiff, in which one of the questions was on the marriage of W. Sacheverel (deceased) to Ann Howe. The mar-

riage had been found on a trial at bar in C. B. on an issue directed from the Court of Chancery. The plaintiff being dissatisfied, published an article of a character which might tend to the subordination of witnesses, and it was moved that he should be committed. The Lord Chancellor said,

“This tends to thê suborning of witnesses,—is very dangerous and not only greatly criminal, but is a *contempt* of the court, being a means of *preventing justice* in a cause *now depending*,” &c.

“*Object.* This matter is now over, (*viz.*) the sentence in the spiritual court and the *trial*.”

“*Resp.* It is *not over*; for suppose, on the reward offered by this advertisement, a dozen affidavits should come in, proving what is desired may be proved; this would probably induce the court to grant a new trial, and might overturn all the *proceedings* which have *hitherto* passed;” and the Lord Chancellor said further, that though he had a favourable opinion of the intention of the plaintiff, whom he knew, yet the “*justice of the court, nay, the justice of the nation*” was concerned in so public a case, and he was committed. Mr. S. said that the verdict on the feigned issue was not necessarily the end of the cause, and it was clear from the Lord Chancellor’s express declaration, that the case was still going on in court. He admitted that this case, thus rightly understood and treated, laid down the rule accurately, and it showed also in what sense libels on the proceedings of the courts were said to be scandals of the justice of the nation, i. e. the *administration of justice*.

Mr. Storrs said that he could not better state the case before *Lord Hardwicke*, in 2d Atkyns, Rep. 469, (1742) than by reading from the abstract of it given by the Committee of the House of Commons.

“A motion against the printer of the *Champion* and the printer of the *St. James’ Evening Post*; that the former, who is already in the *Fleet*, may be committed close prisoner; and that the other, who is at large, may be committed,” &c. “for publishing a libel against Mr. Hall,” &c. and others “taxing them with turning *affidavit-men*, &c. in the cause, *now depending in this court*, and insisting that the publishing *such a paper* is a high contempt of this court.”

“*Lord Hardwicke.* Nothing is more incumbent upon courts of justice than to preserve their *proceedings* from being misrepresented, nor is there any thing of more pernicious consequence than to prejudice the minds of the public *against persons concerned as parties* in causes *before the cause is finally heard*,” &c.

Lord H. then goes on to show that the paper was libellous, and referred to the *parties* who complained. He then stated in general terms the *generic character* of contempts.

“There are *three different sorts* of contempt: One *kind* of contempt is, *scandalizing the Court*. There may be likewise a contempt of this court in *abusing parties* who are concerned in causes here. There may also be a contempt of this court, in *prejudicing mankind* against persons *before the cause is heard*.”

“There cannot be any thing of greater consequence than to keep the *streams of justice* clear and pure, that parties may *proceed* with safety both to themselves and their characters.”

He then puts, in a single sentence, the case of *Raikes*, which he says was of the same kind as that then before the court; and in the next paragraph, the case of *Perry*, for printing his brief before the cause came on, and “prejudicing the world” on the merits of the cause, “*before it was heard*.” He then adds,

“Upon the whole, there is no doubt but *this* (the case in hand) is a *contempt* of the court.”

Mr. S. said that he fully agreed to all this. But it was too obvious to enter upon any argument to show, that in this general classification of contempts by Lord Hardwicke, he was merely speaking of them in general words. He was not defining any other case which fell within them, except the case then before

him. He had truly said that the scandals which were punishable as contempts, related to,

The Court—

The Parties—or,

The Cause.

So far as the case in hand called for illustration, he gave it by two instances. The question of libel on the Court, was not before him, and therefore he merely noticed that class of contempts in general terms. We do not deny here, that one class of contempts is *scandalizing the Court*. But we say that these scandals must relate to *matters pending* in judicature before the judges. There is nothing in this generic classification of the various sorts of contempts by Lord Hardwicke, which is inconsistent with this. If the occasion had called for an exposition of the *sort of scandals* on the court, which constituted that class of contempts, and he had then gone beyond the limit, which we say fixes the extent of that power, his name would have carried great weight against this Impeachment. But so far from this, his whole reasoning confines the rule to the limit which we say controls it.

Nor did Lord *Erskine* extend the principle at all beyond that case, in the case of *Jones* (13 Vesey 237,) and in that case, he also gave the true ground of the case in 2 Atkyns, 469.

The committee of a lunatic, appointed by the court were, in the management of his affairs, under the superintendence of the court. The committee are as much, in such a matter, of the actual *suite* of the court, as any of its officers in the execution of their duties. Their functions are a branch of the *current administration* of the powers of the court—as much so as if the party had been an infant ward of chancery. The whole case went on that ground. The administration of the affairs of lunatics through committees is a part of the ordinary *course of justice* there, and the business of the committee is a part of the business of the court itself. But in this case *proceedings* in that matter were *actually pending* in the court *at the time*.

Mr. S. read the abstract of the case from the report of the Committee of the Commons (3 St. Tr. 53).

“The object of this petition was to remove the committee of a lunatic, and to bring before the Lord Chancellor an alleged contempt, *by the committee* and his wife and other persons, as the authors, printers and publishers of a *pamphlet*, with an *address* to the Lord Chancellor by way of *dedication*, reflecting upon the conduct of the *petitioner* and others *acting in the management of the affairs* of the lunatic, under *orders made* in pursuance of the trusts of a will; the affidavit representing the conduct of the *committee* and his wife *intruding* into the *master's office* and *interrupting* him, not only *in the business of this particular lunacy*, but all other business.”

“Lord *Erskine*. As to remedy at law, the subject of *this application* is not the *libel* on the petitioner.”

“The case of *Roach vs. Garvan* (2 Atk. 469) and another there mentioned, were cases of constructive contempt, depending upon the inference of an intention to *obstruct the course of justice*. In this instance that is not left to conjecture; and whatever may be said as to a constructive contempt, through the medium of a libel against persons engaged in controversy in the court, it never has been nor can be denied that a publication, not only with an obvious tendency, but with the design to *obstruct the ordinary course of justice*, is a very high contempt. Lord Hardwicke considered persons *concerned in the business of the court*, as being under the *protection* of the court, and not to be driven to *other remedies* against libels upon them *in that respect*.”

Thus far Lord *Erskine* had been answering the objection that the only remedy in such cases was by action or indictment.

“It might be sufficient to say of the *book* itself, stripped of the dedication, that it could be published with no other intention than to *obstruct the duties*

cast upon the petitioner, and to bring into contempt the rules and orders that had been made. But upon the *dedication*, this is not a constructive contempt. It is not left to inference. In this dedication the object is avowed, by defaming the *proceedings* of the court *standing upon its rules and orders*, and interesting the public, prejudiced in favor of the author by her own partial representation, to *procure a different species of judgment* from that which *would be administered in the ordinary course*—and by flattering the judge, to taint the source of justice.”

Mr. Storrs said that he believed he had now examined every reported case from the English books, (except Almon's) on which the counsel had relied for the vindication of the jurisdiction assumed by the Respondent, and he confidently submitted to the Court, that before and since the case of Almon, no case or opinion of any judge, fairly and accurately understood, maintained or asserted such a power in the Courts in the case of a general libel not touching any matter in judicature.

He should not take up the time of the court in examining the manuscript or newspaper reports of cases which had been produced from Florida or Missouri. He should neither take the opinion of Mr. Justice-Carr, nor the practice of any of the territorial judges for an authority here on a great constitutional point involving the civil liberties of the country. If it were true that the subordinate courts of the Union in the distant territories, had been lately wielding this high power against the constitutional securities of the People, it rather showed that it was to be feared that the attention of the House of Representatives had been too much drawn away by the party conflicts of the last few years, from the vigilant and faithful discharge of its public duties. From the history of Rome to the present day, it had been in the remoter provinces and colonies of every country, that delegated power had been most frequently and the most grossly abused with impunity.

He then proceeded to the case of *John Almon*. He said that these proceedings belonged rather to the political history of the early part of the reign of Geo. III. than to the records of the law. That case had never found its way into any book of Reports, and was only to be collected from the publications of the day. He thought that on a fair examination of those proceedings in connexion with the political history of the time, it would be found that Almon's case rather weakened than strengthened the jurisdiction asserted by the Respondent. It was so mixed up with the party history of the day, that in estimating the deference or weight to which it was entitled, it was necessary to look to the political history in which its origin was to be found. The political opinions of George III. on his accession to the throne, were too well known to be repeated. He had been educated to high and unbending opinions of government and regal authority, and was not of a temper to relax the reins of prerogative or yield to men or measures which were out of favor with the crown. Mr. S. said that next to the Revolution of 1688, he thought that the People of England might consider the defeat of the ministry in the attempt to revive general warrants and stifle the press from 1763 to 1765, as one of the most memorable eras in the history of their liberties. The Earl of Bute—the favorite of the King and of congenial political principles, came to the Treasury in May 1763. On the same day, the *Briton* (edited by Smollett) appeared—a paper established under the patronage of the Ministry, to write their administration up and write the former ministry down. This was followed by the *North Briton* by Wilkes. The Earl of Bute resigned a few days (April 8) after the 44th number of the *N. Briton* appeared (Apr. 2) and the North and Grenville ministry succeeded. The 45th No. of the *North Briton* was published on the 23d of April, Sir Charles Yorke being then Attorney General, and Sir Fletcher Norton, Solicitor General. Under a ministry of the political principles which then prevailed in the cabinet, it is not very remarkable that we should find them attempting to sustain their power by a revival of

the old practices of general warrants and prosecutions for contempts of Government, under any forms of proceeding which should promise them the most effectual success. The press had been under no *imprimatur* for a century, and the measures of Government were freely examined and perhaps rudely and unjustly assailed. At any rate, the ministry found that without some more vigorous and prompt counteraction to the power of the press than the ordinary course of the law afforded them as it had flown for a century, there was danger that they must be finally compelled to submit to public opinion and yield up their places. There were precedents for *general warrants* for a period long after the Earl of Derby had seized the press of Sir Richard Knightly for printing Puritan books. There was one by Scroggs in 1680, and by Jefferies in 1684. These were, however, issued at least by *Judges*. But after that time, the Secretaries of State had chiefly taken that jurisdiction on themselves. Of *summary process* for Contempts of Government and scandals of Public Justice, the Star Chamber records were full. Accordingly, Lord Halifax issued his general warrant on the 26th of April, 1763, for seizing the authors and printers of the North Briton No. 45, and Wilkes was arrested on the 30th. About fifty persons were taken under this warrant. After some fruitless attempts and disreputable shuffling on their own part to avoid a *habeas corpus*, which came very close to a contempt of the writ, Wilkes was discharged on the 6th of May by the C. B. and the civil prosecutions of the E. of Halifax and the King's messengers followed. The press was opened on the ministry in its full strength. During these proceedings and before the rule against Almon, the doctrines of Lord Mansfield from the bench were severely arraigned and freely censured. Almon had published a Letter on Warrants and general libels, which was considered by the Crown officers to be defamatory of his Lordship. This pamphlet is said, however, to have been written by Mr. Graves, a solicitor, and to have been approved by Lord Camden.

In *Hilary* term 1765, January 25, the rule was made in the K. B. against Almon to show cause against an attachment. It went off to the next term (*Easter*.) The case of Leach against the King's messengers had been tried a few days before, in December; and in *Easter* term (1765), at the same term in which Almon was to show cause, Ld. Ch. J. Pratt came into the K. B. to confess his seal to the Bill of Exceptions in Leach's case.

At that term, the case of Almon on the rule to show cause, was argued. In the same term, the assignment of errors in Leach's case was had; so that the cases of the general warrants and the rule against Almon were going on simultaneously. After the argument on the rule and in *Trinity* term, the *Court* seem to have discovered a flaw in the title of the affidavits and asked Almon's counsel if they would consent to an amendment. In such a case they did not feel warranted in assenting to any thing to help out the Crown officers. The proceeding was therefore dropped at that time, and on the next day, Mr. Wallace, Solicitor for the Treasury, laid a quantity of fresh matter against Almon before the court, and obtained a new rule, which went off to *Michaelmas* term at the request of Almon's counsel. In the mean time, the case of Leach against *Money* had been argued in K. B. (June) and stood over for *further argument*. This case involved the legality of the general warrants.

But when the case of *Leach vs. Money* came on again, (Nov. 8) the Crown officers evaded judgment on the principal point and slipt off on another question.

"Mr. Yorke, Attorney General, was now to *have* argued on behalf of the plaintiffs in error; and *begun* to enter into his argument; but when he came to mention the two cases cited by Mr. Dunning, both of which were determined before Ld. Mansfield, &c. he *seemed* to *intimate* that this objection (that the officer had not *pursued the warrant*,) was too great a difficulty for him to encounter, and therefore rested the matter where it was, without proceeding any further in his argument." Lord Mansfield then said he remembered the cases, and that he continued of the same opinion; and, after a few further remarks, said, "This

makes an end of the case, for this is a previous question and the foundation of the defence fails," and judgment was affirmed. The counsel for the defendants in error appear to have sat by silently. This occurrence was very much like another which happened on the new trial which was ordered in Woodfall's case, a few years afterwards. The case was no doubt very gravely called on and the jury solemnly sworn, when the "Attorney General observed to the Chief Justice (Lord Mansfield) that he had not the original newspaper by which he could prove the publication. His Lordship *laconically* replied, 'That 's not my fault, Mr. Attorney,' and in this manner the trial ended." 20 St. Tr. 89^f.

After the case of Leach vs. Money had thus gone off in the K. B. in Nov. 1765, the second rule against Almon was never heard of again. The ministry went out and the Rockingham administration came in. In C. B. however, the case of the general warrants went on in the case of Entick vs. Carrington and their illegality was established. So no judgment was ever given in Almon's case. The first rule went off on the flaw in the papers, though Almon's counsel seem not to have started that objection. It is said in the Annual Register that "about the middle of June (T. term) the judges *called for the defendant's counsel*, and, in the course of much altercation, repeatedly desired their consent to an amendment in the rule; where instead of the King against Almon, it was put the King against Wilkes. But to this the defendant's counsel very firmly refused to consent." This would have been a convenient way to have got rid of that proceeding too, but the Crown officers refused to yield and took a new rule upon the old charge, which they reinforced with "fresh matters of accusation." This rule died away with their political power and sleeps upon the files of the court to this day.

Mr. S. said that he considered that the result of these measures of the Ministry carried great weight against the argument of the Respondent's counsel. It was a decisive triumph over the Crown officers in both proceedings; and so far as any inference at all could be drawn, it was decidedly against the Respondent's case. The case of general warrants also showed how little respect was due to the vicious precedents which may be found in many parts of English history in support of arbitrary and unconstitutional assumptions of power. These warrants were well sustained by an almost uninterrupted practice; from the time of the Star Chamber down to the publication of the offensive number of the North Briton; and that circumstance was very properly stated by the Judge at the trial, as a ground for mitigating the damages. But the proceeding against Almon had no precedents later than the Star Chamber itself. The Crown officers had none to cite.

Mr. S. then said that in looking carefully to the facts and dates in Almon's case, it might be well doubted, after all, whether it would have supported the power claimed by the Respondent, even if Almon had been attached at last and punished by summary conviction. The charge against him was of a libel on Lord Mansfield in reference to an amendment *at his chambers* in the Informations against Wilkes. The informations against Wilkes were filed in Michaelmas Term 1764, and Wilkes appeared and pleaded not guilty. Lord Mansfield made the orders for the amendments on the 20th of February, and the causes were tried on the 21st day of February 1764, and the verdicts taken before him at *ni prius*. Writs of *capias* were issued (Mr. Wilkes being in France) as in ordinary cases of convictions and the proceedings went on to outlawry before the sheriff and coroners. At what time the outlawry was declared on the processes, does not appear from any report of the case; but the *second* demand on the exigent was as late as the 9th of August and there must have been five in all. At all events, no sentence was given on Mr. Wilkes until June 1768, and the case was finally undisposed of till that time. At what particular period in all these proceedings, Almon *made the offensive publication*, does not appear. If it was done before the return of the

verdict into the *K. B.* or judgment upon it, the case was then *pending before the Court* for all purposes; and it may be truly considered to have been so without question, up to the time of the outlawry at least; for the *process* of the Court was *continuing* on the conviction. Almon's publication was made before Hilary Term 1765, when the rule to show cause was made; and it was not improbable that the publication may have been made even before the outlawry. The question discussed seems to have been rather whether an attachment would lie for a *libel* on *one* of the *Judges* in reference to an act *done at his chambers*; and if the case was pending at this time, it may account for the confinement of the argument to that point. But on whatever point the case may be considered as turning, as the proceeding was dropped, it furnished no precedent. The counsel for Almon, however, cited precedents to show that Lord Coke refused to adopt that process in his court in a case of libel, when he was Chief Justice.

The counsel for Almon (Dunning and Glynn) met the proceeding with firmness and boldly treated it as an enormous stretch of jurisdiction—totally unwarranted by the law—an infringement of the constitutional securities of the People of England—subversive of the trial by jury, and the most interesting to the liberty of the subject of any that had ever been brought before that court. They said that if the attachment went, the court exercised the distinct and peculiar provinces of party, judge, witness and jury. Yet the court of *K. B.* listened with attention and respect to these arguments. They had very different views of the rights and duties of counsel from the Respondent in his court. They took no offence at the vindication at their bar of the constitutional rights of the People of England. It never entered into their minds that the Court was in danger of violence from the surrounding audience. They heard the counsel patiently, attentively, and with great deference and respect; and Ch. J. Wilmot, who sat in place of *Ld. Mansfield*, said, at the close of the argument, that the counsel on both sides had “learnedly and *laudably* discussed the question, and that as the cause was of *great importance*, his brethren and himself would take *time to deliberate*.” And even when the second rule was granted, Mr. Dunning desired further time, as the case was “so interesting to *public liberty*,” and the request was “*readily granted*.” Mr. Storrs said that he had been surprised to find that the Respondent had taken offence at the offering of the same arguments by the counsel of Mr. Lawless;—that he should have felt on that occasion such a carping jealousy, as to have imagined that gentlemen of the high and honorable character of Mr. Geyer and Mr. Maginnis, had intended them as personalities, for the purpose of provoking violence from his fellow-citizens on the spot. He could not account for this temperament of the Respondent, but by believing that he must have been conscious that the whole proceeding truly deserved the reprobation of every man who witnessed it. The whole testimony had unitedly proved that no indecorum of the slightest kind nor the least tendency to any disrespect of the authority of the court, had occurred throughout all the proceedings. Yet the Respondent had examined minutely, at a former period of this impeachment, as to the nature of the offensive topics thus urged by Mr. Lawless' counsel, and had even inquired whether they had not been addressed to the surrounding crowd!—a point which was flatly negatived. Mr. S. said he was almost ashamed of the cause of free government, to find that the time had come so soon, when an American Judge could not sit quietly upon the bench and hear the liberties and privileges of his fellow countrymen vindicated; and he regretted that the Respondent could have held the American bar in such low estimation, as not to have known that when these liberties and privileges are at stake, they would neither quail beneath the frowns of any Court, or palter with their duties to appease the sensibilities of any Judge.

What judgment the court would have given in Almon's case, is left to conjecture only. But since the death of Ch. J. *Wilmot*, a sketch of an opinion partially prepared by him, has appeared among some of his posthumous papers,

which have found their way into the press. We do not know that even this was ever sanctioned by the court.

He stated the objection of Mr. Dunning and Mr. Glynn with great fairness, viz.—that “papers reflecting merely on the *qualities* of the *judges* themselves, are not the proper objects of attachment.”

After showing, what Mr. S. said he did not deny, that the proceeding by *attachment* in cases of *contempt*, was well warranted by the usages of the law of England—that it was coeval with the courts and a part of the “*lex terrae*,” (all which was fully admitted by Almon’s counsel) he came to the point in hand.

“But it is said that the course of *justice* in those cases is *obstructed*, and the obstruction must be instantly removed; that there is no such necessity in the cases of libels upon courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatever. But when the nature of the offence of *libelling judges* for what they do in their judicial capacities, either *in court* or *out of court*, comes to be considered, it does, in *my opinion*, become more proper for an attachment than any other case whatsoever.”

“By our constitution, the *King* is the *fountain of justice*, which is administered in this kingdom, 12 Co. 25. The *King* is *de jure* to distribute justice to all his subjects; and because he cannot do it himself, he *delegates his power* to his *judges*, who have the *custody and guard* of the *King’s oath*, and sit in the seat of the *King* concerning his *justice*.”

“The arraignment of the *justice* of the *judges*, is arraignment the *King’s justice*. It is an impeachment of his wisdom and goodness in the *choice* of his judges, and excites in the minds of the people a *general dissatisfaction* with all *judicial determinations*, and indisposes their minds to obey them; and whenever men’s *allegiance* to the *laws* is so fundamentally shaken, it is the most fatal and the most dangerous *obstruction of justice*; and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatever; not for the sake of the judges as private individuals, but because they are the *channels* by which the *King’s justice* is conveyed to the people. To be impartial and to be *universally* thought to be so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.”

“In the *moral estimation* of the offence and in every *public consequence* arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which attachments are granted constantly, and coolly and deliberately printing the *most virulent* and *malignant* scandal which *fancy could suggest*, upon the judges themselves. It seems to be material to fix the ideas of the words ‘*AUTHORITY*’ and ‘*contempt of court*,’ to speak with *precision* on the question.”

Mr. S. said that he fully agreed here that the whole question turned on the proper legal signification of the word “*authority*.” The merely comparative *moral estimation* of an offence with other contempts, could not sustain the jurisdiction, if the *law* itself had not conferred this power on the court. Ch. J. Wilmot may have, perhaps very justly, expressed his *opinion* that it became “*more proper*” to punish a general libel by attachment than even actual violence to the court. But it is certainly no branch of the *authority* of the judges to make the law themselves for that end. He knew of no principles of the English constitution which inculcated that a man might be deprived of his liberty—not because any such jurisdiction had ever been actually conferred on the courts—but because some judge thought that it was highly *proper* that they *should* have it. Nor did the argument of the Chief Justice acquire any strength by putting so conspicuously into the foreground the comparative immorality of the extreme case of the most *cool, deliberate, most virulent* and *malignant scandal*. The epithets may be strong, but, like most epithets, they really made the argument no stronger. He came to the true and only question at last, when he

said, that the material point was to fix the *legal sense* of the word "*authority*." Mr. S. said that he considered that the Ch. J. had virtually given up the question when he found himself compelled to show that the offence of a general libel was an *obstruction to justice*;—for it was clearly that proposition that he considered his argument as finally establishing, and he rested the soundness of his conclusions on that principle only. It was a direct admission that the power of attachment for contempt was confined to cases of *interruptions of the course of justice*. So that the whole matter turned on the question whether an arraignment of the *qualities* of a judge was an obstruction to the *legal authority* of the court. Mr. S. said that he thought that the argument of the Ch. J. rested upon a subtle and false sense of some of the words which he had used. Thus, he had said that to be universally *thought to be impartial* was necessary to *giving justice* that "free, open, and *uninterrupted current*" which it had found for ages. Now, said Mr. S., we do not understand by the *course of justice*, the abstract or speculative estimation of the qualities of the judges in the minds of men. By the *course of justice* we mean the *actual administration of the law* through the *process, forms, proceedings and judgments* of the courts and the *officers of the law*. To obstruct these proceedings, is to obstruct the *legal course of justice*, and an interference with the *authority of the courts*. The legal authority of the judges consists in their power and the *uninterrupted exercise of their judicial functions*. To doubt or deny their infallibility—to question their accomplishments—their legal acquirements—their impartiality or their moral qualities, is an obstruction only of the good opinion of men as to their fitness for their places. But it is hardly good English to say that this is a denial of their *judicial authority*, in the legal sense of that word. If this be not so, then it is an obstruction of the course of justice to say, *e. g.* that the *opinion* of such a judge is no *authority*—and the argument of the Ch. J. would well sustain that as a contempt—"not for the sake of the judges," but as a contempt of *all law*, and a fundamental shaking of the *allegiance* of the people of England to the King, by reason of such a constructive impeachment of the King's wisdom and goodness in having issued a patent to such a judge for that office. Mr. S. said that the argument was very far fetched at best; and he considered that its fallacy throughout was to be found in the subtle perversion of the legal sense and meaning of one or two words. So far from proving that such an offence is a contempt of the Court, Ch. J. Wilmot had rather shown, by this course of reasoning, that the offence was of a totally different character—that it belonged to another class denominated by Blackstone (Vol. 4. Ch. 9. II. sec. 3,) *Contempts against the King's Person and Government*, which he defines to be "speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may *tend to lessen him in the esteem of his subjects*, may *weaken his government* or may raise *jealousies between him and his people*." And this is the offence of *sedition* or seditious libel, which has come back to the courts, from the Star Chamber—treated there, originally, as a *contempt of the King* and his Government, as a common law offence. We have seen that it was so treated in Wraynham's case in the St. Chamber for slandering Chancellor Bacon; and Ch. J. Wilmot has mixed up the reasoning in the Star Chamber to prove it to be a common law crime against the King, with his own, in order to show it to be a contempt of Court. So, he says—the King is the *fountain of justice*—the judges have the custody and guard of his *oath*, and sit in the seat of the King—to arraign their justice is to arraign the *King's justice*—to impeach his *wisdom and goodness* in the choice of them—thus to excite *general dissatisfaction*, indispose men's minds to *obedience*, and shake their *allegiance to the laws*. This was precisely the argument of the attorney general, in Mr. Hollis's case. (2 St. Tr. 1022.) "The offence wherewith I shall charge the three offenders at the bar is a *misdemeanor* of a high nature, tending to the defaming and *scandal of justice*," &c.

"The *King*, amongst many his princely virtues, is known to excel in that proper virtue of the imperial throne, which is *Justice*. It is a royal virtue, which doth employ the other three cardinal virtues in her service,"—and he enumerates them, *Wisdom*, fortitude and temperance.

"For this, his Majesty's *virtue of justice*, God hath of late raised an occasion, and erected, as it were, a stage or theatre much to his honor, for *him to show it*, and act it in the pursuit of the untimely death of Sir Thomas Overbury," &c.

"This great work of his *Majesty's Justice*, the more excellent it is, your lordships will soon conclude the greater is the offence of any that have sought to *affront* or to *traduce* it. And therefore, before I descend unto the charge of these offenders, I will set before your lordships the weight of that which they have sought to impeach," &c.

After various encomiums and a review of "his Majesty's princely and sacred proceeding" on Sir Thomas Overbury's murder, he considered the criticisms or comments upon such cases, as subjecting "the *majesty of justice* to popular and vulgar talk and opinion"—and that, as to a matter "which is *res judicata*," it was "*intolerable*."

The same argument was offered by another attorney general, in Mr. Wrayham's case, (2 St. Tr. 1061) to show it to be a crime to slander Ch. Bacon, though he was then dead. It was the *attributes* of the *King*, "clemency and justice," that were scandalized;—the attorney general saying, that though Sir F. Bacon was dead, "the State yet lives;"—and Sir E. Coke said, that "the slander of a dead man is punishable in *this court*, as Lewis Pickering is able to tell, whom I caused *here* to be censured for a slander against an *Archbishop* that is dead; for *justice lives*, though the party be dead." The attorney general said that these slanders "set divisions between the King and his great magistrates, to discourage judges and vilify justice." The Bishop of London did not stop with his argument where Ch. J. Wilmot rested the point—that the judges sit in "the seat of the King." He said, "they sit in God's seat, and execute his, and not their own judgments." He seems to have been the first too to treat a scandal of the judges as an assault upon their *authority*. "*Anima et vita regnorum auctoritas*;"—"take it away from the *magistrate of state*, take it away from the King himself, *et subversa jacet pristina sedes soliorum*."

So, King James himself, in his reply to the letter of the Judges in the case of *Commendams*, said to them: "Our *pleasure* therefore is, who are the *head and fountain of Justice* under God in our dominions, and we, out of our *absolute power* and authority royal, do *command* you that you forbear to meddle any further in this plea till our *coming to town*." And he rebuked the Judges when he called them before the Council at Whitehall, for not reproving the barrister in that case, who had presumed to argue against his Prerogative. "He had observed," he said, "that ever since his coming to the Crown, the popular sort of lawyers had been the men that most affrontedly in all parliament had trodden upon his Prerogative, which being most contrary to their vocation of any men, since the *law or lawyers* can never be *respected*, if the *King* be not *reverenced*; it did, *therefore*, best become the Judges of any, to check and bridle such impudent lawyers, and in their several benches to disgrace them that bear so little respect to their King's *Authority*."

Mr. Storrs said that the whole argument of Ch. J. Wilmot was little more than a repetition of some of these arguments, which, in a proper case, might show the political nature of the offence of Seditious Libel. But it was a mere fiction to pervert the principles on which that class of offences rested so far as to confound the moral value of the opinions of the judges with the political attributes of the Crown. To say that the judges have "the *custody and guard* of the *King's oath*," was quite too nice a refinement for a legal argument by which a man's liberty is to be summarily taken away. It was no more than to say that the Chancellor was the keeper of the King's conscience, and not so truly, even as one of those harmless, and perhaps useful fictions, in which the theory of

the British constitution had enshrouded the Royal Dignity. The Authority of the Crown itself, however, did not consist in these fictions—much less that of its judges. Blackstone held to a more accurate sense of that word, when, writing of its prerogatives, he divided them into those which related to the King's "political Character and Authority: or, in other words, his dignity and regal Power." To express an unfavorable opinion of the capacity or integrity of a judge, was to lessen the moral weight of his opinions and character. To resist the execution of the orders of a Court, or interfere with the judges in the exercise of their functions, was to resist their legal authority. Mr. S. said that the case of Almon did not therefore sustain the Respondent. It was not adjudged by any court—the opinion of the court was not known—it had never been followed since—and it was virtually abandoned by the Crown. The opinion of Ch. J. Wilmot has never been re-affirmed to its full extent, or acted upon in any court of law there. The whole attempt was a signal failure to engraft the offence of a general libel on the Courts on the law of contempt. If it had been thought that such a jurisdiction could have been carried through, the offence of Almon was of the mildest character in comparison with the flood of calumny which issued from the press upon Lord Mansfield. One of these libels, of the most atrocious character and tendency, may be seen in the note to State Trials, vol. 20, p. 901.; but there was no further attempt to move or revive the doctrine on which Almon's case was started.

Mr. Storrs said that the argument on which the Star Chamber sustained general libels on the Courts as *Contempts*, on the ground that they were scandals of the Authority of the King in whose seat the Judges sat and whose Justice they administered, had not been confined there to scandals on the Judges only. It was the common pretext uniformly resorted to for the purpose of giving some colour of law to the oppressions habitually practised in that tribunal as an engine of State. Thus, when *Pierce Crosby*, whose intrepid and perilous resistance to the encroachments of the Crown on the liberties of the People of England had made him extremely obnoxious to the King, was arraigned in the Star Chamber for scandalizing the Lord Deputy of Ireland (E. of Strafford) though Sir John Finch, then Chief Justice and the Lord Keeper put the case expressly on the St. 2 R. 2. yet the Archbishop of Canterbury (Laud) went over the old course of argument to show that, independently of the Statute, the scandal of a Lord Deputy, *being a Crown Officer*, was an offence against the King's Authority.

"It is very bad it should be against a Peer of the Realm, but this against my Lord Deputy, that doth represent the King's Person in that kingdom; for the whole trust and government of that kingdom doth rest in him under God and the King. And it argueth to my understanding that such spirits as these, that strike at the authority of him that beareth the power under his Majesty in Ireland; they that begin thus with tongue and pen to scandalize any in Authority, I think the same man will be very bold to scandalize the King too. Gregory Nazianzen, when he speaketh of Kings, saith, they are lively pictures of the Almighty God, drawn short, but not at length, for no resemblance of God can be drawn out at length. As Kings are representations of God drawn out shortly, so Deputies and Lieutenants are Representatives of such as are their King, but drawn out somewhat shorter than the resemblance of their King."

It was on such blasphemous mummery and contemptible trash, contrived at first for the purpose of puffing up the divine right and flattering the power of a bigotted and stupidified family of Kings, that the doctrine rested. Lord Andover had truly said, when he moved the repeal of all the statutes which upheld the Star Chamber, that it had not only been raised to Man's estate by Cardinal Wolsey in 3 H. 3. but it had grown to be a Monster. Every action or word that was offensive to the Stuart Kings or the political functionaries who supported their doctrines or their designs, was swept into the Star Chamber under some frivolous or refined pretext, under the name of *Contempt*. When the

matter touched the creatures of the Crown, it was a Contempt of the King's Authority. It might often be resolved into a mere disobedience of his Will. It was not uncommon, at some periods in England, to issue Proclamations for the observance of Statutes—and sometimes without any statute—and in both cases the course of the Star Chamber was to take cognizance of offenders under colour of the charge of *Contempt*—thus substituting their own heavier and cruel punishments in the place of the penalties of the statutes or the common law, to the utter ruin and destruction of the accused party. It was to countenance and sustain these and similar practices, that the definition of the word *Contempt* had been there so widely enlarged; and it was on this broad and loose sense of the word that scandals on Judges relating to matters not touching their offices nor pending in judicature before them, were denominated *Contempts*.

So, the peril was the same for mere *words* spoken. A jurisdiction over libels, or the press only, fell short of the object to be attained, and so words as well as libels, were put down in the same class of political offences under the same generic name. For many of these pretended offences there was not even a name at common law, for no such offences were known there.

It was quite obvious how this class of offences sprung up so freely at that time. The King was assumed to be the absolute Monarch—unlimited in power and constituting of himself the whole government. Every word or murmur against his Will or his arbitrary usurpations was set down as a contempt of his *Regal Authority*. Thus, *Richard Knightley*, who appears to have been concerned in some silk goods, speaking of the seizure of his property for the famous tonnage and poundage duties, said that *the merchants had more encouragement in Turkey than in England*. For this, he was called to answer in the Star Chamber, as for “*undutifull and false speeches*” which tended to the “*dishonour of the King*” &c. and was fined two thousand pounds and committed to the Fleet. On a Habeas Corpus afterwards issued, he objected on the return to the legality of the sentence, on the ground that the Star Chamber had no jurisdiction for words only. He was remanded because “to deliver one who was committed by the decree of one of the Courts of Justice was not the usage of the Court.” The order of the Court may have been right; but though they said that the Star Chamber was older than the St. 3 H. 7. on which Chambers founded his objection, yet they did not affirm the jurisdiction of the Court—the Habeas Corpus not being the mode of trying that question. The proceeding showed, however, that this sort of jurisdiction in the Star Chamber was questioned at that day. Mr. S. said that he was inclined to believe that if these doctrines of contempt were to be sanctioned at all as the law of the Star Chamber or any other Court, their advocates would be forced at last to place the jurisdiction on the very comprehensive explanation which Lord Bacon had given of it. This great man had taken a very active part there on some occasions, and in the spirit of a courtier, had even pronounced it to be a “noble institution.” He had said that it chiefly took cognizance of four things—“forces, frauds, crimes various of STELLIONATE and the *inchoations* or *middle acts towards crimes* capital or heinous, not actually committed or perpetrated.” This definition would solve the whole secret and gave to the Star Chamber power enough for all its purposes. Lord Bacon had at least done no injustice to that tribunal in the exposition of one branch of its jurisdiction, which he had defined by a word derived from the name of the great Beast of Antiquity. The association was not unnatural and the illustration was not altogether unsuited to the subject.

But even in those bad times, the doctrines of the Star Chamber as to contempts of the Judges never fell from any Judge in a Court of Common Law. The oppressions of the secret recesses of the Council Board, the High Commission Court and the Star Chamber might be screened under the protection of sheer power; but the proceedings at common law were open to the whole kingdom, and the process of indictment and trial there, required the co-operation

of juries from the People of England. The influence of that dauntless spirit of English freedom which was abroad in the land under the Stuarts, would have finally forced its way into the jury-box in spite of the power of the Crown and the threatenings of the Star Chamber on the refractoriness of jurors. The English bar was not subdued and the times had become too perilous for any Judge to trifle in the courts of common law with the administration of criminal justice or to violate openly those fixed principles which were identified with the preservation of the liberties of England. Indeed, it was remarkable, while the grossest oppressions had been practised in other tribunals and in other forms through various periods of English history, that those great principles of the common law and the ancient statutes and charters which formed the bulwark of the liberties of the People of England, had been so much respected and so well maintained in the Courts of Common Law against the influence and the violence of the Crown. Would to God, said Mr. S. that his fellow-countrymen might learn how to prize them as their double birth-right, that they might always know where to look for the most dangerous and daring of their enemies.

This Star Chamber doctrine in cases of *Contempt* was boldly questioned in the early part of the reign of Charles I. In the case of Sir John Eliott, Mr. Selden and others—members of Parliament who fell under the King's displeasure—after the Information had been filed against them in the Star Chamber for matters done in Parliament and particularly for words spoken there which were deemed to be scandalous of the King's Government. they took out a Habeas Corpus before any conviction on the Information. It appeared by the return that they were committed for "notable Contempts against Ourselves and our Government." They objected to the sufficiency of it, and as the charge was not capital, they claimed the right of being bailed. The case was argued, but when the Court were ready to deliver their opinion, the prisoners were not brought to the bar. The Marshal of the King's Bench, in whose custody they had remained after the return of the writ, informed the Court that they had been taken by the King's Warrant and removed. The prisoners not being present, the Court could make no effectual order on the writ. By this contrivance, the matter was slipt over the Term and they lay in the Tower through the vacation—the Habeas Corpus Act not having been then passed. We know, however, from subsequent occurrences what order the Court would have made on the question of bail. The King appeared to falter in his Star Chamber proceeding, and shortly before the next Term convened the Judges in his Council, when he took them aside and told them that he intended to proceed against the prisoners at common law in the King's Bench and to discontinue the process in the Star Chamber. We are informed that "divers other matters he proposed to the Judges by way of advice, and seemed well contented with what they answered *though it was not to his mind* ; which was, that the offences were not capital and that by the law the prisoners ought to be bailed." They were brought into Court again on the first day of the next Term, and it was agreed that they should be bailed, but they were required to find sureties for their good behaviour. They considered this to be a "ticklish point" and refused. Not succeeding in ensnaring them or their friends in that way, the Attorney General filed his Information against them in the King's Bench. Although this information contained a singular jumble of various matters—in one part, charging the words spoken in Parliament—in another seeming to charge an assault on the Speaker—mixing up what may have occurred before the King's *fiat* for adjourning the House with what took place afterwards—yet it may be questionable whether enough was not charged by way of *conspiracy* to have sustained the information at law. Though the Judges, on the defendants' pleas to the jurisdiction (for they flatly refused to plead any thing else and judgment went at last by *nil dicit*) talked much of Sedition and the King's Authority, yet *Jones*, who pronounced the judgment, took care to say, "But in this case there was a *conspiracy* between the defendants to slander the *State* and to

raise Sedition and discord between the King, his Peers and the People." The whole case showed that it was not considered safe to trust the judgment on the ground of *Contempt for speaking the words only*. But there was another remarkable case which happened only two years before the Court of Star Chamber was abolished, which showed that the doctrine of Contempt of the Judges or the Courts had settled down in the courts of Common Law on the true principles which sustained it as an offence. It was the case of an indictment for the offence of Contempt as a common-law misdemeanour, against one Thomas Harrison. He was indicted by the addition of *clerk* and was doubtless some high Tory priest who had taken offence at Mr. Justice Hutton for the opinion which he had delivered a few days before against the King, in the Exchequer in the case of John Hampden on the Ship Warrants. That opinion was given on the 28th of April, and Harrison's offence was laid on the 4th of May. In the mad zeal of his loyalty Harrison had worked himself up to the belief that for a Judge to deny the King's authority to levy money without the grant of the Parliament was High Treason as a denial of the King's *Supremacy*. If Mr. Justice Hutton had on that occasion betrayed his oath and supported that interpretation of the Prerogative instead of manfully resisting the usurpation and closing his Opinion with the memorable declaration that the People of England were "subjects and not slaves—freemen and not villeins," his defamers would doubtless have been punished in the Star Chamber; but being too honest and inflexible to violate his conscience, the matter was left to take its course at common law. Harrison was *indicted* and the indictment *recited* that the court of Common Pleas was an ancient Court of the Realm and that it was against the Crown and its Dignity and against the Laws of the Kingdom for any one to *disturb* the Courts or the Judges *judicially sitting*. It was not however any where recited to be an offence to charge a Judge with Treason or any other crime; and though the indictment, in assiguing the *quo animo*, went on to say that the defendant intended to defame Mr. Justice Hutton, yet it was carefully added *and also for to disturb the said Court of our King and the Justices of the said Court there judicially sitting and to hinder the Administration of Justice*. This was the essence of the misdemeanour. After then charging the offence, *sc.* that Harrison came *into the Court* and there accused Mr. Justice Hutton of High Treason, the indictment concluded "to the great damage, hurt and derogation of our sovereign his Crown and Dignity. and the great contempt of the said Court of Common Pleas, and to the *disturbance* of the Justice and Laws of the King and this Realm and of the Justices of the King and the Administration of Justice in the said Court of Common Pleas, to the evil example of other offenders" and to the "infamy, disgrace and destruction of *Richard Hutton*"—*not naming him as a Judge*. The indictment contained nothing of the *scandal* of the *Administration of Justice*, but was laid to be to the *disturbance* of it.

Mr. Storrs said that it was this offence—the disturbance or interference with the free administration of Justice—which was *contra Coronam*. It was in respect to the reverence and obedience due to Courts and Judges *in the execution of their judicial functions*, that Contempts were against the Crown and its Dignity—or, perhaps, to speak with more precision and accuracy,—against the King's *Sovereignty*, which was one of those points of pre-eminence which collectively constituted the *Regal Dignity*. It was against the King as the *Supreme Administrator* of the Laws, in the exercise of which function of his Sovereignty through the Courts and Judges, every man was bound to obedience and to refrain from disturbing or interfering with its free course under the pain of that summary punishment which the exigency of that power required and which was essential to the execution of it. The moral qualities and tendency of the offence were undoubtedly fit topics of animadversion, and it was true that without this conservative power, the authority of the Courts would be essentially impaired and brought into disrepute. So especially, to insult, libel or scandalize a Judge *in the exercise of his office* was to contemn the *Authority* which had

invested him with his judicial powers and blemished the administration of Justice. But we must not set apart one of the particular consequences of the offence and make it the sole test of the definition of the crime. It was very far from being true that every thing which incidentally or by way of consequence blemished the administration of justice was an indictable offence as a contempt. It would be quite easy to state various instances of individual conduct out of the presence of a Court which manifested the grossest disrespect of the Judiciary, but which could not be brought within the definition of any crime. So, in the case of *William de Bruce*, in the time of Edw. I. who was indicted for charging Roger de Higham, one of the Judges, with injustice, the Court said, *sicut honor et reverentia qui Ministris Domini Regis ratione officii sui faciuntur, ipsi Regi attribuntur, sic dedecus et contemptus Ministris facti eidem Domini Regi inferuntur*. But this was said of an insolent speech made to a Judge while in the actual execution of his office. It is stated to have been "at the time when he gave judgment against him." Hawkins had said too, that the offensive words were spoken in Court.

It was not correct, even according to the theory of the British Constitution, to speak of the *King's Justice*. The administration of Justice was the execution of the Law. The laws were the rules of Justice and its administration had been aptly termed the life of the Law. "By the fountain of Justice," says Sir W. Blackstone, "the law does not mean the Author or original, but only the Distributor. Justice is not derived from the King"—and again, "The King, by his Judges, dispenses what the Law has previously ordained." And hence those who had spoken of it as the *King's Justice* fell into the same style of doctrine with King James who said that "good christians will be content with God's will, revealed in his word; and good subjects will rest in the King's will revealed in his Law." So too it was a refinement which really weakened instead of strengthening the law of Contempts, to say with Ch. J. Wilmot that the Judges had the custody of the King's Coronation Oath. All this was akin to the quaint notion, alluded to by Blackstone as the reason under the "old Gothic constitution" why the King performed the office of prosecutor in criminal cases—that "in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury in having violated the King's Coronation Oath; *dicebatur fregisse juramentum Regis juratum*." Blackstone had also noted the case of Ch. J. Thorpe, condemned to be hanged for bribery in 25 Edw. 3. who was said *sacramentum domini regis fregisse*. The learned Commentator had evidently referred to these as mere curiosities found among the rude relics or the rubbish of antiquity. But it would be found on looking into the charge against Thorpe, that even this idea was there materially qualified. It was said only that he had broken the King's Oath *quantum in ipso fuit*, i. e. "as much as in him lay." It was a perversion of these words to impute to them the sense of a breach of the King's Oath. He was charged with a species of Treason and it was laid to be "false, malicious et rebelliter." The true import of it was that he had traitorously defeated the King's Oath as far as it was in his power to do it, and so it was made a sort of *crimen laesae Majestatis*. It was laid in that way for the purpose of making the punishment capital. Mr. St. John, in his speech before the Lords in 1640, speaking of Ch. J. Thorpe's case, said, "This case is in print, that it is death for any Judge to break his oath or any part of it." It was from some idea like that in Thorpe's case or rather some perversion of it—and perhaps from that very case—that others had since gone on with deductions and corollaries till they had constructed that insolvable puzzle, that to scandalize a Judge was to charge the King with a breach of his Coronation Oath! If this learned conundrum in the law had been as old as the time of Queen Anne, it would have been set down by the satirists of that day among the exercises given out by the tutor of Martinus Scriblerus to task the ingenuity of his pupil.

Mr. Storrs said that he would not deny that the Respondent's Counsel had

truly inferred that his intention was to give a bad name to the proceedings of the Respondent, by fixing the origin of his summary jurisdiction over Mr. Lawless and the doctrines on which he had sustained it, in the Star Chamber. It was submitted to the Court to judge how far the Respondent had brought himself within the justice of such a censure. Mr. S. said that he would not say that the Court of Star Chamber was not, in its original institution and as one of the Courts of the King's Council, to be held in high and honorable respect. The encomium of Lord Coke on that Court undoubtedly referred to its excellence in the purity of its original jurisdiction as well as its dignity and antiquity. There had been many decisions and opinions given there which might be safely relied on as sound expositions of the law. Many of them had been adopted by Coke and other approved reporters. But he would say this—that in all matters handled there from the time of H. 7. to its abolition which were mixed up with the political questions of the day or which touched the liberty of the subject against the Royal Prerogatives, its decisions and its principles were to be received with hesitation and distrust, if not absolutely repudiated, unless they were found to be well sustained by the ancient principles of the common law. If the Respondent had not been able to trace any authority for his proceedings to some approved precedent from the Courts of Law before the Star Chamber adapted their summary process to such a case, he must remember that if his jurisdiction had been blemished by its parentage, he had filiated it for himself, and if it was only at this late day that he had become really unambitious of participating in the honors of its original, it was rather an ungracious expiation of a mere involuntary error of judgment, that he should now instruct his Counsel to engraft its tarnished pedigree on a more honored line of ancestry. He should have been admonished by his books that the English Courts had furnished him no precedent for his proceedings—that Coke and Camden had declined to sanction such a jurisdiction in their day and he should have known enough of these great men to have known that no Judges were ever more firmly persuaded than they of the importance of maintaining the independence of the Courts and the free administration of justice in all their strength and purity. Against such great examples as these, it was a miserable apology for error that the Respondent had only been able to find in the case of John of Northampton a straggling precedent of five centuries ago, on which time had unfortunately failed to do its office.

Mr. S. then proceeded to examine the passage in Blackstone's Commentaries, which had been relied on by the Respondent's counsel.

In treating of *summary convictions for public offences*, he enumerates all the *classes of contempts*.

1. By inferior judges and magistrates.
2. By *sheriffs, bailiffs, &c.*, and *other officers of the court*.
3. By *attorneys, &c.*, "who are also *officers of the respective courts*."
4. By *jurymen*, in "matters relating to the *discharge of their office*."
5. By *witnesses*.
6. By "*parties to any suit or proceedings before the court*."
7. By "*other persons*, under the degree of a peer; and even by peers themselves, when enormous, and accompanied with violence, such as forcible *rescous* and the *like*; or when they import a *disobedience* to the King's great *prerogative writs* of prohibition, *habeas corpus*, and the rest."

He had there finished his *classification of contempts*, every one of which proceeded on principles which excluded the case of a general libel on the Court, not relating to matters in judicature. He then goes on to illustrate them:

"Some of these contempts may arise *in the face of the court* ;
 As ; by rude and contumelious behaviour ;
 by obstinacy, perverseness or prevarication ;
 by breach of the peace, or any wilful disturbance whatever
Others, in the *absence of the party* ;

As ; by disobeying or treating with disrespect the King's writs, or the rules or process of the court ;
 by perverting such writ or process to the purposes of private malice, extortion or injustice ;
 by speaking or writing contemptuously of the *Court* or *Judges*, acting in their *judicial capacity* ;
 by printing false accounts (or even true ones, without proper permission) of causes *then depending in judgment* ;

Mr. S. said that he agreed to all this; and it might be noticed here that contempt by printing *false accounts* of judicial proceedings, was confined by Blackstone to causes "*then depending in judgment.*" It was the next and closing fragment of the paragraph, into which the counsel have supposed that Blackstone had slipt the case of general libel, viz :

"And by *any thing*, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

Mr. S. said that this would no doubt bear out the position of the counsel, if Blackstone had really intended to adopt in this paragraph, the false sense which Mr. Ch. J. Wilmot had put on the word *authority*. He may, possibly, have intended to do so. The fourth volume of the Commentaries was published in 1768, and perhaps Blackstone had the proceeding against Almon in his mind. He may have been aware of the equivocal sense of the word *authority* and perhaps had seen the opinion of Ch. J. Wilmot. The case made a great noise at the time and Blackstone was a Crown officer under the E. of Bute's ministry. He received a patent of precedence to rank with the King's counsel in 1761, and was appointed Solicitor to the Queen in 1763. He may have been in office when the general warrants were issued. Mr. S. said he had not been able to ascertain whether he remained in that office up to 1765, when the rule against Almon was made, but he continued in favour for a long period afterwards.

The tendency of his political views of the British Constitution, however, was well known. It was only necessary to read the closing Chapter of his work to discover the leaning of his principles. He dates the "*complete restitution of English liberty*" at the restoration of Ch. II., and thought that in that King's reign, "*the people had as large a portion of real liberty as is consistent with a state of society*"—and attributes the faults of the constitution "*chiefly*" to the "*decays of time or the rage of unskilful improvements in later ages.*" Mr. S. read several passages from this chapter, to show the bearing of his political opinions. He said that if he had intended in the chapter on Attachments to adopt the doctrine of Ch. J. Wilmot, it was but proof of the introduction into the Commentaries of political principles which went to support the highest dogmas of that party whose cause he had espoused. It is well known that in his early editions of the Commentaries, a disqualification to serve in Parliament was found which bore out the ministry in John Wilkes' case; but he expunged it in subsequent editions. Mr. S. said that he was far from disparaging his work as a highly finished and generally accurate compendium of the principles of the common law. He was only to be distrusted on some points which rather touched political questions than the general code of municipal law, and on these points it should be read with caution. Lord Ellenborough had said that at the time of writing his Commentaries, he was extremely ignorant of criminal law, and that when he compiled his lectures, being then a fellow of All Souls College, he was moderately skilled in the law—that he grew learned as he proceeded with his work and his true and solid legal knowledge he acquired afterwards. Mr. Hargrave has informed us that the *tenth* edition (which was published after his death) was corrected by him. He was one of the most determined supporters of Prerogative, and most active in vindicating the powers

of the Crown—an enemy to all propositions for improvement and bigoted and intolerant in his ecclesiastical as well as his political opinions. On such points—and the case of Almon bordered on them—he should not take an inference from an ambiguous paragraph in his Commentaries, as an authority. He would rather remember that Lord Mansfield once said, when speaking of Sir W. Blackstone's Reports, that we must not rely too implicitly on "great names."

The general accuracy, however, of the Commentaries was not to be impaired. Instead of condemning it for the few errors which have been noted in it, it is the rather to be admired that it contains so few. It is the production of a great and philosophical mind, and as a correct, perspicuous and comprehensive exposition of the code of English law, it has no equal or rival and must forever remain in the first class of standard books in the law.

But, Mr. S. said, he did not think that the passage in question from Blackstone, even general as it was, necessarily bore the interpretation which had been attributed to it. There was a large description of contempts which fell within the very words of the paragraph in question, on the assumption that the word *authority* truly referred to the *legal authority* of the *judges*, as expressive of the *action* of the *courts* in their judicial proceedings;—and it was not by overstrained constructions or metaphysical interpretations of words, that principles were to be enlarged beyond the plain, ordinary and necessary signification of them. In a note to this very paragraph, Chitty has put the case, by way of illustration, of "attempting to influence a jury," citing 3 *Burrows*. So, said Mr. S., he might add—offering to bribe a judge;—writing him a threatening letter relating to a cause;—assaulting a judge on his way to the court-house, as in *Dandridge's case*, *Virginia Rep.*;—libelling the parties in the cause in reference to the merits;—and many other instances, which Blackstone has not enumerated and which do not fall *literally* within the words of either of his classes. All these contempts show that *gross want of respect* to courts of justice and their proceedings, without which their legal authority and moral weight would both be lost and the course of justice made a mere mockery. Yet all these cases proceed on the ground of obstruction and interference with the execution of the legal powers of the judges in the administration of justice. The phrase used by Blackstone may be satisfied more fairly by this reasonable interpretation, which rests the doctrine on confessed principles, than by imputing to him a sense in this paragraph which would render the meaning so general that it would really define nothing. So, the cases which he puts in illustration of the *seventh* class, show the same *gross want of respect* and *regard* of judicial authority—as rude behaviour in court—prevarication—disobedience of rules and process—scandalizing the judges acting in their judicial capacities;—and the whole class of offences by the officers of the court in perverting their offices to purposes of fraud and corruption. So he says, that "treating with *disrespect* the King's writ" is a contempt, and doubtless it is so. But what meaning is to be attached to this, but disobedience or contemptuous treatment of it in the *course of its execution*? In a note to this paragraph, Chitty has illustrated the principle of that case, by referring to the modern cases in *Broderip* and *Bingham* and *Moore*. "An attachment will not be granted for violent or contemptuous behaviour *after* the service of the process." Yet the party may manifest the grossest *disrespect*, in one sense, for the writ and its *authority* after service, as well as before. Sir W. Blackstone is not to be considered as using the same words in different senses in the same sentence. After enumerating the several *classes* of contempt, all of which related to the execution of the judicial functions, and it being obviously useless, if not impossible to enumerate every instance which might fall within these classes, he closed the paragraph by a general expression applicable to all contempts of the character of those of which he had been treating. This was the only fair interpretation of the passage in question, and, candidly considered, did not sustain the position assumed by the counsel for the respondent. The question of general libel on the court had been so recent-

ly agitated and must have been such a prominent topic at that day at the bar, that if Sir W. Blackstone had intended to define it as a contempt, he would, doubtless, have expressly enumerated it. But if he intended to shelter it under the general phrase at the end of this paragraph of his Commentaries, and then leave it to others to hunt it out from the ambiguity of the words, it was quite satisfactory evidence that he thought the existence of such a power in the courts, to be too doubtful to be openly asserted at that day or to be vindicated at any after-time on the authority of his name.

Mr. S. said that as no elementary book had copied even this ambiguous passage or followed it, and no writer or annotator since 1765, had asserted this power; and as no case was to be found in England in which it had been exercised since, it was a fair conclusion that the power itself was not considered as existing there. Yet there had been several periods in England since that time, when the scandalous licentiousness of the press would have demanded the summary interposition of the courts. The case of Almon must have led to a close examination of the point, and we have a private letter from Mr. Erskine, in 1785, to a gentleman of the bar in Dublin, fully expressing his opinion upon it. He says,—

“The rights of the *Superior Courts* to proceed by attachment, and the limitations imposed upon that right, are established upon principles too plain to be misunderstood.

“Every court must have power to enforce its own process and to vindicate contempts of its *authority*; otherwise the *laws would be despised*, and *this obvious necessity* at once produces and limits the process of attachment.

“Whenever any act is done by a court, which the subject is bound to obey, obedience may be enforced and disobedience punished by that summary proceeding. Upon this principle, attachments issue against officers for contempts in not obeying the process of courts directed to them, as the ministerial servants of the law; and the parties on whom such process is served may, in like manner, be attached for disobedience.

“Many other cases might be put, in which it is a legal proceeding, since every act which goes *directly to frustrate the mandates* of a court of justice, is a contempt of its *authority*. But, I may venture to lay down this distinct and absolute limitation of such process, *viz.* that it can only issue in cases where the court which issues it has awarded some *process*—given some *judgment*—made some *legal order*—or done *some act*—which the party against whom it issues, or others on whom it is binding, have either *neglected to obey*, contumaciously refused to submit to, excited others to defeat by artifice or force, or treated with terms of contumely and disrespect.”

“But no *crime*, however *enormous*, even open treason and rebellion, which carries with them a *contempt of all law* and the *authority of all courts* can possibly be considered as a contempt of any particular court, so as to be punishable by attachment, unless the act, which is the object of that punishment, be in *direct violation* or *obstruction* of something previously done by the court which issues it, and which the party attached was bound by some antecedent proceeding of it, to make the rule of his conduct. A constructive extension of contempt beyond the limits of this plain principle, would evidently *involve every misdemeanor*, and deprive the subject of the trial by jury in all cases where the punishment does not extend to touch his life.”

And, said Mr. S., if the reasoning of Ch. J. Wilmot is sound—that the ground of the proceeding in general libels, not touching matters in judicature, is “*not for the sake of the judges*,” but because it is the *King’s justice* which they administer—and so it is *his wisdom* and *goodness* which is arraigned, and *thus the allegiance of men* is shaken—and so all lawful *authority* becomes *despised*—why do they not at once punish all seditious by the same process? If it is *not for the sake of the Court*, but for the *King*, the reason for such a jurisdiction is quite as strong; and what, after all that has been said on this

point, is the offence of general libel on the Courts or the King himself, but a *sedition* Libel, in the strictest law sense of the terms?

The latest editions of Hawkins, by Mr. Leach and others, Archbold and every other writer, have omitted the case of general libel as a contempt, in their treatises and notes; and Judge Dade well said in Dandridge's case, that he could find no case in which a court had exercised such a power. The case of Dandridge was a clear case of contempt. He assailed the judge, as he was going to court, and as he was entering the court-house. It was as much a contempt and a direct obstruction to the administration of justice, as to have kept a juror or a witness away by force. The opinion of Judge Taylor in that matter (Virginia Reports,) placed the case on its true and solid ground. Mr. S. read that opinion.

Mr. S. then read several extracts from an opinion of Lord Holland and Mr. J. Holroyd, in the case of the King *vs.* Clement, 4 B. and A. 218, and the opinion of Mr. J. Platt, 9 Johnson Rep. 417. The case of Oswald *vs.* Pennsylvania, would be more particularly noticed by his fellow manager, who closed the case, (Mr. Buchanan.) He said that before the Respondent was to be justified on the ground that this power was to be treated as existing in England, he should be able to produce a direct and unequivocal assertion of it from some standard book,—the clear opinion of some English judge,—the judgment of some Court,—or at least the assertion of some Crown officer, directly to the purpose, since 1765. The reported cases on which he relied, were not understood in England to sustain the doctrine asserted. Mr. J. Holroyd said, in the case of Clement, that “the cases cited from *Atkyns*, as well as that before Lord *Erskine*, established that any thing done, either for the purpose of *obstructing* justice, or which will have that effect, may be punished as a contempt,” and that was all which they established. Yet the Respondent had relied on cases like those, to bear out his jurisdiction. Mr. S. said that he had no doubt that this power was either considered in England to have never existed at all in any court since the time of the Star Chamber, or that it had been abandoned, as a jurisdiction not to be asserted or borne with at this day. In the cases of Hart and White, who were tried in 1803, (30 St. Tr. 1134. 1194) for libels on “the administration of public justice, upon the trial by jury, upon Mr. J. Le Blanc, and upon the jurors,” in a former cause and upon Lord Ellenborough, the informations accurately defined the nature of the offence of libels on the courts, in matters which had passed into judgment. The malicious intent is charged to be, “to bring the administration of justice in England into hatred and contempt among the liege subjects of our said lord the King, and to raise and excite dissatisfaction and discontent in the minds of the liege subjects of our said lord the King,” &c.; and the informations conclude—“in contempt of our said lord the King and his laws,” &c. No more shameless and atrocious libels on Mr. J. Le Blanc and Lord Ellenborough could have been contrived than these were, and in one respect they were obnoxious to the same charge which the Respondent has made against the publication of Mr. Lawless—that they contained “no reasoning,” but were mere *misrepresentation* and abuse. In these cases the Attorney General, (Sir Vicary Gibbs) after commenting upon the enormity of the offence, said, “It costs these gentlemen nothing to utter these libels. If they be not convicted for publishing them, as libels, they go unpunished—there will be nothing to restrain them, and the public security will have no hold upon them, except by the tie of their own consciences.” Mr. S. said that if there was any thing equivocal in the sense of these expressions, yet the cases showed that the practice in England of proceeding against such offenders, was by indictment or information only.

He agreed most fully and cheerfully with all that had been said and read in condemnation and rebuke of the criminality and indecency of libelling the courts of justice; but one unversed in the law, would have almost believed from the course of the argument on the other side, that there was no punishment

for that crime unless the courts took the retribution of the law into their own hands. But the law was open—clear—and severe. There was no disinclination in juries to punish these or any other assaults on the courts. He did not believe there was any People who would so readily discountenance such an offence, and more cheerfully sustain the authority of their courts and vindicate the administration of justice, than the American People. There was no country in which the moral feeling in support of the civil institutions under which they lived was so strong and sincere, and it was in that feeling that the judiciary especially, as well as the government, would find its strong and solid support. If there was any feeling in this country which prevailed most generally, it was the habitual respect, deference and submission to the authority of the magistracy. The People of this country have been educated to consider and they feel that in the supremacy of the law consisted their real protection. It was the panoply of their liberties and their strong defence. But they know that the right of trial by jury is their birthright too, and that in according it to the vilest felon or the meanest culprit, they vindicate it as the inestimable privilege of all. The most dangerous and alarming extension of the law of contempt would be that which brought within the jurisdiction of the judges or their discretion any thing which partook of the nature of a general Political offence—above all things, one which admitted of no fixed or accurate definition. The law of contempts, when confined to the protection of the courts in their proper constitutional action and duties, and to the punishment of every direct or indirect interference with the exercise of their powers and the protection of those who are concerned in them as parties, jurors, witnesses and officers of justice in aid of the administration of their functions, was too well established and too well sustained by principle as well as positive law, to be doubted or disturbed; and, confined to its proper limits, admitted of all reasonable certainty in its definitions of crime. But if extended to the case of general libel, there was no security for personal liberty but the discretion or feeling of a judge. It would be singular indeed that the final guilt of a man, instead of depending on fixed principles, should hang upon the whim or caprice or even the discretion of a single judge, and that too where in cases of punishment, there could be no effectual appeal or redress. The standard of guilt in such a case was the temperament of the offended party. If he was a man of jealous spirit—of inflated conceit—of sour and phlegmatic feeling—or ardent and fiery temper, we should find that man adjudged to be an atrocious libeller, who would pass harmlessly before a cool and patient court or a placid and gentle judge. The law might be truly said to be locked up in the breast of the court—as much unknown as those which Caligula hung up on the highest pillars. No man knew when he offended. The judge makes the law, and expounds and executes it in the same breath. Indeed, there was no law in the case, and it was to say that there was none, but that the court was to make the law when the case happened *pro re nata*; for, as Lord Hale had said, “it is all one to make a law and to have so authoritative a power to judge according to that which the judge thinks fit to be law.” One judge would be of opinion that a paper was positively scandalous—another that it tended to scandal—one, that it was ironical—another, as in the Respondent’s case, would catch at a word, as “*assumption*” in argument, and insist that this was insufferably contemptuous;—or that the party had said that the “*judge*” had thought proper to decide so and so, and that word (*judge*) must be *personality*; but if that was not so, yet at least to say that he had “*thought proper*” to decide, was downright libel. To say that a judge was superannuated or merely too old, would be an impeachment of his capacity; or that he was too young, would be to pronounce him unfit for his place. To place the doctrine of contempts on such grounds, was to assert that the jurisdiction was arbitrary, unlimited, uncontrolled and undefinable—that the discretion of the judges was not a legal discretion—that it was to be governed by no fixed principles or rules of law, and that it was not their office

“*jus dicere*,” but “*jus dare*.” Mr. S. said that he had no doubt that if the judges should take upon themselves to exercise such a power—and if they had it, it was their duty to do so—they would at last make the judiciary so odious to the country or so ridiculous, that their whole power would be swept away. Their moral power could not be so effectually impaired in any other way. The notion that a general libel on the courts was not to be punishable as a contempt of the particular Court, but as a scandal of Justice in the abstract, was a refinement bordering too close upon absurdity to sustain such a jurisdiction. If this was in truth the foundation of such a power in the courts of law in England, because the King was the fountain of justice and so the justice of the nation was scandalized, why had not the same power been sustained in respect to offences against Religion? The King is the Head of the Church; and why should not the Archbishop of Canterbury (for he was a judge too in ecclesiastical matters) punish a libel on the Bishops as a contempt of the Religion of the country? The bench of Bishops was as much a branch of the constitutional establishments of England as the Courts of law. Or, in case of a general libel on all the courts, or on the whole system of jurisprudence, and not on any particular court, shall it be punished in the Common Pleas, Exchequer, the Chancery or K. Bench, or in all the courts?—for it was a contempt of all;—or was it punishable in K. B. only? If in K. B. only, as the court of general criminal jurisdiction, then it was because it was a general crime, and not a contempt of that Court. And how has it happened that all the kindred offences of the Star Chamber have gone to the common law course of proceeding by indictment, except that? Why had not the K. B. as well taken also the summary process of attachment for scandalizing the other great officers of state? They were all coupled together in one statute at first. To libel the Council, the Nobles and the Judges, were all fellow crimes.

Mr. Storrs said that the doctrine of Ch. J. Wilmot rested on this manifest fallacy—that the Courts might punish summarily as for a Contempt, an *indirect*—*incidental* or *constructive* reflection on the King, but had no such power when he was assailed directly with the grossest defamation.

But at all events there was no analogy between the British Constitution and our own systems in any of these respects. We had no Executive Power here which concentrated the Sovereignty of the government. To apply the argument of Ch. J. Wilmot to the Federal Constitution was little more than a burlesque of our political institutions. The absurdity would appear more clearly by illustration than argument. For example—the Secretaries of the Departments of State and War are of the Cabinet—the President’s Council—perhaps it might be said—his “*Privy Council*.” Would it be gravely said any where that to doubt the political qualifications or fitness of both or either of these high functionaries of the government, was to incur the offence of Contempt because the Federal Constitution had theoretically imputed to the President an ideal superiority in Wisdom and Goodness and Dignity? We could hardly speak of things in this way with gravity. If we had a Court of Star Chamber too, there would doubtless be no lack of victims to appease the wrath of the Offended Dignity of the State.

There were grosser absurdities still in the application of these fictions to our political systems. In some of the States, the office of the Judges was elective. And how would these doctrines apply in practice there? It was undoubtedly the right of the electors in those States to discuss the qualifications of the Judges and to express their opinions freely in respect to their official conduct, if they did not interfere with the actual exercise of the judicial authority of the State. But such a right in the People would the rather be a scourge than a privilege, if it was to be exercised only under the peril of a summary judgment and punishment for contempt.

In truth, said Mr. S., the fiction on which Ch. J. Wilmot placed the case of general libel, really weakened the law of contempts. As a protective princi-

ple, the jurisdiction of the courts in cases of contempt, was well sustained, and on no other ground. If the power was originally inherent in the judicial function, as the counsel for the Respondent appear to have considered it, then it has been conferred on the judges by the Constitution itself which created their office, and it would follow that even Congress could not abridge it by statute. But Mr. S. said he did not consider it to be so in the full sense which that argument imported. It was doubtless a crime in the early stages of the judicial history of England, the origin of which could not be now exactly fixed and punished by summary process beyond the date of any known records of the law. It was safer to take it as a crime within the limits which we find assigned to it by the law, than to go back to first principles for the purpose of establishing that as a crime by deduction, which the law had not specifically made so. It is not to be made an offence on arguments drawn from necessity, unless the law has made it so. Power was ever silently stealing its way along that path. It was first necessary—then inherent—then implied—then expedient—then adopted—then demonstrated on precedent, as well as principle—and finally established, defended and learnedly and eloquently vindicated. It was not many years ago that it was questioned, whether the whole Legislative power of the Federal government was competent to create the offence of libel “against the government of the United States.” Yet, if the argument of Ch. J. Wilmot was sound, and contempt by general libel on the courts was sustainable on the principles on which he rested his opinion, there was at least one department of this government which might punish this political crime without the authority of an Act of Congress.

Mr. Storrs said that no argument could better illustrate the abuses which had flowed from the exercise of this power, even in cases where it was admitted to exist in England, than that the House of Commons had adjudged that to be a libel and so a breach of its privileges, which proved on trial to have been no libel and where the party was acquitted. *Stockdale's case*; 22 St. Tr. 237, and *Reeves' case*, 26 St. Tr. 259.

If the power to punish a general scandal as for contempt, was inherent in the judicial function, then it was not confined to the Superior courts alone, but extended to all persons exercising functions of that character;—to commissioners of bankruptcy, the sheriff, the coroners and certainly to every Justice of the Peace. It must be remembered too, that the doctrine reaches contemptuous words of general scandal, as well as *libel*. Yet we can hardly believe that any of these persons have any such jurisdiction; though if the power is inherent in the judicial functionaries created by the Constitution, it is equally annexed to such as are created by acts of Congress. We should then have all our Justices of the Peace in the full exercise of this power; and as Shakspeare has been freely quoted by the learned counsel against us, we might refer them to an authority for their case, which they seem to have omitted, where Mr. Justice Shallow threatened Sir Hugh Evans, perhaps for some slander of his dignity, that *he too would “make a Star Chamber business of it.”*

So the power of the House of Lords and the Commons, in cases of *breach of privilege*, rests on the *lex et consuetudo parliamenti*, which is a part of the *lex terrae*. It was doubtless exercised originally when the King and both houses met together. It was the high Court of Parliament—the great Council of the King. Since the two bodies had separated, they have both exercised this power immemorially. The committee of the House of Commons placed the power on this ground. They say in the report in Sir F. Burdett's case, “The power is in truth a part of the fundamental law of parliament; the law of parliament is the law of the land—part of the *lex terrae* ;” that it is “proved by *immemorial usage*, recognized and sanctioned by the highest legal authorities, and analogous (*analogous*) to the power exercised without dispute by courts of justice; that it *grew up with the constitution*; that it is established and confirmed as clearly and incontrovertibly as any part of the law of the land.” So in 3 *Wilson*, in

Brass Crosby's case, and in the case of Ashby and White, the courts sustained the power as a part of the *lex terrae*—the *lex et consuetudo parliamenti*. But the better opinion at this day is, that whatever may have been the precedents which may be found, this power is, in truth, merely protective. The question has been much agitated, and Mr. Hargrave has given his opinion decidedly that the House of Lords cannot commit beyond the end of the session. See 2 *Jurid. Arg.* and *Palmer's practice of the H. of Lords* p. 69. So, said Mr. S., in the case of John Anderson, the H. of Representatives brought him before them in the District of Columbia, where the Congress is the Supreme legislature, for a direct interference in their proceedings by an attempt to bribe a member. Mr. S. said, that one of the Respondent's counsel had been pleased to refer to what he (Mr. S.) had said in the H. of Representatives on that proceeding. He felt himself quite flattered that the counsel thought so well of his poor opinions on any occasion, as to give them the additional weight of his approbation here. He had said then, and he said now, that an attempt to *bribe a member* was a direct interference with and an obstruction to the action of the House. His remarks on that occasion will show the reasons why he thought so, and the ground on which he placed that power. If he should ever feel it to be his duty to express his opinion in that place on the question of a general libel on the house or an individual member, published after the adjournment or even during its sittings, and the counsel shall continue to hold his humble opinions in the high favour which he seems now to entertain for them, he shall certainly have the benefit of his views on that question too.

Contempt was a *crime* at common law, and the mode of punishing it chiefly distinguished it from others—it being the only public offence punishable summarily by attachment, fine and imprisonment, except when summary convictions had been ordered by Statute. It was classed among crimes by all writers. Hawkins and Blackstone both assign it to that place.

“Having shown in what manner *offenders* may be apprehended, *without process* from a court of record, I am now to show in what manner they may be brought into court by such process.”

“Of PROCESS from a court of record, there are two sorts.

“1. Such as may be awarded by the discretion of the justices, upon a bare suggestion, or their own knowledge, *without any appeal, indictment or information*.

“2. Such as can be awarded only upon such accusation.”

“The FIRST is generally called an *attachment*, and is properly grantable in cases of *contempts*,” &c. *H. P. C. lib. 2, ch. 22*. Hawkins then goes on, through this chapter, to define the law of contempts and the mode of proceeding. In the following chapters, he treats of appeal, indictment and other modes of proceeding in criminal cases. In this whole chapter there is nothing which countenances the idea that a general libel on the court was punishable in that way.

On all principles it must be a crime; for what can that be but crime, which is prosecuted in the name of the King, and which subjects the party to fine and loss of liberty? The mode of proceeding—its more immediate relation to other judicial proceedings—and the civil objects between parties, to which, in some cases, it has been made subservient from the course of practice in civil actions, may have led some to consider it as a matter *sui generis*. But it was not so. It seems to have been considered not to be a crime, because it is said that every court is the judge of its own contempts—that it is not examinable on habeas corpus, and that no writ of error lies on conviction. That it is not examined on *habeas corpus*, is for the very reason that it is a crime. The party is “*convict in execution*,” and so within the exception of the habeas corpus act. It was on this ground expressly, that the courts refused to discharge on commitments for contempt. Mr. S. then read several extracts from 3 Wilson 188. 19 St. Tr. 1046. 9 Johnson R. 421, 422. It was so of all crimes, where the party was in execution after judgment. It was not clear that no writ of error lay in the case,

but the K. B. will examine a commitment for contempt by an inferior jurisdiction, on *certiorari*, which is the proper remedy on all summary convictions. The offence rested on the common law, like many other misdemeanors, and was founded on immemorial usage. It may have begun with courts themselves—and so may the offence of perjury, and the original strict common law crime of forgery, which related to the records of the courts; but it was not the less a crime than these because the same necessity may have first introduced it. All those offences which we now denominate offences at common law, must have had some beginning. They may have been coeval with courts themselves, and either founded on statutes or some principles of obvious necessity in every government, which would constitute them misdemeanors. The necessity of the case doubtless led to the summary punishment by attachment; but contempts of court consisted of interference in their proceedings and obstructions of their authority which no other mode of proceeding could adequately redress, and this was doubtless the reason why the process by summary proceeding was originally adapted to the case.

The case read on the other side from Strange's Reports (Barber's case) itself showed that it was a crime. It is there said in the margin, "This prosecution went no further—the *act of grace* interposing." Mr. S. said that he had no doubt that *contempt* was also an indictable offence. He read from 2 Hawk. P. C. 206. et seq. to 212, 1 ch. C. L. 88. It had indeed been said by the court in Tennessee in the case of Patrick H. Darby, that "the power to *punish* for *contempts* was no part of the *criminal law*." He thought that to be a great error if used in a general sense. If the remark was intended to apply to Darby's case only, it was true. That was a proceeding by *rule*, to show cause why he should not be *stricken from the roll*, and was a power of a very different character.

Mr. Storrs said that he had examined this point more at large as it stood in England at common law, because if the jurisdiction in question did not exist there, the whole superstructure which the Respondent's counsel had raised up on the contrary assumption, fell to the ground. But if it was admitted for the sake of the argument, that the cases would have borne out the extreme position that disrespectful or general defamatory words of those who held Commissions as Judges, constituted the offence of Contempt punishable summarily there at common law, it availed the Respondent nothing until it was further shown that such was the *Federal law* here—the *lex terræ* of the Federal Government. He did not speak of the law of the Courts, for he knew nothing of any *law* of the *Courts* as distinguished from the *law of the land*.

If it was assumed then that the English Courts had power over an offence like this, he should admit that it would exist here in the Courts of those States which had expressly adopted the common law as the *lex terræ* or in which it had become established by long usage or consent.

But he was not aware in what part of the Federal Constitution or on what principles the English code of common law offences had been adopted in the Federal Government. Whatever question may have been made heretofore or whatever opinions may have been given on this point, it may now be considered as settled and universally admitted that the Courts of the United States took no jurisdiction over common-law offences.

It was true that in framing the Constitution, many terms had been adopted which were derived from the common law. But it was not to be inferred from that circumstance that it had been therefore assumed that the common law of *England* was to be treated as in force in the Federal Government. The common law was in force here at that time in most if not all the States, and these terms might as well, and perhaps more pertinently, be considered to have been drawn from or referrible to the law of the States as the law of England. They were used in reference to the existing systems under which we lived and which would enter more or less into the organization and operations of the new gov-

ernment. The terms *trial by jury—bail—attainder—habeas corpus—suits at common law* &c. were as well known to the laws of the States and their definitions as well fixed here as in England. They were used in the constitution as terms of definition, better known and better adapted than any other to express the meaning of those principles which were to be observed in the new government. It would have been mere supererogation to have resorted to circumlocution, when terms so well fixed, were so near at hand to express the meaning of the framers of that instrument.

The power of the Federal Courts was either defined in the Constitution or by Statute; and the common law was of so little account in that respect, that without the Act of 1789 the Supreme Court could not have been put into operation and the repeal of any vital part of that statute was to abrogate the Court itself. It was because the Federal Courts possessed no common law jurisdiction over offences, that the Judiciary Act had prescribed their power in cases of contempt and specifically conferred it on them. He should not attempt to add anything to the argument which his fellow-manager (Mr. Spencer) had so conclusively drawn from that Statute. That section (*sec. 17.*) had defined their power in cases of contempt with great precision. It was—"to *punish, by fine and imprisonment* at their discretion, all contempts of *authority in any cause or hearing before them.*" The sense which Ch. J. Wilmot had put upon the word "*Authority*" was here repudiated. Contempt was treated as a *punishable crime*. Independently of the strength of the argument which had been drawn from the statute itself, it was further entitled to very great consideration that this Act had been drawn up by one of the greatest lawyers who had ever sat on the bench of the Supreme Court. Indeed, that Statute was remarkable throughout for its clearness, comprehensiveness and legal accuracy as well as its sound political wisdom and foresight. It was the honest execution of the duty imposed on Congress by the Constitution itself. It was the finishing key-stone of the Federal Government and the Political Functionary who should dare to weaken or displace it by the hand of power, would prove himself to be a traitor to the Constitution—to his Country and his Oath. When the Judiciary should have been destroyed or its legitimate powers shall have been paralyzed, the Executive Power becomes the arbiter of our liberties. Nothing was more true than a remark which once fell from a distinguished politician of Virginia, that "*after the Book of Judges comes the Book of Kings.*"

The *process* on summary conviction for *contempt* as a *crime* was by attachment and *arrest*;—the process issued on probable cause shown on oath as in other criminal cases or on facts judicially before the court;—there must be an *adjudication* by way of *conviction* and the *commitment* was by *order* or *writ*. The Respondent himself followed all these forms of conviction very exactly, in the case of Mr. Lawless.

The course of argument on the part of the Respondent's counsel had gone to confound the case of summary conviction for contempt with the power of the judges to suspend attorneys and counsellors from practice in their courts, or to strike their names from the rolls. Such was Darby's case;—the case of Palmer in New Hampshire, for some silly speech out of doors, which it would as well have comported with the true dignity of the judge not to have noticed at all;—and Tillinghast's case in New-York, for highly insolent language out of court and an affrontful insult to the Judge in his remarks to the jury during the trial of a cause. If the respondent had merely exercised the power of suspending Mr. Lawless from practice, the counsel might have more pertinently asked why "the respondent had been impeached and Judge Conkling eulogized?" Mr. S. said that he had not sat as a member of the Judiciary Committee on the petition for impeaching Judge Conkling and took no part in the proceedings, having been of counsel, since Mr. T. was struck from the roll, in the same matter on the other side. But it was not on the exercise of that power, that this impeachment rested. The Respondent had assumed the power to punish as a crime by way of *attachment, summary conviction* and *imprisonment*

a free citizen for that which, if a crime at all, was not punishable before him at his discretion, without indictment and trial by jury. Mr. Lawless, even as an attorney and counsellor of that court, was not punishable in that way for any act or omission not done or omitted in the execution of his office as an attorney or counsellor. 4 Blackst. Comm. ch. 20, III. 2, 3. p. 284. 2 H. P. C. 206, 208, 210. The courts have no power to proceed in this way against their officers, as such, for any misconduct independently of their offices or profession. The courts have very lately extended the principle to cases for malconduct in a business entrusted to the party in his character or capacity of an attorney, where no suit was pending. 1 Bingham 91;—as, where he had received monies under a power of attorney describing him as a counsellor and attorney and the employment was manifestly in his professional capacity, 2 Chitty R. 68; 7 Moore 424, 437. In these cases, they interpose by rule and enforce obedience by attachment. This jurisdiction is well stated by Ch. J. Abbott in 4 B. and A. 47. “The rule by which the court is to be governed in exercising this summary jurisdiction over its officers seems to me to be this; where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way, &c. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction.”

In respect to matters not connected with the execution of their offices, the rights of Mr. Lawless and the bar are as well secured against summary conviction for public offences as all other citizens, and the rights of all others have no better security than theirs. Miserable indeed would be the condition of the profession, if they were to be degraded in their character of free citizens so far below the rest of their fellow countrymen. It is not among the least offensive traits of the Respondent's case, that his principles would sink to the most degrading vassalage those high and honorable minds, which, in every country, have been the first to warn their fellow countrymen of the approaches of tyranny and the most fearless in exciting and leading them to resistance. Mr. S. said that he freely admitted the right of the judges who had the power of licensing practitioners before them, to suspend attorneys and counsellors or strike them from the rolls by rule, for any mal-practice or grossly immoral conduct which rendered the continuance of that relation disreputable to the court. They were licensed by the court and were officers of the court. Every court must possess the power of determining who shall practise as attorneys before them, unless some statute has regulated it in some other way. The license was holden during the pleasure of the court and revocable for any mal-practice or grossly immoral or criminal conduct. But this supervisory power over their licenses as officers appointed by them, was of a totally distinct character from the process of summary conviction for the offence of contempt. The court may proceed by attachment to conviction against the sheriff for contempt, but they cannot take away his office summarily, because he does not hold it from them. The court may revoke the license of an attorney who had been convicted of perjury in any other court, but they could not proceed in that case against him by attachment as for a contempt. So they may dismiss their clerk from office, if he is appointed by them, for many improprieties of conduct for which no attachment would lay. The numerous cases which have been read on the other side to show this supervisory power of the courts over the license of an attorney and the various comments of judges in such cases, do not, therefore, reach the conclusions which the Respondent's counsel have drawn from them. It may be an aggravation of the offence of the Respondent that he superadded the suspension of Mr. Lawless from office to his imprisonment; but he neither had, nor claimed at the time to have nor could he have even thought that he took the jurisdiction over his person by reason of his office as an attorney and counsellor. He knew too well that his proceedings were not had on that ground even in his own

estimation of his powers—for he was going on with the same jurisdiction by way of attachment and summary conviction against Mr. Foreman; and there was no principle on which he could sustain that proceeding against the printer, except that he had the power of punishing a general libel by attachment or that he held the “*imprimatur*” of the press. A great portion of the argument and a great mass of the cases, authorities and commentaries which have been read on the part of the respondent, have been therefore directed to a point which has no immediate relation to the question. The substance of the charge contained in the article of impeachment was the arrest of the person of Mr. Lawless and his conviction and imprisonment under color of law. It was this oppression and imprisonment, which was charged to be “to the disparagement of *public justice*, the abuse of *judicial authority* and to the subversion of the *liberties of the People of the United States.*” The suspension of Mr. Lawless was recited in the article as a part of the history of the case and was descriptive of the proceedings. It was laid too by way of aggravation. But, the Respondent might be convicted on this article even for that only, if the power was exercised under the influence of personal resentment and without adequate cause for such a punishment. The charge embraced both cases, and the offence was alleged to have been committed under “*color of law.*” It was framed in that way, to meet either branch of his proceedings or both of them if the proof should establish an unlawful intent, either in the exercise of a jurisdiction by usurpation or in the execution of any power which the Respondent lawfully held.

Mr. Storrs then proceeded to an examination of the Article published by Mr. Lawless. He said, that it was perfectly respectful and decorous in its character and temper;

That it was a fair and true statement of the points involved in the Opinion which the Respondent had written out for the newspapers, and that it contained nothing which was libellous or defamatory;

That Mr. Lawless was fully justified in making the publication which the Respondent had adjudged to be a contempt.

The case of Souldard had been finally disposed of and gone beyond the jurisdiction of the Respondent, on the appeal. That it might possibly be sent back on reversal, was of no moment. It might also be affirmed. It is enough that he then had no existing jurisdiction in the cause. He had no more than if the case itself had never existed. He had delivered a verbal opinion on the final decree, and after the cause had been appealed, he wrote out for the newspapers and published a more formal argument. It is alleged in his answer to the Article of Impeachment that his Opinion “had proceeded *exclusively* on grounds which had not been *fully* argued at the bar.” The note published at the end of his Opinion in the newspapers, goes somewhat further. It is there said that it “proceeded on grounds which had been *little or not at all* examined in the argument of the cause;” that it “mainly proceeded upon a view which had *not been taken at the bar;*” and that the title to more than “a million, perhaps millions of acres of land, was supposed to depend upon the decision.” This estimate has proved to be rather fanciful. The quantity was large, but that amount had appeared to have been the work of some imagination since the docket of cases then pending had been shown. The greater, however, the magnitude of the causes yet to be heard, the greater was the impropriety on his part of prejudicating the public opinion against the parties through the newspapers.

He now states in his Answer, that the second of the two chief grounds on which he adjudged Mr. Lawless to be in contempt, was,

“2. Because before and at the time of the said publication (*by Mr. L.*) there were *other claims* for lands *still pending and undecided*, in which the said Luke E. Lawless and others were of *counsel* for the *petitioners*, which other claims were of the same character and rested for their decision on the same general principles on which the case of Antoine Souldard’s representatives had been decided by the court; and the immediate *tendency* and object of the publication were to

prejudice the public mind with regard to these claims," &c. So that it was highly proper and not at all calculated "to interrupt and disturb the *due and regular* administration of justice" for the Judge himself to enter the field with new views and arguments, on which no parties had been heard at all, and thus infect the public mind *against the suitors* in his court; but it was highly contemptuous in any one else to comment upon his views, lest it should "beget in the public mind such an undue sympathy and prejudice *in favor* of these claimants and their claims, as to unfit that public for the performance of the office of jurors in the trial of issues in fact." The apology which is put forth in the Answer for this inconsistency (and it certainly required some explanation) is, that "it would be a *new thing* to apply this principle to a *judicial decision*"—and so indeed it would be, of reports of cases made in a proper and regular way. It would be a new thing also to extend the law of contempts to any review, commentary or criticism of such reports, whether the personal qualities of the judges and their opinions were treated contemptuously or not. From the moment that the Respondent took the public newspapers for the vindication of his judgments, the display of his learning, the instruction of the public or as his own reporter through that channel to fame, he became a newspaper writer. His publications in that way are not in virtue of his office or in execution of it. He cannot wield his pen in one hand and his judicial authority in the other. After the Respondent had appealed this cause before the public, instead of leaving it where it had properly gone for legal revision, he had chosen his forum for himself. It was not only the right of any one interested in the claims, but it was the duty of counsel to protect their clients, and caution the public opinion against the influence of the Respondent's publication. It was not to be tolerated, that with the full knowledge that parties were yet to be heard in the orderly course of justice, any judge should select the newspapers for the trial of causes and turn round upon the doctrine of contempts to shelter his opinions or his judicial influence from examination or even from rudeness in the handling of them in that field. It was an invitation to all the world to meet him there. His apology, that this was done at the request of the bar, turns out to have been the suggestion of one of its members. Mr. Lawless knew nothing even of that. He found him in the newspapers, discussing the merits of his client's causes or his own on grounds that had never been argued, and took the same channel for communicating to the public in a brief article, framed in decorous and respectful language, the errors and assumptions of fact and doctrine on which he considered the Judge's argument to have rested. Mr. S. said that if the cause was to have been decided on new grounds, the duty of the Respondent was quite plain. Instead of going into the newspapers, he should have ordered a new argument. A candid judge would have taken that course. Before he decided the cause against the claimants on new points which even the counsel for the government had not made, he should have frankly made to the bar the suggestions which had occurred to his own mind. It was not a clear case. The cause was argued in the Supreme Court a year ago, and was not yet decided there. If the Respondent was to be judged here by his own rules, the example of interference with the due and regular administration of justice was his own too. That part of his answer in which, speaking of Mr. Lawless, he has said that "the effect to be produced from such a publication was manifest, and, both in law and morals, every man is presumed to intend the natural consequences of his own actions," was a striking rebuke of his own conduct, and the comments of his counsel on the dangers to which the impartial administration of justice had been exposed in these cases, had been the severest censures on their client. *Mutata nomine, de te fabula narratur.*

Mr. S. said that it had also been alleged in the Answer, that the publication of Mr. Lawless, was calculated to "*excite the resentment and hostility* of the numerous and influential body of land claimants in Missouri and their connexions, against the Judge, who alone composed the court;" and, again, "to inflame

the resentment of the very numerous and powerful body of land claimants in Missouri, together with that of their adherents and connexions; and thus to array against the Judge a power which might overawe and control him in the decision of the pending cases;” and, again, “to influence and restrain the court in the free and independent exercise of its judgment.” Mr. S. said that after all that had been set up on this point with so much gravity in the Answer, upon naked assertion only, it was now time to ask what proof the respondent had offered to the truth of the suggestions which had been thus thrown out? Where was it to be found? What witness had he called on? Of whom had he ventured to ask the question whether the slightest excitement had been produced either among the claimants or in any body else? His friends were here and the witnesses who have been called on either side, were gentlemen of the most extensive acquaintance and information among the people of that State. The counsel for the claimants too are among them. With this full opportunity to make good the suggestion that he was surrounded by “claimants so formidable in numbers, and some of them at least, it is to be feared, still more formidable by the absence of moral restraint and by their frontier habits of life,” and to show further (what would inevitably have been the effect of the publication of Mr. L. if it was assumed that society was thus constituted) that the hostility and resentment of the claimants was in fact excited to the last degree,—the Respondent had declined to ask a single question on these points, made so material to his defence in the Answer. There had been arguments and assertions only, in the place of evidence. That point was open to inquiry and could it be doubted that if these assertions could have been made good, he would have offered some proof to this Court to show his actual situation in these causes? It had been proposed, indeed, to ask a witness his opinion of the tendency of the publication, but that inquiry had been overruled. The inquiry had still been open, however, throughout the trial, to proof of the fact itself that any hostility or excitement had been produced or even existed there. To that point, the Respondent’s counsel had prudently avoided all inquiry, doubtless under the impression that it could be demonstrated more favourably for their client by argument than by proof. Mr. S. said, that this part of the answer too could be set down only to the same imaginative powers of recital, which had swelled the cases then pending to “unsettled claims for *millions of acres*.” It had turned out in evidence at last, that this formidable body of banditti, which had been arrayed on paper here, in all the terrors which fancy could paint, were the families of a few of the old French settlers and the “rude assaults” which the Respondent had so alarmingly expected to find in their “propensity to the *summary process* of self redress,” were to be apprehended from a few old women and children who were to be led on by the widow of Antoine Soulard and her daughter.

Mr. S. said that there had been another feature of the defence to this impeachment, in all its stages, which had doubtless attracted some notice. The history of these claims had been given in some of the papers offered by the Respondent, and especially in his letter to the House of Representatives, in a way that was calculated to draw to himself some merit for a decision in favour of the government. Else, why had they been so carefully arrayed and so prominently asserted to have been calculated to “startle the nation;” “to awaken suspicions;” and why the commentaries on the “skill” which the Respondent had to meet on the part of the claimants, the former liberality of Congress, the “class of characters” who held the claims and the forgeries which were to be apprehended? The case of Soulard and the commentary of Mr. Lawless had no relation to these topics. The genuineness of that concession had been found by the jury before the Respondent himself, and he was satisfied with the verdict. We should hope that the Respondent had not thought himself entitled to favor or merit for his decision in the Soulard case—that he neither considered himself a governmental officer nor believed that any judge could render a ser-

vice to his country, by a decision in favor of the government at the expense of the rights of the humblest citizen.

Mr. S. said, that although it had been said in the first instance that it was "not the *form*, but the substance" of the publication of Mr. L. which the Respondent had treated as a contempt, yet, in the Answer here, as well as in argument, it has been considered that the forms of expression in the introductory part of the article in question, abound with the most "*contemptuous misrepresentation*" and insult to the court.

The article first said, that the writer has "read with the attention which the subject deserves the Opinion of *Judge Peck* on the claim of the widow and heirs of Antoine Soulard published in the Republican of the 30th ultimo. I observe that although the Judge has thought proper to decide against the claim, he leaves the ground of his decree open for further discussion." This is gravely said in the answer to contain a contemptuous "*sneer*." The argument to prove it to be so was then made out by *italicizing* the words "*although the Judge has thought proper to decide against the claim*." But in the argument here, it has been shown with more apparent confidence by the enunciation of the words "*thought proper*" with the actual accompaniment of a suitable sneer for that purpose. The contempt seems not to have consisted, in the Judge's opinion, in the words themselves, but in the peculiar intonation of which the power of the human voice was susceptible in the speaking of them. Mr. S. said that he had heard that the meaning of words might be aided by *innuendo*, but the law had no terms to express this new improvement in the way of explanation. He had met with only one case in his scanty reading, which seemed to be at all analogous to it or which might have furnished the Respondent a precedent for determining this species of contempt. John Home once said to a friend, that after the judge had decided on the trial that there was no treason in the words of a certain song, he intended to have sung it to the jury, to give his Lordship an opportunity of deciding whether there was any in the tune.

The answer had further alleged it to be contemptuous and insulting, to have said that the Judge had erred in certain "*assumptions*" of fact and doctrine. This poor word had been so much persecuted in the Answer as to have been dressed out in *italics* at almost every page. It had been fairly pilloried there and been made to ring with emphasis here throughout the argument of the counsel, as if Mr. Lawless had maliciously selected it to express that an opinion of twenty octavo pages, which the public had before them to examine for themselves, was a mere string of dogmatical postulates. It was quite unfortunate for the Respondent, that the draftsman of his Answer should have attempted to fasten a contemptuous sense on this word. The Respondent himself had used it in reference to the argument of Mr. Lawless, in his Opinion in the Soulard case.

"It is *contended on behalf of the petitioners*, that the 81st article of the ordinance of the King of Spain became in force in Louisiana immediately on the ratification of the treaty of Fontainbleau, of the 3d of November 1762; or, at all events, on the occupation of Louisiana by Spain in 1769, under that treaty.

"The *assumption* that this article of the ordinance became in force in Louisiana, as contended for, either as it is attempted to be supported by the law of nations or by the proclamation of Count O'Reilly, Governor General, appears to be without foundation."

But this was not all. In his printed opinion, laid before this court, in the case of Choteau, he had used the same word in reference to his own arguments.

"It may be *assumed*, that the country which was present to the mind of the Spanish monarch in the formation of this ordinance, consisted of the dominions which were then ruled and governed by him; and that that country, such as it then was, is that in which alone those laws were to have authority; and that

Louisiana not then having been acquired, was consequently foreign to his mind, and would remain unaffected by those laws, until they should be extended there by his will. *This assumption* rests upon the terms of the ordinance; upon the policy which is recited in the previous part of it, in relation to the expediency that the laws which were to govern should come to the knowledge of all; upon a fundamental law of the kingdom, that the promulgation of the law should precede its obligation; upon the principle that the laws of a ceded country continue in force until changed by the new sovereign; and upon all the forcible considerations which establish this principle as an indispensable maxim in the code of nations: *an assumption* which is also in accordance with the opinion of O'Reilly, as evinced by his subsequent introduction of those laws by proclamation."

Mr. Storrs said that he really thought it to be a waste of time to follow these trifling criticisms. It was true that a mind distempered by jealousy and misled by false notions of judicial dignity or which placed a conceited value on its own powers, might quarrel with any harmless word. That this Opinion of the Respondent did contain a vast mass of facts which had not been proved in evidence, no one would deny. It may have been proper to state them, and perhaps it would not have been necessary to have proved them. They related chiefly to the history of the country and to the Spanish laws and ordinances. But they were controvertible by the parties;—and if any thing was *assumed* which they denied, it was not disrespectful to the Judge in any sense to say that he had erred in such an *assumption*. The verb was not more offensive than the noun, and if that had been used, the most carping spirit could hardly have felt disturbed. The one might not flow as smoothly as the other on the ear, but there was no sting in either to a candid or a gentle mind.

Mr. Storrs then proceeded to examine the first nine specifications contained in the Article, signed "*A Citizen*." The other specifications would be examined by his fellow manager (Mr. Buchanan), who was to close the case on the part of the House.

The question on this branch of the case was not whether the Respondent had decided the case of Soulard correctly, but whether he had virtually decided the points stated in the publication of Mr. Lawless. The merits of the claim were not in question here. Mr. S. said that throughout the Answer of the Respondent on this part of the case, as well as in the whole argument which had been offered here to sustain it, there had been one lurking error in the manner of treating the article written by Mr. Lawless, to which he would first call the attention of the court. It had been assumed (and he did not intend to use the word in any offensive sense) that this publication purported to be an abstract of the errors of the Respondent appearing on the face of the printed Opinion. It had then been argued that Mr. Lawless had imputed to the Judge in some of these specifications, opinions on some points of Soulard's case, on which the Opinion itself was entirely silent and had thus been guilty of gross misrepresentation. Thus, the 16th and 17th specifications were that the Judge had decided,

"16. That the *historical fact*, that *nineteen twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords *no inference* in favor of the general *legality* of those titles.

"17. That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, *treated* and considered by the *Government* and population of *Louisiana* as property, saleable, transferable, and the subject of inheritance and distribution *ab intestato*, furnishes *no inference* in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations."

These specifications had been charged to have been a coinage of the "mint of the writer's own imagination;" and the Opinion having been confidently ap-

pealed to in the argument, to show that the Judge had said nothing whatever on these points, it was then charged that Mr. Lawless had therefore grossly misrepresented the court. The fallacy of this ingenious mode of demonstration consisted in first assuming that the publication was designed or to be understood to be an analysis of those points in the Soulard case, which appeared on the face of the printed Opinion only. Such was neither the object of the article or its purport. The history of the Soulard case was well known in Missouri. Every claimant under the act of 1824 well understood the grounds on which that case had been argued and submitted to the Judge and on which the claims generally rested for confirmation. The counsel too in all the cases relied on the same points. The argument of Mr. Lawless had been printed and a copy of it was before the Judge. The article signed "*A Citizen*" was addressed to a community who were perfectly conversant with the whole case, with all the points of law and evidence which had been relied on before the court and who had the argument of Mr. Lawless and the printed Opinion of the Judge both before them. It was one of the points first taken and one of the most prominent arguments on the part of the claimants, that the historical facts stated in the 16th and 17th specifications were strong presumptive proof of the legal authority of the lieutenant governors of Upper Louisiana to make such concessions. The argument of Mr. Lawless enumerates these cases as a part of the known history of the colony, and insisted on the strength of the inference thus fairly to be drawn from these facts; and he showed that the governors general of the province had confirmed such concessions. The Court was bound to notice these historical facts, although the answer of the Respondent seemed to have treated them as facts requiring parol or other proof. In deciding the case and in the printed Opinion, the Respondent took no notice whatever of these facts, allowed no weight to the inference which the counsel had drawn from them and passed over that prominent point in the case altogether. Mr. Lawless accordingly said, that he had erred in assuming that these historical facts "*afforded no inference in favor of the general legality of those titles.*" This specification of error was addressed to those who had the whole argument as well as the Opinion before them. No man misunderstood or misinterpreted it. It was, besides, strictly true to the very letter. To pass over in total silence such a prominent argument in favor of the authority of the lieutenant governors, was to *assume* without argument, that not only no such inference could be drawn, but that it was totally unworthy of any refutation. But now, the Respondent's counsel, after laying entirely out of view the notorious fact that this whole matter was before every man who knew any thing of the Soulard case and then assuming that the article written by Mr. Lawless was an abstract of points specifically settled *on the face of the opinion* only, had proceeded to convict Mr. Lawless of misrepresentation in that way, by showing that the Respondent had passed that point of the case over in silence. Accordingly, the Answer had said that there was "*no such assumptions there, nor one word in the Opinion to countenance either imputation.*" It was in the very truth of this assertion, that the error of the Respondent consisted. If he had proceeded to repel the inference from these historical facts by argument, it could hardly have been charged that he had assumed it to be unworthy of notice. Mr. Storrs said that as the publication had been thus addressed to a community perfectly conversant with all the facts and points in the Soulard case, it had also been very naturally said in the introduction of the article itself, that the writer should not "*enter into any developed reasoning*" on the subject, and that "*as regards most of the points,*" it was not "*absolutely necessary.*" It was in that light that the publication was to be considered. It would tend to place the Respondent himself in a ridiculous light, to suppose that before an audience in Missouri, who had all these papers in their hands, he had gravely undertaken to treat this publication of Mr. Lawless as an abstract of his printed Opinion. No one there could have mistaken these specifications and it would be imputing to the Respondent the grossest ignorance

of the case argued before him, to say that he could possibly have misunderstood it himself. The publication, therefore, was to be treated here, as in fact it was, as an epitome of the points ruled and overruled in that case.

Mr. Storrs said that it appeared to him that the Answer was extremely uncandid in its comments on the specifications which he had thus incidentally noticed. It was now said that these historical facts, and the facts stated in the 17th specification, were not in proof. If this had been the real ground on which the Respondent had disregarded that point in the argument when he decided the cause, we should have expected that he would have said so at the time. But nothing even of that sort, was to be found in the Opinion. But was it true that these facts were not in proof? The complete titles by the governor general, enumerated in Mr. Lawless' argument, are there stated to be "ready to be produced for the inspection of the Court." Those issued by the intendant general, Morales, were also "ready to be produced to the Court." From the argument itself, which gives their dates and many particulars of them with extracts, no one can doubt that when the cause came on, the copies were in court and no objection appears to have been ever made on the other side to the insufficiency of the proof. As to the transfer of incomplete titles *inter vivos*, and their distribution and sale as property of testators and intestates, the argument states ;

"In support of these propositions, we refer to the records in the office of the clerk of the Circuit Court for the county of St. Louis ;" and it enumerated seven records, to which the judge was specifically referred. The usage and practice of the colony had been relied on to show the legality of the authority of the officers issuing these concessions. This was a question of history purely, on which the courts would judicially take notice of the records of the colony as historical evidence of the practice of the colonial government, without the formal, technical proof of the original papers on file in the public offices. This is the very reason why these historical facts do not appear in the record of the proceedings in Soulard's case. It might as well have been said that Stoddard's history of Louisiana, which was also referred to, had not been inserted in the record. The act of 1824 had required the judge to state in his decree the laws or ordinances from which the claim was "*alleged to be derived.*" The usages and practices of the colonial government were relied on, as cotemporaneous expositions or proofs of the *law*, and the Respondent himself clearly considered this part of the case in that light. In his decree, he explicitly negatived, as a point of law, the position of Mr. Lawless that these historical proofs afforded any inference in favor of the *legality* of the titles.

After premising his views of the Spanish regulations themselves, the decree went on to say, that the "principles, commands and prohibitions in those regulations contained, are not to be reconciled with any idea of the *legality* of the said concession, and are incompatible with the existence of any *law, usage or custom*, in conformity with which the said concession might have been confirmed, had no change of sovereignty taken place." The decision of the case of Soulard was postponed at the last term of the Supreme Court (4 Peters' Rep. 512.) that the court might obtain further information, consisting of documentary evidence of the laws or ordinances regulating the land system of Spain in Louisiana. The Chief Justice, in that case, stated as a matter of history, the practice of the deputy governors and other officers in that colony. Mr. Storrs repeated that it was the duty of the Respondent as a judge to have examined the records to which he had been thus referred, even if copies of them had not been in court or furnished on the argument. If he had done his duty in that respect, (and it was not even certain that he had not) he has then admitted himself that the position taken by Mr. Lawless was correct. In his letter to the House of Representatives, he says: "Had those facts been *in proof*, they would have afforded an inference in favor of the claim, and the presumption arising from them would have been fairly weighed with the other evidence in the cause." The apology for not treating these facts as *in proof*, had also been thus given:

“The fact, if *historically* true, was not a fact about which a *written history* would have been received in evidence, because it was too recent and because the *archives of the province* were at hand to make good the fact, if true, and afforded the best, and therefore the only evidence of which a court could *judicially* take notice.” This was the very reason why the apology now set up was groundless. It was these *archives of the province* which the Respondent was bound to take notice of *judicially*, that is, without technical proof. No written book of history was offered on this point. The archives themselves were the history of the province. The more recent, the clearer would the practice have appeared. The authority of the lieutenant governor was not asserted as a matter of prescriptive right, but the practice was alleged as a cotemporaneous and uniform exposition and adoption of that interpretation of his powers by his superiors. Mr. S. said that it was evident that the apology now set up for disregarding all that portion of the argument of Mr. Lawless, was an after-thought. He would not enter upon any further argument as to these two specifications. His fellow manager would notice them more particularly. He had only referred to them at all, to show that Mr. Lawless’ publication was to be treated here as a publication addressed to a community, who had the original argument and the printed Opinion before them, and who were well acquainted with the whole case. With this explanation, he should proceed to the specifications which he had proposed to examine.

Mr. Lawless had imputed error to the Respondent in assuming or taking the two positions,

“1. That by the ordinance of 1754, a sub-delegate was *prohibited* from making a grant, in consideration of *services* rendered or to be rendered.

“2. That a *sub-delegate in Louisiana*, was not a sub-delegate *as contemplated by the above ordinance.*”

The first objection taken to the *second* of these specifications was thus given in the respondent’s answer:

“To the readers of this article, *who had never seen the Opinion* of the Judge, (which was the case with a great mass of its readers) this charge must have exhibited the Judge in the light of having *assumed* the ridiculous solecism ‘that a sub-delegate was not a sub-delegate,’ since to *such a reader* the additional words ‘as contemplated by that ordinance,’ could have presented *no intelligible qualification* of the absurdity.”

Mr. Storrs said, that he thought it would be difficult to find a man who could read at all, who would confess that he understood this specification to say that the Judge had decided that a *sub-delegate was no sub-delegate*. A reader of this specification who had any intelligence at all, would be quite apt to find some *intelligible qualification* of such a proposition in this sentence. The reading of the Opinion of the Judge, he thought would not be necessary to qualify any man of plain common sense to understand that this specification imputed no such absurdity to the respondent. If such a reader was desirous to know the *reasons* why the respondent had considered that sub-delegates *in Louisiana* were not the sub-delegates referred to in an ordinance of the king of Spain of the year 1754, he might wish to read the Opinion; or, if he desired a more certain criterion to determine whether he had decided that point, it might be found in the Respondent’s Answer before this court, where it is said;

“Upon this whole head of argument, therefore, the conclusions of the court were,

“1. That the royal ordinance of 1754 was not *in force* in *Louisiana*.

“2. That if it was, the lieutenant governor of Upper Louisiana had not the powers of a sub-delegate *under that ordinance*, because he had not been appointed *in conformity with its provisions.*”

Mr. Lawless had claimed in the argument that the sub-delegate power of the lieutenant governors in Upper Louisiana was the sub-delegate function contemplated by the ordinance of 1754. The Judge considered, however, that the

sub-delegate function, annexed to the office of lieutenant governor as such, was not the sub-delegate function within the meaning of the ordinance—that the sub-delegates who could make concessions of land under it, were those only who had been specially appointed by the viceroys and presidents of the audiencias, and that the lieutenant governor did not hold his commission from them. That the lieutenant governors of Upper Louisiana, however, exercised powers as sub-delegates in one sense, was an admitted fact. The evidence had shown it, and the Respondent had accordingly said in his Opinion.—“The evidence of the late lieutenant governor of Upper Louisiana to this point, is, that he and his predecessors acted as sub-delegate, without any commission *as such*; that he and they performed the functions of that office in virtue of their commission as lieutenant governor, which *issued from the governor general* of Louisiana; that the practice in other parts of the province, in this respect, was the same as in Upper Louisiana; in all, the lieutenant governors were, *ex officio*, sub-delegates.” The Judge did not consider, therefore, that they held their *appointments* as sub-delegates *under the ordinance*, having been appointed in another way; and for that reason, as well as because the ordinance itself was not, in his opinion, in force at all in *Louisiana*, that the *sub-delegates in Louisiana* were not *sub-delegates within the meaning of that ordinance*, or, to use the very words of the Opinion itself, that they were not sub-delegates “within the *intention* of the ordinance.”

The complaint made against the first specification was stated in the Answer to be, that the court was charged with having “assumed that the ordinance of 1754 contained a *positive prohibition*” against making grants for *services*. It neither imputed that decision to the Judge, nor would the charge bear that construction. The respondent's Opinion had maintained that grants could only be made *in any case*, except for certain considerations, which the ordinance enumerated and that this enumeration excluded the case of *services* altogether. Instead of using the expression that the Judge had decided that a grant for services was *not authorized* by the ordinance and so forbidden, because it prescribed the only cases in which grants could be issued at all, the writer had expressed it in the form of the conclusion which followed from the view taken by the Judge of the effect of that ordinance. It was not possible that any claimant could have been misled by this specification. They had the argument of their counsel before them, and the Answer itself asserts that it was “strongly pressed in the argument of “Soulard's case,” and had been “as strongly admitted,” that there was “*no such positive prohibition*.” The complaint against this specification consisted, therefore, of placing a false sense here upon that word, which was never imputed to it any where else and which no man had probably ever thought of until the Answer was filed in this case.

“3. That O'Reilly's regulations, made in *February*, 1770, can be *considered as demonstrative* of the *extent* of the granting power of either the governor general or the sub-delegates, under the royal order of *August*, 1770.”

The Answer states, on this point, that the court did not *refer* to the prior regulations of O'Reilly, as being “*in themselves demonstrative*” of the *granting power* under the subsequent royal order of 1770. Nor does this specification by Mr. Lawless assert that the court had so decided. There was nothing very absurd in the Opinion of the Respondent, in considering that all the regulations of the governors general under the authority of the crown and the royal orders of the Crown itself were parts of one uniform system of policy in the granting of the public lands. That the Respondent considered the regulations of O'Reilly of February, 1770, to have been afterwards sanctioned by the Crown, is clear from the Opinion itself; and it was quite obvious, therefore, that in explaining the meaning of the royal order of August following or in searching for its terms, (for it was not before the court,) the Respondent had very properly referred to the antecedent regulations of the same year, from which he might fairly infer the *extent* of the granting power which the subsequent order, not

then before him, may have been designed to sanction. The regulations and orders were all *in pari materia*. It appears from this case in Peters' Reports, that the Supreme Court have but recently obtained a copy of the order of August, 1770. Mr. Lawless had said in this specification, that the Respondent did consider that these regulations of O'Reilly afforded some evidence and some just inferences as to the probable terms of the order which shortly followed them; or, in other words, that they might be fairly resorted to, for inferring the extent of the granting power which the royal order had probably afterwards sanctioned or affirmed. The question was as to the authority of O'Reilly to make the regulations and they involved the extent of the power of the governors general in the granting of lands. The respondent said accordingly in his Opinion;

"That the regulations of O'Reilly are of a date anterior to the order of 1770, does not appear to affect their authority. There would not, necessarily, be such a repugnancy between this order and those regulations, as to annul the latter. The subsequent sanction of these, and the presumption of their being authorized, thence arising, must be considered sufficient to give them the authority of law, whether the power to make them was comprised in the general and extraordinary powers given to the governor general, O'Reilly, previous to the order of 1770 or not." Mr. Lawless may have considered that the reasons which he had urged to the court had been sufficient to repel the inference to be drawn from O'Reilly's regulations as to the terms of the subsequent orders. That question, however, was immaterial here. It was enough that the reasoning of the court on the other side had not been misrepresented. It is now stated in the answer, that the Judge was correct.

"The respondent will here observe that since the decision in Soulard's case, a copy of the royal order of the 24th of August, 1770, has been procured, and it is found that the inference drawn by the court from existing appearances was correct; the order being nothing more nor less than a mere, simple ratification by the King, of the antecedent regulations of O'Reilly, of which a copy had been forwarded to Madrid for the royal consideration." If this were true, and he did not doubt it, Mr. S. said that it was to have been regretted that the Respondent had not contented himself with this supposed triumph in argument over Mr. Lawless as to the inferences which he had drawn from O'Reilly's regulations of the probable character of the order which followed them so soon. It now turns out that it was, in the Respondent's opinion, a very sound deduction.

"4. That the Royal Order of 1770 (as recited or referred to in the preamble to the regulations of Morales, of July, 1799) related exclusively to the governor general."

The answer of the respondent affirms that this is "another wanton and wilful perversion of the reasoning and conclusion of the court. The court never pretended to indicate the whole extent of the royal order of August, 1770;" nor had Mr. Lawless asserted that the court had done so. The question before the court and understood by every one who knew any thing of the case, or who had read the argument or the Respondent's Opinion was, whether the power of granting lands, contained in this royal order, was vested in the governor general only—or, in other words, the civil and military governor of the colony. The Respondent had expressly said in his Opinion;

"We have the testimony of Morales, the intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military government—after the order of the 24th August, 1770, the powers of the civil and military government both centered in the governor general. To him belonged the power to divide and grant lands, in virtue of this order."

The question in the cause was whether the concession issued by the lieutenant governor was sanctioned by the order of 1770; and when the terms of the royal order were spoken of by all the parties, it was in reference only to the power which it conferred of granting the public lands. Speaking of this and

nothing else and on a point which the Respondent himself could not misinterpret, Mr. Lawless had here said that the court considered the order to relate exclusively to the power of the governor general only. It was this "one feature" only of the order that was the subject of the argument, and the Respondent himself so treated it in his Opinion. The "whole extent" of the order was not the subject of the argument, the Opinion or these specifications. That part of it which was in controversy in the Soulard case, related to the *granting of lands* only, and whenever it was spoken of, it was understood by every body to be referred to on that point only.

"5. That the word '*mercedes*,' in the ordinance of 1754, which, in the Spanish language, means '*gifts*,' can be narrowed by any thing in that ordinance or in any other law, to the idea of a grant to an Indian or a reward to an informer and much less to a mere sale for money."

The Respondent's answer had asserted again, in a style of language somewhat unusual for the grave and calm temper which should distinguish a judicial defence, that this specification also was "the pure coinage of the author's own brain."

"For in the first place, it is not true, that the judge either *assumed* or *admitted* that the word *mercedes*, in the Spanish language, means only *gifts*; on the contrary, the judge held that it was capable of being translated *grants*, and had, in fact, been so rendered by the translator to the government."

"Thus, the *leading proposition*, with which *this charge* sets out, *to wit*: that *mercedes* means *gifts*, and was so *assumed* or *admitted* by the *judge*, on the truth of which proposition the whole sarcasm depends, is false in fact."

And so indeed, said Mr. Storrs, is such a proposition false. He could have wished that the Answer had manifested more candour in the exposition of this specification. The charge contained no such imputation as the Answer had asserted. The fallacy of this construction of it consisted in still persisting that the publication of Mr. Lawless purported to have been made up of *extracts* from the printed Opinion; instead of being a mere enumeration of such errors as, in the opinion of Mr. Lawless, it was believed to involve and a publication addressed to a community which was familiar with the whole case. Mr. S. said that the Respondent must have been so well acquainted with the case itself, that it was hardly possible to attribute such a mis-interpretation of this specification to an honest misconception of its true and fair import.

Mr. Lawless insisted in his argument, that the word "*mercedes*," in the royal ordinance of 1754, meant *gifts*, and that it was therefore sufficiently comprehensive to infer an authority to concede lands beyond the cases afterwards more specifically stated in it. The court was of a different opinion and decided that its true interpretation was *grants*, and that the grants contemplated by the ordinance were those only which it afterwards specified, *viz.* on sales and compositions for revenue—to the inhabitants for pasturage and commons—to the Indians for tillage, &c., and rewards to informers. The argument and Opinion were in every man's hands, and Mr. Lawless, addressing himself to those who knew precisely his own argument on the one side and the Opinion of the Judge against it, made this specification of error. The respondent now takes into his own mouth the words,—"*which in the Spanish language means gifts*"—which are the words of Mr. Lawless in reference to his own argument; and after thus placing himself in a ridiculous light before the public, gravely charges the sarcasm which he would thus impute to this specification, on Mr. Lawless. These words are the assertion of the writer and the repetition of the definition of the word which had been asserted by Mr. Lawless himself and here repeated. But the Answer still persisting in the erroneous assumption that the article was an abstract of language taken from the Opinion only, had contrived in that way, a ridiculous exposition of the charge and then imputed it to the writer of the article.

"6. That O'Reilly's regulations were, *in their terms*, applicable, or were, *in fact*, applied to, or published in, Upper Louisiana."

It is said in the Answer, that this is not true "*in the sense* in which the writer manifestly intended it to be understood by his readers." The specification does not charge that the court had decided that the regulations were "*in terms*" applicable to Upper Louisiana, that is, *in express words*, but in *their terms*, i. e. *their provisions*. The Answer therefore had correctly stated that the court "never did assume or contend that these regulations were, by *their terms*, extended *specifically* to Upper Louisiana," nor is this asserted in this specification. It is, that the *provisions* contained in the regulations were *applicable* to Upper Louisiana. That was the true sense of the charge, and no other,—not that they had been specifically *applied*, but were not "*applicable in their terms*" or provisions, to that part of the province; and it was in this sense only that it could be understood by any reader.

The Judge had undoubtedly decided that these regulations (of O'Reilly) were applicable to Upper Louisiana, and that they were in fact applied to and actually published there. The answer re-affirms it when it says;

"The court did say that O'Reilly himself had declared these regulations to be published for the government of the grants of land in the *province of Louisiana*; that is to say, in the whole province, because he himself had made no exception of any part of it. And the court did further say, that the policy of the regulations applied as well to one part of the province as another." The only complaint set up in the answer to this specification was, that it imported that he had decided that the regulation had, *in express terms*, of itself *specifically* been applied *by name* to Upper Louisiana,—a sense which it was clear the charge would not bear without perverting the words.

"7. That the regulations of O'Reilly have *any bearing* on the grant to Antoine Soulard, or that *such a grant* was contemplated by them."

The whole complaint on this point in the Answer was comprised in two brief sentences:

"This is another misrepresentation, of the same character with the last, intended to mislead the reader to the prejudice of the court. The Judge never did assume that the regulations of O'Reilly had any bearing on the *specific grant* to Antoine Soulard; and so far from saying that such a grant *was contemplated* by them, the court decided the exact reverse, to wit: that *no such grant* ever was *contemplated* by them." The same perversion of the sense of this specification was made as in the last. The charge did not import that the Judge had ever said that these regulations *specifically* bore on the Soulard claim, i. e. *by name*, if such is the meaning of this complaint. No reader could have so understood it; for the regulations of O'Reilly were made in 1770, and the concession to Soulard was not issued until 1796. When it is said that the Respondent erred in considering that these regulations had *any bearing on the grant*, it is to be understood that he erred in treating them as affecting its validity in any way or to be resorted to at all for determining whether the issuing of this concession had been authorized by law; it having been also contended by the claimants, that the regulations of O'Reilly had reference to a different sort of grants and that they were never intended to serve as rules in cases like Soulard's, or, in other words, that no *such grant*, i. e. of that kind of concessions was contemplated by them. Again, Mr. Lawless had contended that the regulations of O'Reilly as to the granting of lands, did not extend at all to Upper Louisiana and that this concession to Soulard was therefore out of the purview of them. The Judge decided, however, that they did extend to Upper Louisiana, and that, therefore, *all grants there* were within the regulations, i. e. within the *contemplation* of them; or, in other words, that *all grants in Upper Louisiana* were to be regulated by them. This was the true meaning of the specification and it bore no other. Every grant to be made in Upper Louisiana was, therefore, within the purview of them, in his opinion. "From what has been

said," continues the Answer, "it appears that the regulations of *O'Reilly*, of *Gayoso* and of *Morales*, are the *only laws* which regulated the distribution of lands in Louisiana under the Spanish government. Was the concession *in this case* authorized by *those laws*? It is not pretended that it was, and that it was not, is unquestionable. But it is insisted for the petitioners that the regulations of *O'Reilly* did not extend to *Upper Louisiana*."

Again, "The regulations of *O'Reilly* were made for the entire province; they were made, as we are informed in the preamble to them, in consequence of petitions from the inhabitants and of the information derived by the governor in his visit through the country," &c.

Again, "It would appear that the policy apparent in *O'Reilly's* regulations did extend itself to the province of *Upper Louisiana*."

The Judge decided that these regulations did not *authorize* such a grant as that to *Soulard*; and that was the only sense in which his Answer in this point was true, when it says that he decided that "no such grant ever was *contemplated* by them." That they contemplated *all grants* in *Upper Louisiana* was the very point which he ruled and he must have settled, therefore, that *Soulard's* was within the purview of them. This was accordingly so stated by Mr. Lawless in this publication.

"8. That the limitation to a square league of grants to new settlers in *Opelousas*, *Attakapas* and *Natchitoches* (in 3th article of *O'Reilly's* regulations) prohibits a larger grant in *Upper Louisiana*."

The answer had put its usual embellishments of the imagination on this specification also and had accordingly interpreted this charge to be an "*isolated* assumption, on the part of the Judge, that the *mere* limitation to a league square, in *Opelousas*, *Attakapas* and *Natchitoches*, did, *per se*, prohibit a larger grant in *Upper Louisiana*." A very brief examination of his Opinion would show that this was a very free paraphrase of this specification. In reply to the position that *O'Reilly's* regulations did not extend to *Upper Louisiana*, where *Soulard's* grant was made, the Respondent had fortified the argument which he drew from the regulations themselves by further considerations drawn from his views of the *policy* of the system adopted by *O'Reilly*; and in illustration of his argument, had also referred to that part of the 3th section of the regulations which had prescribed that "no grant in the *Opelousas*, *Attakapas* and *Natchitoches* shall exceed one league in front by one league in depth." The claimants would naturally insist that if these regulations applied to *Upper Louisiana* at all, the quantity of land conceded should not be limited *there*, by reason of the introduction into the regulations of a limitation of this power as to lands situated in *another part of the province*. But the Respondent considered that the regulations would bear a different interpretation and said in his opinion;

"Upon *what reason* is it to be believed that the governor general intended to authorize grants of land in *Upper Louisiana* upon principles different from those upon which grants were to be made in every other part of the province? Upon *what reason* were grants of land to be limited in quantity in *Natchitoches*, *Attakapas* and *Opelousas*, and unlimited in *Upper Louisiana*?"

Now, said Mr. S., all these might have been very pertinent questions to have been put to the Governor General himself, who had *thought proper* (he did not mean to speak *contemptuously* of him) to confine that limitation to those three places only. But it appeared to Mr. Lawless somewhat singular that a limitation of the granting power expressly confined to these places only, should have been construed to import a prohibition as to another part of the province; and that too the more especially, as these regulations, which, except on that point, were general in the opinion of the Judge and applied to the whole colony, contained no similar prohibition as to lands situated any where else. As Mr. Lawless had failed to discover the strength of that sort of reasoning, he enumerated it as an error of judgment on the part of the Respondent.

"9. That the regulations of the governor general, *Gayoso*, dated 9th

September, 1797, entitled "Instructions to be observed for the admission on new settlers," prohibit, *in future*, a grant for services, or have the effect of annulling that to Antoine Soulard which was made in 1796, and not located or surveyed until February, 1804."

Mr. Storrs said that one of the chief complaints which had been made against this specification, in the Answer, consisted in a miserable perversion of the words "have the effect of annulling." He would read that part of the answer.

"The Judge is represented as assuming that the regulations of Gayoso in 1797, annulled the *prior* grant to Soulard, which was made in 1796. But he made no such assumption. He assigned no *retroactive effect* to those regulations. The character he assigned to them was purely *prospective*. This honorable Court will be pleased to observe, that the King of Spain by one of the laws in the *Recopilacion* (Law 11, page 969, Land Laws,) had required all persons to whom lands had been distributed, to take possession within three months, on pain of forfeiture. Gayoso and Morales, pursuing the example of their sovereign, made similar regulations in Louisiana. The 14th of Gayoso required all to whom lands had been granted, to take possession within one year, and to make a specified progress in cultivation in three years, on pain of forfeiture. The 4th of Morales is of the same character. Soulard had disobeyed them both. The conclusion of the court, therefore, was, that his title had been forfeited by this act of disobedience subsequent to the law. The court assigned no retrospection whatever to these regulations; but considered them as purely prospective. Whereas the assumption imputed to the court is, that these regulations struck backwards at the grant, and annulled it in its origin, although, according to the implication, it proceeded originally from a competent authority."

And what had Mr. Lawless said in the article signed "A Citizen?" That the Judge decided that these regulations of Gayoso had the "effect of annulling" Soulard's grant. It was hardly worth the time wasted to enter upon any argument to show that this was literally true. The grants were forfeited, says the Answer, by the effect of Gayoso's regulations—and the consequent right of resumption of the lands by the crown has not the same effect as if the original grant was annulled! What right was left to the party? What force remained in the grant? The annulment of the right under it and the destruction of the force of the grant, could be nothing less in their effect than the annulment of the grant itself. Mr. Lawless had said that the Judge claimed that such was the effect of those regulations. In this sense and it was a very proper sense of the terms, the regulations were prospective and retroactive both;—prospective as to the requirements of the law—and retroactive as to the effect of a non-compliance with them. To use the expressive language of Gayoso himself, as cited by the Respondent, the lands were "remitted to the domain." In strictness, it amounted to a revocation of the grant; and if to abrogate the right conferred by it is not to produce the same effect as to annul the grant itself, then, and not otherwise, has the Opinion been misrepresented on that point.

It had been further said that the Judge had been misrepresented in the statement, that he had been of opinion that the regulations had forbidden a grant for services, *in future*, i. e. prospectively to their enactment. The Answer had asserted that it was a necessary implication from this, that the Judge had admitted that grants for services were allowable, before these regulations were made. The charge neither implied that, nor had the Judge admitted it.

Mr. Lawless had insisted that such a concession as that to Soulard, i. e. for services, was authorized before Gayoso's regulations. The Judge had not denied that position, but also had gone into an examination to show that if it were so, they would not authorize the issuing of such a concession after they were made. It was hardly necessary to read any part of the Opinion, to show that such was his argument. This was what this specification imputed and it was not possible for any who had read the Opinion to misinterpret the specification successfully.

Mr. Storrs said that his fellow-manager (Mr. Buchanan) would dispose of the remaining specifications.

Mr. Lawless himself had set the whole of this part of the case in so clear a light on his cross-examination and had so triumphantly vindicated his publication from the charge of misrepresentation, that it would scarcely have been necessary to have gone over that ground again. It was bare justice to him to say that he had shown himself to be a complete master of the whole subject, and he thought that after the Respondent's counsel ventured, with so much apparent confidence, upon that test of his skill and candour, they seemed to have retired at last from that task of their own ingenuity with some appearance of disappointment. And he thought that he might safely appeal to the Court for the justice of the remark, when he said that throughout the whole examination of Mr. Lawless, he had made the most favorable impression on all who heard him, of his candour and frankness as a witness and his accomplishments as a gentleman. If that were the place for the expression of a private feeling, he might say that any man might consider himself honoured by his friendship. Though he was of ardent temperament, yet the generous warmth of his heart was but the native sincerity of his countrymen. His sensibilities were keen, but he had felt before that the iron hand of power had been laid heavily upon him. He had heard and read of our free institutions and been instructed that the law had here spread its broad and ample mantle over the liberties of every citizen. He came among us, a stranger and an exile—a man who had been deeply wounded in every noble feeling and in every tender relation of life which had endeared his native country to his heart. He would have been unworthy of his adopted country and a recreant to her institutions, if he could have tamely submitted to the usurpations of the Respondent. He had proved himself to be worthy of his American privileges, by his respectful submission to the judicial power while he suffered under the forms of law and his perseverance in bringing the Respondent to answer to his country for the violation of his personal liberty. He was aware that he must expect to meet and hear much that would be designed to wound his feelings as a man and a gentleman. The same spirit which had so freely poured out upon its victim the bitterness of its resentment even in the sanctuary of justice, was not yet appeased. He had borne himself through the argument with that calmness and self-possession with which a man might sometimes well bear injustice, but when he found that the Respondent's counsel had been instructed by their client to say that he was yet to learn that the "burning of houses and dragging of judges from the bench was not the fashion of this country," he was evidently moved with suppressed feeling, for he had not been prepared to hear his native country openly reproached of her misfortunes before an American Senate. It was, surely, not a crime that he had been born an Irishman. We cannot have forgotten so soon that in the day of our own adversity, it was in Burke and Barré that we found our most fearless and generous friends in Parliament. The blood of his countrymen was mingled with our fathers in the same fields. It was the native land of one whose death had consecrated our liberties and of another whose undying fame we had made our own. It was the birth-place of Montgomery and Emmett. If the people of Ireland have been goaded to desperation by a long course of mal-administration or cold neglect of their wrongs, we could surely forbear to reproach, if we could not forgive, the misguided resentment of a gallant and generous nation, who have suffered until oppression was no longer supportable by men, in all the sensibilities and sympathies of those endearing relations of life, which bind the human family together as fathers and brethren and friends. Honored and sacred be the cause of the oppressed everywhere.

Mr. Storrs then proceeded to examine the occurrences which took place before the District Court of Missouri on the rules against Mr. Lawless, and said that he considered the whole proceeding on the part of the Respondent to have been a wanton and unjustifiable abuse of his judicial authority;

That the general temper and feeling which he manifested was highly unbecoming his station;

That his language and manner decisively indicated that he was acting under the influence of personal resentment;

That the Respondent himself had shown in evidence that the personal relations between him and Mr. Lawless had not been of a friendly character for some period of time before, and that he appeared to have taken that opportunity to gratify a long-cherished resentment. If the publication had been such a flagrant contempt as it had been represented here and so dangerously calculated as he asserted, to provoke personal violence to the court, he had dealt quite tenderly with the printer who had scattered this firebrand through the State. But the press itself required not even an admonition from the bench, though in the cases on which the Respondent had relied for his examples, the Chancellors of England had punished the printers too for a much less dangerous offence. But in the present case, which the Respondent had represented to have been of the most criminal and atrocious character and his escape from actual violence almost a miracle, the printer was passed harmlessly through the ordeal. It was only when the name of Mr. Lawless was brought before him judicially, that the offence demanded the severest retributions of the law. Mr. S. said that the apology which had been set up, that the Respondent was in danger of personal violence, had been so completely disproved that it was useless to review the evidence on that point.

He said that the conduct of Mr. Lawless, throughout the proceedings, was respectful and praiseworthy;

That nothing fell from his counsel that could have been offensive to a patient or an upright judge; that they had borne even more than it was their duty to have submitted to. On the one side, all was passion, impatience and petulance—on the other, the most respectful deference to the judicial authority. The Respondent was the only person whose indecorous and intemperate excitement attracted universal notice. It was quite natural that a community of freemen should have felt some indignation on witnessing this mockery of justice. Yet not a word—not a murmur was heard. The Respondent went out and came back through the crowd, from day to day and from one hour to the next, as safely as he walked his chamber. He was admonished by the arguments of intelligent and able counsel, one of whom was his personal friend, that he was advancing on tender ground. He was delicately cautioned by another personal friend in terms that could not be misunderstood; but he told him (and it was before he moved at all) that his "*course was fixed.*" He was a volunteer—it was all his own work. Should he not have paused—reflected—examined? and was there any part of his conduct which showed that he was proceeding as a calm inquirer after truth? What case or book was examined? What opinion—and of what judge, did he consult? The right to personal liberty—to freedom of public inquiry—of the press and the trial by jury,—in a word, all that was dear to the American People and which had been dearly purchased, was at hazard. Was all this not worth the reflection of a day or an hour? Were the counsel even heard? It was mockery and insult. They might as well have invoked the deaf adder or the dead. The argument itself was forbidden on some points, as if his retribution on the victim of his resentment might be delayed too long. And when and where else was it denied to the least offender in a case involving his personal liberty, that he should be heard? The judgment followed immediately without reflection, as soon as the irksome forms which had delayed it had been disposed of with scarcely the semblance of decency; and then followed that intemperate and disreputable exhibition which the witnesses themselves could not adequately describe. It had degenerated to personal insult, when Mr. Lawless could bear it no longer and left the court with the approbation of his counsel. The sentence itself was proof that his judicial power had been abused. No one could read the publication by Mr. Lawless and not say that

if it had even misinterpreted the Opinion on which it commented, a public admonition only would have amply vindicated the offended dignity of the court. The suspension of his license was a severe punishment of itself. But it was not enough that his professional character should have been brought into some disrepute and his livelihood taken away. He must also be made to feel the Respondent's personal power and submit to the further degradation of an imprisonment. Mr. S. said that there was another part of the case which even his counsel had not explained. Several months after the suspension of Mr. Lawless had expired, and when he first appeared in court again in a distant part of the State, the Respondent called out from the bench to the clerk of the court to know if Mr. Lawless' suspension from practice had expired;—as if in ignorance of the terms of his own court in the previous year at St. Louis! Yet with all these accumulated proofs of passion and violence, it had been said that the Respondent was a man of placid temperament and mild and gentle manner. If that were so indeed, it greatly strengthened the unfavorable inference that in these proceedings, he had been actuated by personal resentment or some unhallowed motive.

Mr. Storrs said, in conclusion, that such was the case on the part of the House of Representatives, on which they had demanded in the name of the American people, the judgment of this high Court on the judicial conduct of the Respondent. If the Court was convinced upon the evidence, that the usurpation of the unlawful jurisdiction which he assumed and the violation of the constitutional securities of the American People which he had committed, had sprung from the honest error of his judgment, God forbid that he or any judge should be condemned for that only. He should consider a conviction in such a case, a great public calamity. But it was not to be tolerated that in any case, before any judge, involving the most sacred privileges of this free people, he should recklessly venture on this forbidden ground in defiance of all the warnings he might receive, and then demand here that his usurpations should be covered by the mantle of charity only. He had not been called to answer for an opinion given in the hurry of a trial and where the ordinary course of the administration of his duties required him to pronounce a hasty or immediate decision. Nor had he been surprised into any momentary feeling from the accidental excitement which may sometimes occur in the discharge of the duties of any judge. The case presented no apology or palliation from such circumstances. The whole proceeding was his own work—he voluntarily prepared it and deliberately executed it. There was no proof that he had anxiously, carefully or patiently devoted a moment's reflection to the examination of his judicial powers. He disregarded the suggestions of friendship and the admonitions of counsel. The very excitement which drew that crowded assembly into his court-room should have admonished him to look carefully to his jurisdiction and be well assured that the authority which he assumed was sustained by the constitution and laws of his country. It was not to be tolerated, if he had even then seen this publication for the first time, that he should have retired to his closet, opened a volume of commentaries, replaced it hastily upon the shelf, and putting on his cloak, have hastened to his court-room, and investing himself there with his judicial armour, have sent the sheriff for a free citizen, before the excitement of his feelings had subsided—that as his resentment quickened and his pulse beat faster under the short delay of a hasty and ill-prepared defence by counsel who were accidentally in court, he should have seized the first moment of which the forms of law, with the least appearance of decency, permitted him to avail himself, to bring down his vengeance on his victim and then appear before this high Court to plead the errors of his judgment as the apology for his usurpations, against the violated liberties of his countrymen and the insulted sovereignty of the constitution. Charity, as well as mercy, was indeed a heavenly virtue. It "blesseth him who gives and him who takes." But before the Respondent claimed that he should "find mercy, rendering none"—he should have felt assured that it

was not a case in which it could be fairly alleged against him upon the evidence, that he had never exercised his judgment at all.

Mr. S. said that he should have been glad to have been convinced by the proof that the Respondent had acted from a pure sense of duty only. He was a stranger to him, until he was known to him in the course of the duties which the House of Representatives had imposed on him. Towards him personally, he cherished no feeling but that of kindness, but he held in much higher respect the purity of that office which he had blemished. He should view the conviction of any judge as a public misfortune in some respects, but he should consider it a far greater calamity that the personal liberty of any citizen should have no better security than the good pleasure or the passions of any man. He had thought elsewhere that the House of Representatives would have been faithless to the duty which they owed to the American People, if they had failed on such a case as this, to bring the Respondent to answer here; and the evidence on this trial had confirmed him in that opinion. It was a great consolation to him, in the discharge of the painful duty which their commands had imposed on him, to know that the House of Representatives had not preferred this impeachment with the view of impairing the independence of the judiciary. He felt himself justified in saying in their name, that the just authority of the judges would find no surer support in any branch of the government or any where, than in that House. The counsel might dismiss their fears and treasure up their rebukes for other times. He felt quite confident that if the House of Representatives should be called to speak on that subject, the impulse which their moral influence would give to public opinion would be such as to convince the People of this country that their Representatives were already very far in advance of a forensic admonition at the bar of this Court. He had no doubt that public opinion was already sound on that point;—but the American People well knew the difference between the independence of the judges and their irresponsibility. They had been made independent of the Executive and the Legislature in the tenure of their offices; and it was in that respect, that their independence was essential to the impartial administration of justice and one of the best securities of the rights and privileges of the People. They were not responsible to the Executive Department. They were no longer dependent in England on the favor of the Crown, nor in the Federal Government on the good pleasure of the President. They had been thus placed above the temptation of perverting the administration of the laws to serve the purposes of government against the civil liberties of the country. British history had shown that judges were, after all, but men. The most striking illustrations of the oppressions which the People of England had suffered from the dependency of the Judges on the Crown were to be found in the abuses of the Star Chamber in the jurisdiction which they assumed over libels on the public functionaries, and especially, in cases of contempts of the justice of the nation, and it was a singular feature in the Respondent's defence on this trial, that he should have first taken his principles and his examples from the court of Star Chamber to sustain his jurisdiction, and then turned round to conciliate the favor of this Court by appealing to the necessity of supporting the independence of the Judiciary. It was the rather inferrible that a Judge who now held his office by the independent tenure of the constitution, could be actuated by no motive to revive those judicial abuses at this day, but the love of oppression itself. It was the privilege of the Judges in England (and unquestionably here also) that they had been freed from all question or prosecution, except in parliament, for any thing done by them as judges. But, neither there nor here, had any one claimed that irresponsibility was a judicial franchise. The country would cheerfully sustain the independence and just authority of the courts; but their real security in this government, was in the affections of the People who had conferred their independence on them by their Constitution. The judiciary best commends itself to the American people, by the firm administration of the law

and nothing but the law—its beneficent protection of property—and, above all, as the sanctuary of their civil liberties. Its enemies, if any such there be, could not more fatally weaken the moral feeling which sustains it and more effectually contrive its ruin, than by successfully teaching this People to believe that they had unwarily invested the judges with an arbitrary jurisdiction over their personal liberty. When they shall have been convinced that their Constitution has secured the Judges in the exercise of the insupportable judicial tyranny under which their ancestors suffered, if they did not crush the whole fabric of oppression at a single blow, they would at least direct their efforts to the finding of new securities for their liberties.

The Court then adjourned.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Friday, January 28.

The Managers, accompanied by the House of Representatives, attended.

The Respondent's Counsel also attended.

The Hon. JAMES BUCHANAN, one of the Managers, addressed the Court on behalf of the United States, as follows:

Mr. President,—I concur with the gentleman who last addressed you in behalf of the respondent, that the fate of the judiciary of the United States may, to a considerable extent, depend upon the event of this impeachment. I believe his position to be true; and it is that characteristic of this proceeding, which has impressed me with the deep sense I feel of its great importance. If this High Court of Impeachment shall establish the claim which has been asserted by the respondent, in behalf of himself and all other judges, that they possess the power to proceed in a summary manner against the authors of all publications, which they may fancy or may believe to be derogatory to their judicial dignity; if they may deprive such authors of their constitutional right to a trial by jury, and fine and imprison them at discretion, then indeed the judiciary will be in danger. The people of this country love their judiciary well, but they love the freedom of their press still better; and if these two great branches of our civil policy shall be placed in hostile array against each other by the decision of this Senate, God only knows what may be the consequences. It is this consideration which has given such solemn importance to the trial in which we are engaged.

In the letter, which Judge Peck addressed to the House of Representatives, in explanation of the charges, which had been preferred against him by Mr. Lawless, he used this strong language. "The liberty of the press has always been the favorite watch-word of those who live by its *licentiousness*. It has been, from time immemorial, is still, and ever will be, the perpetual *decantatum* on the lips of all libellers." My colleague thought that this remark was a sneer at the liberty of the press, and for expressing that conviction he has been severely reproved by the respondent's counsel. I leave the Senate to judge whether my colleague was not correct in his conclusion, especially considering the time and manner in which the remark was made, and the body to whom it was addressed. Be that as it may, I might here observe, that, if "the liberty of the press has always been the favorite watch-word of those who live by its *licentiousness*," the *licentiousness* of the press has always been the favorite watch-word of those who are afraid of its liberty. It has been the pretext used in every age since the art of printing was known, by every tyrant who sought to demolish its freedom; and even Charles the Tenth himself, when he passed those edicts against the press, whose effect upon the people hurled him from his throne, attempted to justify his atrocious conduct by abusing its *licentiousness*. The counsel, who last addressed you in behalf of the respondent, has

presented to us several figures of speech for the purpose of illustrating the necessity of restraining this great instrument of our freedom. However happy, and however eloquent these illustrations may have been, they might with equal truth and propriety have been applied (though that gentleman would be the last to apply them) to the edict of Charles X. Figures of speech prove only the ingenuity or the eloquence of the orator who uses them. They are always dangerous in a grave discussion, where the guilt or innocence of an accused person is to be established. It would be easy for me, in answering the gentleman, to turn his figures against himself and say, Better that the noble vine should shoot into rank luxuriance, than plant a canker in its root which would destroy the tree;—or even commit it to the care of such a vine-dresser as the respondent, to lop away all its fruitful branches, and leave it a naked trunk.

The constitution and laws of the several States have conferred upon juries, under the advice of the court, the trial of the crime of libel. A jury is the only tribunal to which the liberty of the press can be safely entrusted. To allow the judiciary to dispense with this tribunal, whenever any publication has been made affecting the dignity or the official conduct of a judge, is to create a privileged order of men in the state whose will is law, and who are not only judges in their own cause of the guilt of the accused, but also of the extent of his punishment. Such a power, so far as it goes, partakes of the very essence and rankness of despotism.

Again, the gentleman (Mr. Wirt) in his introductory remarks observed, that he apprehended the existence of some strange and unaccountable prejudice in the minds of the managers, which had influenced and inflamed the spirit of this prosecution. Indeed the gentlemen seem to believe, that we saw what was not to be seen, and were constantly imagining what had no existence, save in our own disordered fancy. Now I would ask of this Court, what possible ground of prejudice the managers could have had against this respondent? He was a judge unknown to fame; “a stranger from the Western wilds.” All the managers, from their professional habits, and most of them too from their political feelings, are firmly convinced that the judiciary ought to be independent. I speak no more than the truth when I declare, that in the beginning every bias of my heart was against this impeachment, and that at last I was impelled to undertake it only by an irresistible sense of public duty.

In reply to this suggestion of the respondent's counsel, I must say there appears to exist a stronger prejudice in the gentlemen, themselves, than they have even attributed to the managers. I do not blame them for it. I would not employ an advocate who did not enter deeply into the feelings and interests of his clients; and it is with pleasure I find that the respondent's counsel excel in this attribute of a good advocate, as they do in all others. But it does appear to me to be somewhat extraordinary, that such a sudden and extravagant friendship for the respondent should have taken possession of the breast of the gentleman, who last addressed you in his behalf. I am sorry, very sorry, that we cannot reach the accused, without striking through the heart of his advocate. If this be indeed the fact, it constitutes in itself the best reason I have yet heard for the acquittal of the respondent.

There was one circumstance remarked upon by the gentleman, (Mr. Wirt,) as evidence of the existence of prejudice against the accused on our part, to which, in justice to my friend Judge Spencer, I must be permitted to reply. The judge, in his introductory remarks, after expressing the regret which he felt at being obliged to stand before you in the character of a public prosecutor, said that it was a cheering reflection, and one which went greatly to allay his regret, that the House of Representatives, after a mature and laborious deliberation, uninfluenced by any party feeling, had by a large majority agreed in the necessity of this impeachment. What evidence of prejudice could the gentleman justly extract from this harmless and very proper remark? Did he really believe that a man who has so long occupied a distinguished judicial station in his own

State, and whose fame as a jurist has long been known to the people of this country, intended to come before the highest tribunal in the nation, and insist that any proceedings which had taken place in the House of Representatives could furnish the least evidence of the guilt of the accused before the Senate? He never intended to express, nor did he express, any such sentiment; and yet so prejudiced was the learned gentleman himself, that he thought it necessary to take up the time of the court in proving, that as the indictment found by a grand jury is no evidence of guilt before a petit jury, so, neither ought the article of impeachment, voted by the House of Representatives, to be evidence against the party impeached on his trial before the Senate. We freely admit that what was done in the other branch of the legislature cannot and ought not to produce the slightest effect against the accused upon this trial. His guilt must be established, if at all, by the law and the evidence. To these and to these alone the managers appeal for his conviction.

But as the subject has been introduced, I shall take this occasion to remark, that in my opinion the voting of an impeachment in the House of Representatives should never be a mere *ex parte* proceeding *there*, though it ought always to be so considered *here*. The power of impeachment is too important; the expense to the nation, both in time and in money, is too great to justify the House in proceeding upon the mere *ex parte* testimony, presented by a private accuser. Neither the investigating committee nor the House should rest satisfied with such evidence alone. They ought to go beyond this rule, and examine so much testimony as to create a rational belief that the accused is guilty. But whatever the House of Representatives may owe to itself in conducting its own proceedings, I concur with the gentleman in the opinion, that the voting of articles of impeachment by that House is entirely out of the question, as furnishing the least evidence of the guilt of the accused before this tribunal.

I now come to the substance of this cause, and I shall endeavor, (though I fear the contrast will be striking) to follow the last counsel, who addressed the court in behalf of the respondent, through his argument, except so far as that argument has been already answered by my colleague who concluded his remarks yesterday.

What is an impeachable offence? This is a preliminary question, which demands attention. It must be decided, before the Court can rightly understand what it is they have to try. The constitution of the United States declares the tenure of the judicial office to be "during good behaviour." Official misbehaviour, therefore, in a judge is a forfeiture of his office. But when we say this, we have advanced only a small distance. Another question meets us. What is misbehaviour 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. This I think was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offence impeachable, it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal, as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines him a thousand dollars, and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offence, at his discretion, would not this punishment be such an abuse of judicial discretion, and afford such evidence of the tyrannical and arbitrary exercise of power, as would justify the House of Representatives in voting an impeachment? But why need I fancy

cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the Judge,—a libel, however, perfectly decorous in its terms, and imputing no criminal intention, and so difficult of construction, that though the counsel of the respondent have laboured for hours to prove it to be a libel, still that question remains doubtful. If, in this case, the Judge has degraded the author by imprisonment, and deprived him of the means of earning bread for himself and his family, by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive abuse of authority, even admitting the power to punish in such a case to be possessed by the Judge?

A gross abuse of granted power, and an usurpation of power not granted, are offences equally worthy of and liable to impeachment. If therefore the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far towards the acquittal of his client.

I make these remarks, not because I entertain the smallest doubt of being able to establish, that the respondent has been guilty of a total usurpation of power in open defiance of the constitution and laws of the land; but merely to express what I believe to be the true law of impeachment.

It has been contended, that even supposing the judge to have transcended his power, and violated the law, yet he cannot be convicted, unless the Senate should believe he did the act with a criminal intention. It has been said that crime consists in two things, a fact and an intention; and in support of this proposition, the legal maxim has been quoted that "*actus non fit reum, nisi mens rea.*" This may be true as a general proposition, and yet it may have but a slight bearing upon the present case. Did the gentlemen mean to contend, that before the Judge could be convicted, we must prove by positive testimony malice in his breast, a lurking enmity against Mr. Lawless, and the purpose of gratifying a base revenge? I should suppose that to have been the reason for which they asked so many questions to show, that the Judge and Mr. Lawless had previously been upon good terms. This argument may be answered with great force in the strong language of the respondent himself, in his answer to the article of impeachment. "Both in law and in morals, (says the Judge) every man is presumed to intend the natural consequences of his own actions." This was the rule by which he tried Mr. Lawless. He took up the article signed "A Citizen," and from that article alone he inferred the intention of its author. In doing this, he acted correctly; but his jaundiced mind and wounded vanity had so diseased his perceptions, that he saw burning letters upon the scroll, although in themselves they were perfectly innocent and harmless.

"Out of the abundance of the heart the mouth speaketh," and "the tree is known by the fruit," are axioms which we have derived from the fountain of all truth. Actions speak louder than words; and it is from the criminal action that judges must infer the criminal intention. If a judge has cruelly and illegally imprisoned and punished an American citizen, the court before whom he is impeached will never set out to hunt after a good motive for this bad action.

I admit that if the charge against a judge be merely an illegal decision on a question of property, in a civil cause, his error ought to be gross and palpable indeed, to justify the inference of a criminal intention, and to convict him upon an impeachment. And yet one case of this character has occurred in our history. Judge Pickering was tried and condemned upon all the four articles exhibited against him, although the three first contained no other charge than that of making decisions contrary to law in a cause involving a mere question of property; and then refusing to grant the party injured an appeal from his decision, to which he was entitled.

And yet am I to be told, that if a judge shall do an act which is in itself

criminal; if he shall, in an arbitrary and oppressive manner, and without the authority of law, imprison a citizen of this country, and thus consign him to infamy, you are not to infer his intention from the act? Is not the act itself the best source from which to draw the inference? Must we, without any evidence, in the spirit of false charity and mercy, ramble out of the record to imagine a good motive for this bad conduct?

Such a rule of decision would defeat the execution of all human laws. No man can doubt but that many a traitor, during the American Revolution, believed in his conscience that he owed allegiance to the king of Great Britain, and would violate his duty to his God, if he should lend the least aid to the cause of freedom. But if such a man had committed treasonable acts, will any person say he was not guilty of treason, because in his secret heart he might have had a good intention? Does a poor naked hungry wretch, in the midst of this inclement season, filch from my pocket a single dollar, to satisfy the cravings of appetite; the law infers a felonious intent, and he must be convicted and punished as a thief, though he may have had no other purpose but that of saving himself and his children from starvation. And shall a man, who has been selected to fill a high judicial office on account of his knowledge of the laws of the land, be permitted to come before the Senate, and say, It is very true that I did, against law, imprison an American citizen, and deprive him for eighteen months of the power of practising that profession by which he lived; it is true that I violated the Constitution of the United States by inflicting on him "a cruel and unusual punishment;" but I did not know any better. I had a good intention. I did the act to subserve the purposes of justice, and to prevent my own official dignity from falling into contempt before the citizens of Missouri. Of all men living, a judge "ought to be presumed to intend the natural consequences of his own actions." Out of his own lips let the respondent be judged.

The fourth article of impeachment exhibited against Judge Pickering charged him with having appeared upon the bench in a state of total intoxication. This was gross official misbehaviour. Would the Senate in that case have gravely listened to an argument to prove, that the judge might have got drunk without any evil intention? Certainly not. The act was done. The tribunal had been disgraced; and the Senate inferred his intention from his conduct, and turned him out of office.

I have made these remarks in reply to the argument of the gentleman, and not because they have any material bearing on the case now before the Court. When I come to sum up the testimony (which has hitherto I think been too slightly examined,) I trust I shall be able to make it as clear as the light, that the Judge acted under the influence of his evil passions and the stings of mortified vanity, and not with that coolness, caution and dignity, which ought ever to be found upon the bench, and which will ever be respected there. Nor should I consider his conduct the less reprehensible, had he been able to command his temper, and do an act of cruelty with calm and deliberate malice.

I have now arrived at the great points of the cause. And I shall in the first place proceed to show, that the conduct of Judge Peck was in express violation of the constitution and laws of the country: and in the second, that from the circumstances attending the case, the Court ought to infer a criminal intention. The first will be a question of law, the second of fact. If I should succeed in establishing these two propositions, then I shall demand the judgment of this Court against the respondent. I well know that the feelings of mercy are far more congenial to the breast of every member of this Court, than the dictates of stern and inflexible justice; but yet I trust they will remember that in pardoning this Judge, if he be guilty, they may attack the first principles of civil liberty, and destroy one of its firmest foundations.

In discussing the first proposition, it is not my intention to occupy any of the ground so ably gone over by my colleague, (Mr. Storrs.) I shall neither mar the beauty nor the force of his argument by any observations of my own. He

has conclusively established, that the power to punish the offence of scandalizing a court was a Star Chamber power; and although it was there exercised in a summary manner by attachment, fine and imprisonment,—yet that after it came into the court of King's Bench, upon the dissolution of that odious tribunal, this offence has always been tried, like other criminal charges, by a jury of the country.

Neither shall I discuss the question to what extent courts of justice in England possess the power of punishing libels against the judges, the parties, or the witnesses in causes depending. I will say, however, it is an astonishing fact, that in that country, the industry of the gentlemen has furnished us but four cases in which an attempt has been made to punish in a summary manner the author of a libel even in causes depending; and three of them occurred in the court of chancery. We are warranted in believing that none others exist. In one of the cases of impeachment, which has been cited by the counsel of the respondent, (that of Passmore) the Judges of the Supreme Court of Pennsylvania were defended before the Senate of that state by Messrs Dallas and Ingersoll. The great learning and high professional character of these gentlemen are well known. They were defending judges of as pure a character as ever adorned any bench in this or any other country, and they were instigated to exertion by warm personal friendship and personal feeling; and yet they were able to produce but the four cases which have been cited by the counsel upon the present occasion. These are *Roach vs. Roach's executors*, 2 Atkyns 469; *Pool vs. Sacheverel*, 1 P. Williams 675; the case of *Mrs. Farley*, 2 Vesey 250, and that of the *King vs. Wyatt*, 3 Modern 123. The case *ex parte Jones*, cited from 13 Vesey 237, was not merely a case of libel, but it was a direct attempt to influence Lord Erskine in a cause then depending.

We have heard much of the necessity that a court should sustain its own dignity, without which, we are told, courts could not exist; and yet it does not appear that this power has been exercised by any court of law in England for more than a century, and then it was employed in vindicating the character of a Doctor of Divinity at Oxford. The case of the *King vs. Almon*, of which we have heard much, turns out to be no case at all. The opinion of Chief Justice Wilmot, which has been so greatly relied upon by the respondent, was never delivered in court, but was found after his decease, among the rubbish of his office, and was published to the world to help to make a book. The prosecution against Almon was abandoned by the highest tory administration which has existed in England since the revolution of 1688, because they did not dare to press it any further.

I should not have touched this part of the case, had it not been assigned to me as a duty by my colleagues, to answer the argument founded on the two cases from Pennsylvania. I shall perform this duty with the more pleasure, as it will be a fit and appropriate introduction to the argument, which I intend to advance on another branch of the subject.

In Pennsylvania, at an early day, the same struggle took place between judicial prerogative and the rights of the people, which has brought the present impeachment before the court, and there the rights of the people have been triumphantly vindicated. This must ever be the issue of such a struggle under a government like ours; and I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.

In the case of Eleazer Oswald, (cited from 1 Dallas 319,) an action for libel had been brought against him in the Supreme Court of Pennsylvania, in the year 1788, by Andrew Browne, who demanded special bail in £1000. Previous to the return day of the writ, the question of bail was heard before one of the judges, at his chambers, and Oswald was discharged on common bail. From this order of the Judge, Browne appealed to the court.

This Court will observe that all had been done by the judge, which Oswald could have desired ; and yet on the very day before the return of the writ, there appeared in "the Independent Gazetteer," his own newspaper, above his own signature, a scandalous and outrageous libel, both against Browne and the court, evidently intended to influence the future decision of the cause. It was a publication of such a character, that all persons, at the first blush, would pronounce it to be a gross libel in relation to the cause then pending.

After the return of the writ, Mr. Lewis moved the court for a rule to show cause why an attachment should not issue against Oswald, for this alleged contempt of court. And what was the first thing he did to sustain his motion ? It was to give a transcript of the record in evidence "*to show that the action between Browne and Oswald was depending in the court.*" Chief Justice M'Kean, and the two other judges on the Bench at the time, granted the rule and ordered Oswald to be brought before them. I shall certainly never utter a sentiment which might tend to impair the fair fame of that very distinguished and illustrious judge. He was well known, however, to hold high notions of his own judicial prerogatives, and to be a severe disciplinarian in court.

The Supreme Court of Pennsylvania assumed jurisdiction of this case as a contempt, and Oswald was fined and imprisoned expressly upon the ground, that the tendency of the libel was to prejudice the public, with respect to the merit of a cause then depending and afterwards to be tried by a jury. They do not appear to have entertained the most distant idea, that their power extended to the infliction of punishment, in a summary manner, against all persons who should venture to criticize the merits of an opinion, published by the court to the world after the cause had been finally decided. The exercise of such a power was reserved for Judge Peck.

Oswald afterwards complained to the General Assembly of the State against C. J. M'Kean and the two other judges, who had concurred in the sentence against him. When his complaint came to be heard before the Assembly, Mr. Lewis defended the decision of the court, upon the ground that the Bill of Rights in our state constitution of 1776 did not simply declare, that no man should be deprived of his liberty except "by the judgment of his peers ;" but that "the laws of the land" were also embraced in this exception. The language used is, "nor can any man be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." It was contended that a distinction existed between "the judgment of a man's peers" and "the laws of the land," and that as the summary power of punishing by attachment had been actually exercised before the Revolution by Chief Justice Kinsey, it was preserved and sanctioned by the constitution, as being a part of "the laws of the land." In support of this principle it was said that Magna Charta contained the same expressions ; and yet the English judges, after its passage, had always exercised the power of punishing contempts of court by attachment.

I shall not at present stop to show the entire futility of this reasoning, as it applies to the case of libel. Even if it were true to its utmost extent, it could have no bearing on the cause now before this court. We are not now before a State Senate, trying a State Judge. Under the constitution of the United States, no pre-existing law of the land was recognized. There never had been such a law. The people of the United States established a new federal government, and conferred upon it certain enumerated powers. Upon the federal constitution alone, and the laws enacted in pursuance of its provisions, they have rested their rights and their liberties, so far as this government is concerned.

As no member of the Assembly entertained a doubt of the upright intention of the judges, none was in favor of impeaching them. But Mr. Findlay offered a substitute for the unqualified resolution in favor of the judges which had been proposed. This substitute was in the following language:—"Resolved, that the proceedings of the Supreme Court against Mr. Eleazer Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or

implied contempt, not committed in the presence of the court, nor against any officer or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the Supreme Court, and respecting some of the judges of said court, was an unconstitutional exercise of judicial power, and sets an alarming precedent, of the most dangerous consequence, to the citizens of this commonwealth."

Mr. Findlay sustained this resolution with all the practical good sense and correct knowledge of constitutional liberty for which he was remarkable. "He acknowledged that he had received great information and pleasure, from the learned and eloquent speech of the member who preceded him; (Mr. Lewis) but he thought it was unnecessary, upon the present occasion, to explore the dark and distant periods of juridical history. The rights and immunities, which formed the great object of the Revolution, he contended, were capable of an easy and unequivocal definition; they were not of such remote antiquity as to be lost even to the feelings of the people; and the constitution of the state was the only proper criterion, by which they could be judged and ascertained. He did not, therefore, intend to pursue Mr. Lewis, in the track of legal disquisition; but appealing confidently to the instrument itself, he deemed it to be his duty to pronounce, that the decision of the Supreme Court was a deviation from the spirit and the letter of the frame of government."

Mr. Findlay's substitute was, notwithstanding, negatived; and the original resolution adopted by a vote of 34 to 23.

In 1802, the Supreme Court of Pennsylvania again exercised the power in question *in a case depending before them*. They did so, because it had been sanctioned as they believed by the new constitution of 1790, which, like the old one, contained a provision declaring that the accused "cannot be deprived of his life, liberty or property, unless by the judgment of his peers, *or the law of the land*;" and because they had a precedent before them in the case of Oswald, which had been sanctioned by the General Assembly of Pennsylvania, so far as the vote of a legislative body could sanction the unconstitutional violation of personal liberty. But in 1802, the principles of our government were better understood. We were then getting clear of the prejudices, which had so long bound us to the British government, and led us, on this side of the Atlantic, to make the judgments of their courts the standard of our decisions even on questions affecting our personal rights. The Judges of the Supreme Court had not kept up with the spirit of the times; and in a summary manner they fined and imprisoned Thomas Passmore, the defendant in a cause then pending before them, for the publication of a libel against the plaintiffs, in relation to that cause. For this act they were impeached by the House of Representatives by a vote of 65 to 16. Of the then Chief Justice Shippen it may be said, he was distinguished as much for his amenity of temper as for his extensive legal acquirements. He was what the counsel in this cause has painted his client to be—a man so kind and guileless that he would injure no one—he had not the heart voluntarily to inflict pain upon a fellow creature. And yet, though his character was perfectly known to every member of the House of Representatives, that body thought, if he had inflicted fine and imprisonment in a summary manner upon a citizen for the publication of a libel and had deprived him of a trial by "his peers," it was a dangerous usurpation of authority, and they must infer the intention from the act. They proceeded upon principle, and could not have felt any enmity against the chief justice or the two other distinguished judges whom they impeached.

These judges were tried and were acquitted; but that the Court may know how narrowly they escaped, I will state that 13 members of the senate voted for their acquittal, whilst 11 voted for their conviction. A change of but three votes would have produced the constitutional majority against them. By this vote the exercise of such a power was forever put down in Pennsylvania. No judge has since that day attempted to exercise it. But to make assurance doubly sure, the legislature, in 1809, passed a declaratory act upon the subject, to one section

of which I beg leave to refer the court. It declares, "that from and after the passing of this Act, all publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in, and concerning *any cause pending* before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same; but if such publication shall improperly tend to bias the minds of the public, the court, the officers, jurors, witnesses, or any of them, or a question pending before the court, any person feeling himself aggrieved by such publication shall be at liberty either to proceed by indictment, or to bring an action at law against the author, printer, publisher, or either of them, and recover thereupon such damages as a jury may think fit to award."

The court will observe the remarkable phraseology here employed. The legislature of Pennsylvania never dreamt that any judge would attempt to exercise this power in a cause not depending in judgment. The Act is expressly confined to "causes pending." If the power of the courts previously to the passage of this Act extended also to causes decided, as the gentlemen have been compelled to contend on the present occasion, then the legislature have been guilty of the gross absurdity of expressly forbidding this arbitrary proceeding *in causes pending*, where there might be some pretext for its exercise, whilst they have remained entirely silent, in relation to *causes decided*, where the only plausible reason which can be given for the existence of such a power entirely fails.

It was urged against the judges of the Supreme Court of Pennsylvania, upon their trial, that the cause in relation to which they fined and imprisoned Passmore had been finally ended, and therefore that their conduct was clearly illegal. Whether from the face of the record, that cause was pending or not, was made a serious question. I have looked over the arguments of Mr. Dallas and Mr. Ingersoll, although I have not read every page of them, and I cannot discover that they attempted to sustain the proposition, that the court possessed the same power, after a cause had been decided, that they did whilst it was still pending. If these gentlemen had supposed they could have maintained this position, the circumstances of the case called loudly upon them to make it a prominent point of their argument. If any such point was made, it has escaped my observation. At all events, the legislators of Pennsylvania, in their declaratory Act which grew out of this trial, did not deem it necessary even to mention the case of the publication of any article, referring to causes which had passed into final judgment. But it has been contended, that although the case of Soulard had been decided, yet the publications of Mr. Lawless ought to be considered a contempt, because other causes were then still depending before Judge Peck on the same principles.

This is a novel doctrine, and has not been sustained by a single authority. Who ever heard before, that after the final decision of a cause in one court, and during its pendency before another, the very same publication could be a contempt against both courts? This would be giving the contempt a double aspect; and a man might be punished by both courts—and afterwards indicted for the very same offence. It would be a strange principle indeed to establish, that no man should be permitted to review the reasons delivered by the court when they rendered a final judgment in one cause, lest peradventure there might be other causes of a similar nature still depending.

The Opinion of Judge Peck in Soulard's case was a virtual rejection of all the Spanish claims before his court. Nothing afterwards remained to be done but to strike them from the list. They all fell under this single blow. They were all decided in this one cause, and were afterwards withdrawn by the parties. Can it be possible that the publication of Mr. Lawless, although it could have been no contempt, had all the claims been withdrawn when it was made—

yet that if one lingering claim had still remained upon the docket, this would have changed its nature and converted it into a contempt? It cannot be.

In courts of extensive business, the decision of one case will in almost every instance have a direct bearing on some other. If no man can dare to publish a criticism on such a decision, unless under the penalty of being guilty of a contempt of court in case another cause of a similar nature should be found upon the docket, then all distinctions between causes depending and decided are in effect abolished.

I have thought it proper to make these remarks in reply to this argument of the gentleman, although in the view which I shall take of the present impeachment, it would be a matter of no importance, even if they could establish their position.

In the progress of this trial we have made a long excursion to England. We have had the principles of the English government extensively discussed, and the court has been entertained with a minute account of the judicial history of that country. And what does it all prove towards the elucidation of this cause? I should not have cared if the gentlemen had succeeded in establishing, that the offence of scandalizing a court, whether a cause was pending or not, is punishable in a summary manner in England. If it were so, what then? Are we to look to the laws of England, or to the constitution and laws of the United States, for the powers of our judges? At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy. The gentlemen have been discussing the extent of personal rights in England; but that is not the standard of the rights of the people of this country. When we arrive at the proper stage of the cause, I think I shall then show that the language of the constitution of the United States upon this subject is so plain, that he who runs may read. Judge Peck had no occasion to go to England and consult the common law to discover prerogatives for the courts of this country; all he had to do, to ascertain the limits of their legitimate power over contempts, was to read the seventh section of the judiciary Act of 1789, and the constitution of the United States.

In the further prosecution of this subject, I shall contend that under the constitution and laws of the United States, the federal courts possess no power to punish in a summary manner, as contempts, publications reflecting on the court, whether in relation to a cause pending or one finally decided; and that in either case, such a power is equally at war both with the spirit and the letter of the constitution.

And here I will take leave to observe, that any one who has attended to the course of this trial might almost imagine, it was the impeachment of an English judge before the House of Lords, and not that of an American judge before the Senate of the United States. We have scarcely heard of our own constitution or our own laws. This may have been accident, or it may have been design. If it has been by design, it shall not succeed. The gentleman shall not keep us pursuing the judicial history of England for the last 500 years, and thus place out of view our own constitutional guarantees for the personal rights and personal liberty of our own citizens.

If the courts of the United States do possess this power, it must be derived either from the common law, or from the inherent powers which necessarily belong to all courts of justice, or from the judiciary Act of 1789. If the power exists at all, it must come from one of these three sources.

As it regards the common law, I think it is now conclusively settled by the adjudged cases, that the courts of the United States possess no criminal common-law jurisdiction. If any question can be considered at rest, it is this. It is utterly astonishing to me, that such a claim of jurisdiction should ever have been asserted for the judiciary. The constitution of the United States called

into existence a new government. Under its provisions Congress established new courts of justice. To the legislature it belonged to declare what ought or ought not to be the law by which these courts should be governed. The attempt to transfer from England to the United States the whole criminal code of the common law, without the sanction of Congress, was the most extraordinary that can well be conceived. I have ever been a friend to courts, and in an especial manner a friend to the Supreme Court of the United States, and I trust I have shown it by my public conduct; but if even *they* should attempt to usurp the legislative power of declaring any act to be a crime in this country, merely because it is a crime by the common law of England, I do not know but I should be willing to bring the judges of that court themselves before this tribunal. The Congress of the United States have ever legislated upon the principles, that an act must be declared a crime by law before the courts can notice it as such. In 1825, the chairman of the committee on the judiciary in the House of Representatives, who is now a distinguished member of this court, (Mr. Webster) reported a bill on the avowed principle, that many actions manifestly of a criminal character had not been declared crimes by act of Congress, and it was necessary that this omission should be supplied, in order to give the courts of the United States the power of trying and punishing them. The bill thus reported was enacted into a law. This doctrine, which is clearly correct in reason and in principle, has been settled by the two adjudged cases, which have already been cited. Indeed so firmly is it established, that the late Mr. Justice Washington, in delivering a charge to the grand jury at Philadelphia, in 1822, laid it down as settled, that the courts of the United States have not cognizance of offences at common law, unless it be conferred on them by the laws of the United States.

I shall therefore take it for granted, as an axiom, that no common-law criminal jurisdiction exists in the courts of the United States. I now ask, is the power of punishing a libel, in a summary manner as a contempt of court, a criminal common-law power, or is it not? It is true, as has been said, that the power to punish for contempts is exerted by courts of civil jurisdiction; but that does not make the power either civil or criminal in its character. It is the nature of the power, after which we are inquiring, not the character of the courts by whom it is exercised. Is not a man accused, tried, found guilty and punished for a contempt of court? Is not his conduct treated as a criminal offence throughout? I need not surely argue this point. It has been settled by the authorities cited on the other side. I will merely read a short passage on the subject from Sergeant's Constitutional Law, 66 and 67.

“But the Supreme Court will not grant a *habeas corpus* to bring up a person, who is in the custody of the Marshal, under a commitment of a Circuit Court of the United States for a contempt; nor, if granted, will it inquire whether the court erred in its judgment of the law applicable to the case, if there be no question but that such commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. *The adjudication of the court below is a conviction, and the commitment in consequence is an execution; and the exercise of the power of revising the case on a habeas corpus would be the exercise of an appellate jurisdiction in criminal cases, which is an authority not granted by the laws of the United States, except by a certificate that the opinions of the judges are opposed; and the court will not do indirectly, what they cannot do directly. Where, therefore, the party was in gaol, in custody of the Marshal, under a commitment of the Circuit Court for the District of Columbia, for an alleged contempt in refusing to answer a question put to him as a witness, on the trial of an indictment, the Supreme Court refused to grant a habeas corpus to bring up his body.*” Ex parte Kearney, 7 Wheat. 38. See also Anderson, vs. Dunn, 6 Wheat. 204.

I think then I have fully maintained the position, that this power cannot be derived from the common law. That libelling a court is a criminal offence at

the common law cannot be doubted. It is equally clear that the courts of the United States possess no criminal common-law jurisdiction. The common law, therefore, as the source of such a power as was exercised by the respondent, must be abandoned.

Let me now advance one step further and consider, whether the respondent's counsel can derive this authority from the inherent and necessary powers vested in all courts. Upon this point, we shall not differ very widely, in the abstract. I admit that by its very organization, every court of justice is clothed with the power of imposing silence, respect and decorum in its presence, and enforcing obedience to all its lawful commands. 6 Wheaton 227. Anderson vs. Dunn. I heartily concur with the positions taken and ably sustained by Mr. Wirt, and Mr. Jones, in their argument in that case, and hold the general principle of the law to be what they have stated, "that the power of punishing contempts is incidental to all courts of justice, and even to the most inferior magistrates, *when in the exercise of their public functions*, and arises out of the absolute necessity of the case, which renders it indispensable that they should have such a power," page 219. Neither do I say that the Supreme Court, in deciding this cause, intended to enumerate all the cases in which courts have the power of punishing for contempts; but from their general reasoning it is manifest they could not have thought for one moment of extending it to the punishment of libels. They claim the power as inherent, from necessity and necessity alone but necessity; is the tyrant's plea, and beyond its limits the power cannot exist.

I shall first show that the power exercised by the respondent is not necessary, and then that is in express violation of the constitution.

First, then, as to the necessity for its existence. The power of punishing for contempts is greatly misunderstood, perhaps even by the distinguished gentlemen who act as counsel for the respondent. This power, when confined to its own proper limits, is not only harmless, but so necessary that without it no cause could be brought to a conclusion. It is only when courts attempt to extend it to cases which it was never intended to embrace, that it becomes dangerous to liberty. What is it? A juryman is summoned to attend court; he disobeys the writ, and this is a contempt. An attachment issues to bring him in, and on its return he is asked, "Why did you not attend?" He gives his reason under oath, and if it be a good one, there is an end of the matter. This is the origin of the purgation by interrogatories, of which we have heard so much on this trial. So a witness is subpoenaed. He does not appear. He is brought in on an attachment. He is sworn, and tells the court he was prevented from attending by sickness, and is then discharged. In like manner, when the court make an order upon the sheriff to pay money over, if he disobeys, he is attached. When he comes into court upon the attachment, he may be sworn, and may excuse himself by rendering a good reason for his disobedience. In all these and other similar cases, it is the privilege of the party to have interrogatories propounded to him. If he chooses to let the matter stand upon the evidence on which the court proceeded against him in the first instance, it is well, and the court then punishes him; but if he asks leave to excuse his disobedience, he is then sworn and answers. This purgation, whilst confined to the cases for which it was originally provided, is innocent and highly advantageous to the party. But when courts, using the power to punish for contempts, as a pretext to enlarge their jurisdiction, extended it to the case of libels, then this power, so simple and salutary in itself, became odious, arbitrary and tyrannical. Then the power of purgation, which was intended solely for the benefit of the accused, becomes an engine for his conviction. If he answers and confesses his guilt, he is liable to punishment; if he refuses to answer, he is then, for such refusal, pronounced guilty of a high and aggravated contempt sufficient in itself to justify the whole proceeding. It is, to use the language of the Respondent, "a new and substantive contempt, which would, of itself, have justified the sentence that was passed." If he clears himself upon oath, he is discharged; but in that case, if he has sworn falsely, he may be prosecuted for perjury.

The extension of this power to libels is nothing better than a mere fiction of law. It is absolutely necessary that courts should have the power of compelling the attendance of witnesses and jurors by attachment; otherwise the course of justice would be obstructed. It could not proceed. In analogy to this principle, courts have assumed the position, that the course of public justice would be entirely obstructed, if they should permit any thing disrespectful to themselves to be uttered or published; and they have therefore thought proper to usurp the power of punishing libels against themselves as contempts of court; thus erecting one of the most formidable engines of oppression that was ever set up in a free state.

I shall now attempt to bring the odious features of the power, when applied to libels, into one group before the Senate. If my sketch should not be accurate in any particular, (though enjoying the advantage of speaking last) I ask to be corrected by the gentlemen.

What is the power of punishing libels as contempts? An individual publishes a criticism to the world upon the opinion of a court in a cause, either still pending or finally decided, which the judge fancies to be an attack either on his dignity or his character. What, on the principles contended for, has he a right to do? He may call the author to answer before him, and, with all his feelings of mortified vanity excited to the highest pitch by this attack in the public papers, he is constituted the sole judge in his own cause. His power to fine and to imprison is unlimited. He knows no rule but his own discretion. His mere will stands for the law of the land, and from his decision there is no appeal. If his victim should unfortunately belong to the profession of the law, then, in addition to fine and imprisonment, he may be deprived of the means of earning bread for himself and his children, by a sentence of expulsion or suspension from the practice of his profession. The punishment is measured by no other standard than the excited feelings of the judge; and in all the wide field of judicial discretion there is no barrier to protect the accused from his fury. When he has decided that the offence is a contempt of court, he calls upon the accused to answer interrogatories. If he answers and confesses, he is punished of course. If he is so degraded as to bow down submissively at the footstool of usurped power, and will swear he had no intention of calling a judge weak or wicked, whom he believed to be so in his heart, he is discharged; but then he is liable to an indictment for perjury. If he stands on the rights and dignity of an American citizen and refuses to answer, (as I feel in my bosom I should have done, had I been Mr. Lawless, at the peril of my life,) this refusal is a high and aggravated contempt. What law is this for these United States? It is against every principle of civil liberty and all notions of human right. The principles and the spirit of the American revolution would have put such doctrines to flight forever, even if we had no written constitution by which they are condemned.

I said that the power of impeachment was a tremendous power. I am happy I used the expression, since it has given birth to one of the most beautiful exordiums I ever had the pleasure of hearing. But this power is as the morning breeze compared with the raving storm, when it is placed by the side of the power to punish libels as contempts, now claimed for the judiciary. The effect of an impeachment is a mere dismissal from office, and in very aggravated cases a judgment of disqualification might probably be pronounced; but the power now claimed may at once subject any attorney or counsellor in the United States, who may express, in the public papers, an opinion in the least degree derogatory to the capacity or integrity of a judge, not only to fine and imprisonment, but to a deprivation of the profession by which he lives.

And this is the power which the gentleman (Mr. Wirt) would infer by construction, as implied in the mere creation of a court of justice. He says correctly, that the constitution of the United States contains many terms and phrases derived from the common law, and that to the common law we must resort for their meaning. He gives as an example the clause which declares, that "the

Senate shall have the sole power to try all impeachments," and asks where are we to look for the meaning of the term impeachment? Must we not go to the common law? Granted. So the constitution provides, that "the President, Vice President, and all civil officers of the United States shall be removed from office on impeachment, for treason, bribery or other high crimes and misdemeanors." Must we not, says the gentleman, refer to the common law for the meaning of "high crimes and misdemeanors?" Who doubts it? On the same principle, if any term of art is used in an instrument of writing, we must refer for its meaning to the best standard publications on the subject of that art. It means no more. The gentleman has woven the web of his argument with great ingenuity. He now advances another step, and tells us that Congress under the constitution have established courts of law and courts of equity, and asks us how we are to ascertain what either mean, without resorting to the common law. So far he is correct. But then, per saltum, by a most astonishing bound, he infers, that the mere establishment of a court, *ex vi termini*, confers upon it all the criminal power of punishing contempts which belongs to the courts of England. This, give me leave to say, is an entire non sequitur. Placed in the form of a syllogism, the argument would stand thus:—The constitution in its grants of power has used common-law terms; the common law must be referred to for the purpose of ascertaining the meaning of these grants of power; therefore, where no such express grant has been made, but merely an authority to establish courts of justice has been given, these courts shall by implication possess the same power of punishing all criminal common-law offences which the courts of England have enjoyed; and this although neither the constitution nor the laws of the United States have conferred upon them any such power. Had the constitution given to the courts the power of punishing libels as contempts, then the common law might fairly have been invoked for the meaning of these terms; but as it is silent upon the subject, the gentleman's argument has no foundation upon which it can rest.

In this argument the gentleman has carried the doctrine of implied powers further than has ever been contended for heretofore. I am myself friendly to a fair and liberal construction of the constitution; but to decide that because Congress has established a court, that therefore, *ex vi termini*, that court has all the criminal powers exercised by courts of a similar character in England under the common law, is a doctrine to which I shall never assent. I feel satisfied the gentleman himself, upon a re-examination of his own argument, would not wish that any such doctrine should prevail. (I speak this from knowing his habits of thought as a public man, although I do not enjoy the honor of his personal acquaintance. The gentleman is mistaken if he supposes he can be unknown to posterity, or that his character required the explanation he has this day deemed it proper to make to the court.)

I think then it has been proved, that the federal judiciary, which is a mere emanation under the constitution from a Congress possessing only limited and specific powers, was not on its establishment invested by construction with all the power of deciding what were contempts against its own dignity, and all the power of punishing them in a summary manner, which belongs to the courts of a monarchy governed by an omnipotent parliament.

Whatever inherent powers the courts of the United States possess, they must derive from the great law of necessity. Let us then proceed more directly to inquire whether there be the least necessity for the possession of a power by courts of justice to punish libels as contempts.

The constitution of the United States presents the best and the only rule for judging of the extent and the limits of this necessity. It is a grant of enumerated powers. From the very nature of such a grant, Congress is restrained from exercising power on any subject not embraced by the constitution. This would have been the principle of construction, without any constitutional rule upon the subject; because both in reason and in law a grant of certain enumerated

powers necessarily excludes all powers not enumerated. *Expressio unius est exclusio alterius*. But so jealous were the people of the United States, as to the exercise of power, that the constitution expressly declares that all powers not granted are reserved to the States or to the people. It is true that a few wild enthusiasts have seized upon two or three words in the preamble of that instrument, and have construed them as if the whole constitution were to be superseded by its preamble. These men, because its framers have declared it to be their intention, by its provisions, "to promote the general welfare," would construe this into an express grant of power, which would swallow up all the other powers in the constitution, and leave Congress the uncontrolled arbiter both of the States and of the people. This absurd doctrine has never been the creed of any political party in this country, though it has been held by a few individuals.

The constitution itself, by a necessary analogy, furnishes the true rule for the implied power of the courts. It declares that "Congress shall have power to make all laws, which shall be necessary and proper for carrying into execution" the powers expressly granted. In like manner, the courts of the United States, by the very act of their creation, were invested with such implied powers as were necessary for self-preservation, and for conducting the business with which they were entrusted. The implication of power cannot and ought not to transcend this necessity. When the Congress of 1789 came to legislate upon this subject, they fixed the proper limit in language both accurate and comprehensive. The 17th section of the judiciary Act provides, "that all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law, and shall have power to impose and administer all necessary oaths and affirmations, and to punish, by fine or imprisonment, at the discretion of said courts, *all contempts of authority in any cause or hearing before the same.*" What was the argument of the respondent's counsel on this point? They contended that this section merely affirmed the existence of general powers, which would have existed without it, and was not intended to limit any of the powers which it embraced. This I grant to be correct with respect to the two powers first enumerated. The courts could doubtless have granted new trials and administered oaths, if these powers had not been given by the act. But what is the language used in relation to contempts? Is it general in its character? Does it authorize the courts to punish all contempts without any limitation? By no means. Their power is confined to the punishment of "*all contempts of authority in any cause or hearing before them.*" The power is given so far as any necessity exists for its exercise; beyond that the grant does not extend. It is evidently confined to what are called direct contempts. There can be no pretext under this language for including those which are merely constructive. It embraces all the powers, which the Supreme Court have declared in the case of Anderson and Dunn they would possess without the provision of written law. No person can contend for a moment, that it authorizes the punishment of libels as contempts of court.

I have been reflecting much upon this subject, and endeavoring to discover whether there was a single power of a proper and necessary character not embraced by the language of this Act, and I cannot fancy one. The counsel who first addressed the court in behalf of the respondent contended, that it would not embrace the case of a juror, who disobeyed the process of the court, because a general venire facias issues, and the jury is not summoned to try any one cause, but all the causes on the list at that particular term. But did not the gentleman perceive, that he was himself furnishing the best answer to his own argument? A juror, in disobeying his summons, would be guilty of a contempt not in one particular cause only, but in any or all the causes pending for trial before the court, and is therefore embraced by the language of the seventeenth section. He also suggested the case of tumultuous noises, not in the presence of the court, but so near to the court-house as to interrupt the progress of business. But would not such

a disturbance be a contempt within the language of the Act, in whatever cause or hearing happened then to be before the court?

But for one, I solemnly protest against the mode adopted by the gentlemen of construing statutes of the United States. When the language of a statute, at the same time that it confers a power, limits its exercise by express words, for a court to say, We will not confine ourselves to this limit, but will take the power from the Act as far as it goes, and then seek for the remainder among our inherent powers, is in my opinion to adopt a very bad rule under our constitution and laws. When Congress have spoken not generally but specially on the subject of contempts, it is surely at war with the spirit of the federal government for the courts to assume other powers than those which have been expressly granted.

But it is of little importance to pursue this branch of the subject further. Whether all possible cases of the proper exercise of this power are or are not embraced by the 17th section of the judiciary act, all agree that the courts, if they pass its limits, are still confined to such inherent powers as are founded on necessity. Is a publication in a newspaper, even in relation to a cause depending, which reflects on the judge, embraced by this plea of necessity? Suppose the person accused of this offence to be guilty, is there any necessity that all the constitutional forms of justice shall be trampled under foot, and that the object of the publication shall be made the judge in his own cause? There is not the least. All the citizens of this country are equally under the protection of the laws. If a libel is published against me, I can have the author of it punished by an impartial court, through the agency of a grand and petit jury. Is there any necessity that a judge who has been libelled should have the power to dispense with this rule, and to call the libeller before him, and inflict what punishment he may think proper? Why should this be so? If punishment be inflicted for the sake of example, it would be a much more solemn and impressive warning to have such a libeller indicted by a grand jury, convicted by a petit jury, and sentenced according to the ordinary rules of law, than to have him punished in a summary manner by the very person against whom the offence was committed. Such an example will always operate powerfully in a way directly the reverse of that which was intended. There is a spirit in this country, and I trust that spirit will ever prevail, which rebels against arbitrary power. Such an example, instead of sustaining that judge before the people, will never fail to enlist the sympathy of the community in favor of the victim of his oppression.

But on the other hand, let us view the effect of the legitimate exercise of punishment for such an offence. A calm, upright and dignified judge is libelled. He does not appear as the accuser. The public prosecutor, in the discharge of his official duty, takes up this offence against the laws, and the state becomes the party in behalf of the judge. The libeller is tried by a jury of his peers, he is convicted and sentenced, and the whole spectacle is calculated to impress the public mind and sustain the judicial dignity and authority. The man is marked as an atrocious libeller, and the example has a powerful effect on society. In its moral power one such example is worth a hundred such as Judge Peck has exhibited to the world.

Ay, but the delay! the delay! And what does this amount to? Can there be any difference in the effect whether a libeller is punished on the day after, or three months after, his offence has been committed? In most cases a judge, who knows he can stand upon the weight of his own character, will not suffer a prosecution to be commenced; but if there be any necessity for it, the offender can be punished within three months, in almost every state of the Union. Am I to be told that a libel against a judge is so atrocious an offence that he, with all his angry and indignant feelings fresh upon him, must be permitted to punish the offender without delay? It is ridiculous. This doctrine has been applied to such cases by a fancied but false analogy. In the case of a jury there can be no delay. It is of indispensable necessity to bring in the jurors upon an attachment, that the business of the court may proceed. The same rule holds with respect to

witnesses. The subpoena of the court must be obeyed, and all resistance be put down by summary process, otherwise a cause could never be tried. The same necessity exists in all other cases within the legitimate range of this power. But when the doctrine is transferred to libels against the judges, there is neither reason nor justice in proceeding in this summary manner. The judge, whose reputation would suffer between the offence and its punishment by the ordinary course of law, has no character worth preserving.

I would, (if it should not be deemed presuming,) cite the example of my native state. No such power has been claimed there on the part of the judiciary since 1803, and its exercise has been expressly prohibited since 1809. For nearly thirty years we have heard of no such proceeding; and yet I will undertake to say, that there is no state in this Union where a more habitual regard is manifested by the people to their courts of justice of every description. Since the Act of 1809, I have not heard of a single libel against a judge in relation to a cause pending in all that Commonwealth,—no, not one. Before the exercise of this usurped power was prohibited, cases of the kind were frequently occurring; and such will ever be the case, from the nature of man. A claim to the exercise of arbitrary power will ever meet with resistance in the human breast. It is a natural feeling, and when it shall be banished from the hearts of Americans, we shall no longer be worthy of freedom.

To show how far the power of punishing contempts is necessary, and what barriers ought to be erected against it for the preservation of personal liberty, I shall read to this Court the opinion of one of its members, whose name and whose fame as a jurist, have long been known to the American people. He places the entire subject on its true ground. To be sure, he is stating not what was the law of Louisiana, but what it ought to be. But in regard to the courts of the United States, what the law ought to be, it is. The inherent powers of these courts extends just so far as they are needed to carry into effect the purposes for which they were created. If the distinguished author of the work, at the time he wrote it, had foreseen the conduct of Judge Peck, as exhibited upon this trial, he could not have painted it and its dangerous consequences more truly than he has done, in the extract which I shall read.

“The power of punishing for contempts, in the extent to which it has been carried, it is believed has never been justified but by the plea of necessity. Its repugnance to all the fundamental principles which secure private rights in the administration of justice, is so apparent, that no other argument can possibly be used. The offence is the showing a contempt for the court. Of all the words in the language, this is, perhaps, the most indefinite. Every thing, that can, by any process of reasoning, be considered as a disrespect to the court, is a contempt. Blackstone enumerates seven different species of consequential, as contradistinguished from direct contempts, each of them comprehending a countless number of different acts, as distinct from each other in their nature, as all of them are from contempt, according to its strict definition. For instance, the second division of consequential contempts comprehends those committed by sheriffs, bailiffs, and other officers of the court, by receiving the parties—by acts of oppression—by culpable neglect of duty, &c. In short, there is nothing, from an indecorous gesture, or a rude hasty word, up to the most violent opposition to legal authority, that cannot be brought within the purview of the law of contempts. Printing a false account of the proceedings of a court, (or a true account while the suit is pending, without permission,) as well as speaking, or writing contemptuously of the court—treating a piece of paper, under its seal, with disrespect; and, to sum up all in the words of the apologist of the law of England, any thing that shows a gross want of regard and respect.

“Now I put it to those who contend that this power ought to be vested in courts,—I put it to them to say, what is the conduct that will secure a man against its exercise in the hands of a vain or vindictive judge?

“ A want of regard and respect ! ”—but regard and respect cannot be commanded but by moral conduct, and not always by that. The most correct conduct will not always secure it; the feeling is involuntary, and cannot be punished. But you must not show that you want it; it is the demonstration that is culpable. But how shall I avoid showing it? When in my own defence, or in the prosecution of my right, I differ from the judge, and show that the opinion he has given is absurd, certainly I treat him with very little regard or respect. I can feel none for a man who, by some miserable sophistry, deprives me of my right; and if I expose it to the world, I show my want of respect; but a want of respect is a contempt; I am, therefore, liable to be punished for defending my right in the only way that justice requires it should be defended. Oh, say the advocates of this tyrannical power, you must distinguish; attack the argument of the judge as much as you please, but say nothing disrespectful of the court. But what jesuit will teach me how I may tell a court, that it has decided against the plainest principles of law, without showing that I think they have been ignorant, careless, prejudiced, or worse? When I know, that by reason of either of these faults they are about to deprive me of my fortune or my life, can I feel ‘ regard or respect ? ’ When I state the reasons by which I demonstrate it, do I not, (clothe it in what language I will,) do I not make that want of regard manifest? and is not this (according to the very terms used by the author I have quoted) a contempt? It is amusing to observe the expedients which have been resorted to, to reconcile things that are irreconcilable—great respect for the judge and contempt for his opinion—professions of the highest veneration and regard coupled with allegations that show the speaker can feel neither—introducing, among other evils, a fawning, hypocritical cant, equally unworthy of the suitors and the judges.

“ An offence, so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded; none of them are preserved, and the plainest letter of the constitution is violated in its most sacred provisions. It declares, that in all criminal prosecutions the accused shall have the right of meeting the witnesses face to face, nor shall be compelled to give evidence against himself. Yet process of attachment for contempt issues on an affidavit, and when the defendant is brought in, it is not to meet his accuser face to face, but in direct defiance of the constitution to ‘ give evidence against himself,’ if he be guilty, under the penalty of being punished for a ‘ high and repeated contempt.’ The punishment by our statutes is limited to fine of fifty dollars and ten days’ imprisonment; but from the case cited in the note, it appears that the Spanish laws are still in force, unless there is an express repeal or incongruity between them and our statutes. With respect to counsellors and attorneys, there is such express repeal, but in no other cases. Now in the variety of offences created by the Spanish statutes, many relate to courts and judges, and to their officers and process; all these, by the sweeping definition of contempts may be properly considered as such; and as the Spanish law has been decided not to be repealed by our law of contempts, the aggravated punishment may, in those cases, be inflicted as it was in the one referred to in the note. But without this, if the punishment is confined to that directed by our statute—is that nothing? Is it nothing to be deprived of liberty for ten days, without conviction—without jury? Is it nothing to be forced to give evidence against yourself? The magnitude of the punishment is comparatively of little moment. It is the principle that is dangerous. A free citizen ought never to hold his liberty, even for an hour, or the slightest portion of his property, at the will of any magistrate. But those I have noticed are not the worst features of this species of punishment. Vague and uncertain as is the definition of the offence, yet if impartial persons were appointed to decide, whether any given word, look, or gesture, was contemptuous, there would be some security (a slight one, I grant) against oppression; but as if it were to make this example one in

which every principle of correct procedure was to be violated, the person offended is constituted the only judge—the judge without appeal; and lest his resentment should have time to cool, he is armed with the power of summary process—and if he want evidence, he may force the defendant to produce it. Let it not be said, as it sometimes is, that this is an advantage; that the defendant may, by his answers to the interrogatories, exonerate himself. Not so. In the case of contemptuous words, (and I see no reason why it should not extend to acts also,) if he admit the speaking or the writing, the court have the right to judge of the intent as manifested by the words; and although the party should deny any disrespectful intent in the most unequivocal terms, the court may declare that the answer is false, and proceed to impose the punishment; and this power is given too, in the very cases where it ought to be withheld. If it were confined to cases of actual injury, not only would the offence be more susceptible of proof—not only would there be a corrective in public opinion, which could be fixed upon the question, whether the injurious act had been committed or not; but the passions even of the party injured, if he were constituted the Judge, would be less liable to be roused. It is a trite, and therefore probably a true observation, that men forgive injuries much sooner than insults. Judges (although by vesting them with this power we treat them as angels) are men; their passions will be more readily roused by real or fancied insults than they would be by injuries; and nothing can be more at war with justice than passion. Another evil (there is no end to them) is, that from the nature of the crime, its existence must depend on the temper of the Judge who happens to preside. Words, which a man of a cool and considerate disposition would pass over without notice, might trouble the serenity of another more susceptible in his feelings or irritable by his nature. There is no measure for the offence, but the ever variable one of the human mind. The judge carries the standard in his own breast; and if, by close observation, you have discovered its probable dimensions, your work is but begun, for every succeeding magistrate has his own scale for the weight of an offence, his own measure for the extent of the punishment.

“I do but waste the time of the honorable body I address, in showing the dangerous nature of this undefined power; for its apologists cannot hide its hideous features. Blackstone acknowledges, that it “is not agreeable to the genius of the common law in any other instance;” but he does not attempt to justify it even from necessity, and contents himself with showing that it is of “high antiquity, and by immemorial usage has become the law of the land;” that is to say, that it is common law, and as that is the perfection of human reason, that it must be good. But here, where we are not satisfied in general with this reasoning, as summary as the process it is used to defend—here, and on this occasion, when we are inquiring, not what is, but what ought to be law—here some other argument must be used to show that we ought to adopt or continue this oppressive absurdity; and that argument is found in a single word—necessity. In the present improved state of human intellect, people do not so readily submit to the force of this word as they formerly did. They inquire—they investigate—and in more instances than one, the result has been, that attributes before deemed necessary for the exercise of legal power, were found to be only engines for its abuse. Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was, in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation. Let us examine whether this power does not partake of the same nature.

“A recurrence to the great principle of self-defence, which we have in a former part of this report developed, will serve to show with some certainty, as it is thought, to what extent this power is necessary or proper—society has, if our reasoning be correct, the right of self-defence. Every department created by that society for its government—every individual composing that society, has the same right, defined to mean the right of defending existence, and the operations

necessary to existence. But society, as the superintending power, must have for the purpose of securing these and all other rights belonging to departments and to individuals, the further power to punish. Society alone has this right. Try the law of contempts by this simple rule. Courts of law are the organs of one of the departments of society; and, to avoid confusion, we will select for one example courts of exclusively civil jurisdiction; such courts have the right to defend their own existence, and to repress every thing that interferes immediately with the exercise of their legal powers. They have this right, as a legitimate part of society, by the principles of natural law; and if it be curtailed by any constitutional provision, it is a great defect, because self-preservation very frequently requires immediate efforts that would make an application to any other power ineffectual. Every thing, then, that is necessary and proper to defend its existence, and secure the free performance of its functions, can with no greater propriety be denied to a court than there would be in forbidding an individual to defend his life against the attack of an assassin. But neither the court nor the individuals have necessarily the right to punish, either after the attempt has been repelled or after it has been carried into execution. That is the duty and the right exclusively vested in the whole society. An individual has the right to defend himself against an attack upon his liberty or life; but after he has successfully resisted it, he has no right to punish; yet liberty and life are considered as sufficiently protected by this limited power. Courts of justice have the same right to repel all attempts to interrupt the performance of their functions. They are incorporeal beings, whose existence is only in the performance of their functions—that is their life—that is their liberty. They are, or ought to be, armed with every power necessary to defend them. Noise, interruptions, violence of every kind, must be repressed; obedience to all lawful orders, which are necessary for the performance of their functions, must be enforced. Thus far the law of self-defence goes, but no further. Is the violence over—has the interruption ceased—is the intruder removed—has the order, which was disobeyed, been complied with?—Here the power of the incorporeal being, as well as that of the individual in the analogous case, ceases, and the duty of the sovereign power begins. That alone must punish—that alone can define offences and fix the penalty for committing them. An infringement of the legal rights of a court of justice is an offence, and that government is radically defective, which places the power to punish it in the hands of the offended party. Here, then, we find the limit of that necessity which is so much insisted on, and so little understood. There is a necessity that courts should have the power of removing interruptions to their proceedings, because, unless they can perform their functions, they cannot exist; but there is none that they should have the power to punish those interruptions; the laws must do that, by the instrumentality of the courts, but in the form prescribed by law.

“If the argument has been as clearly expressed as its force is felt, it must be convincing to show, that all those offences, distinguished by the name of contempts, ought to be banished from our penal laws which they disfigure by the grossest departure from principle; that courts ought to be empowered to remove all obstructions to their proceeding; that all those acts, as well as those tending to interrupt the course of judicial proceeding, to taint its purity, or even to bring it into disrepute, should be punished only by the due course of law; and that proper punishments, inflicted by the regular operations of law, will deter from these acts much more effectually than the irregular agency of the offended party, who sometimes, from delicacy, will abstain from enforcing the penalty of the law—sometimes, from the indulgence of passion, will exceed it.

“It is on these principles that this part of the code has been framed. It vests ample powers of repression in the court. They may remove every interruption to their proceedings; they may enforce prompt obedience to their orders; they may, if simple removal is not found sufficient, restrain by imprisonment; and after this, a regular trial and punishment follows for the offence. Here is no an-

gry altercation. All is done with the composure necessary to the dignity of justice. The judge is not the accuser; the accuser is not the judge. All that class of offences too, which consist in insulting expressions, are provided for. But here again an impartial jury decide, as well on the nature of the words as on the intent with which they were used. The Judge cannot improperly indulge his feelings, or restrain them, to the injury of public justice; and the offender against laws for preserving the order and dignity of the judiciary, is liable to the same penalties, entitled to the same rights, and judged by the same laws, that apply to other offenders.

“This chapter, then, far from derogating from the respect due to the judiciary, is calculated, in all its provisions, to enforce it; and the insinuation, that its author could be actuated by any hostility to that department, is not only groundless but absurd. If, indeed, it is hostility to a department of government to desire that none but its proper powers should be vested in it by law, or still less, should be exercised without law; if it be hostility to the judiciary to divest them of the odious accumulation of the offices of judge, party, legislator, and accuser, in the same person—to protect their functions in their exercise, and punish all attempts to interrupt them—then is this chapter dictated by a spirit of the most determined hostility.”

I shall not add a single word on this part of the subject. The proposition is here conclusively established, that the exercise of such a power is not necessary, and therefore cannot be inherent.

I shall now proceed to prove, that the power claimed and exercised by the respondent is in direct violation of the letter and spirit of the constitution. In order to demonstrate this proposition it is only necessary to contrast the provisions of the constitution with the proceedings of the Judge against Mr. Lawless. The constitution declares that, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” What does this mean? Does it not extend to all criminal prosecutions? And is it not established that the prosecution of a libel as a contempt is a criminal prosecution? In criminal prosecutions the rights of a citizen are never to be taken away, without a *trial by an impartial jury*. Impartiality is the attribute peculiarly required. But what does the law of contempts, as administered by Judge Peck, declare? That the dearest rights of a citizen may be taken away without any trial by jury, and by the sole authority of an angry, offended, and therefore partial judge. Need I add another word?

Again; the constitution provides, that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces,” &c. In England, where the power of punishing libels against judges as contempts came to the King’s Bench from the Star Chamber, a man may be prosecuted criminally upon a mere information filed by the law officers of the crown. But the constitution of the United States explodes this doctrine, except in cases arising in the land and naval service. In all other cases a grand jury must pass upon the accused, before he can be brought to trial. So careful has the constitution been of the liberty of the citizen, that it has blotted out forever the proceeding by information; although before any punishment can be inflicted, even by this mode, a petit jury must first have found the accused to be guilty. But what is the process in the case of contempts? Without either an information or an indictment, but merely on a simple rule to show cause, drawn up in any form the judge may think proper, a man is put upon his trial for an infamous offence, involving in its punishment the loss both of liberty and property. He is deprived both of petit jury and grand jury, and is tried by an angry adversary prepared to sacrifice him and his rights on the altar of his own vengeance.

The constitution declares, “that no person shall be compelled, in any criminal case, to be a witness against himself.” Now I ask can the English language furnish plainer words than these? Did not the respondent know when he called

upon Mr. Lawless to answer interrogatories upon oath, and on his refusal inflicted an additional punishment, that the constitution protected him against any such inquisition? If the constitution does not apply to a case of this kind, in the name of Heaven, when or where will it apply? By the common law of England, the refusal to answer interrogatories is itself "a high and repeated contempt, to be punished at the discretion of the court," and so thought Judge Peck; but the constitution interposes its protection, and secures the citizen against being called upon to answer. Even the courtly Blackstone, the apologist of every abuse under the British government, declares "that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance." 4 Com. 287. Now I verily believe that when the framers of that sacred instrument inserted in it the provision, "that no person shall be compelled, in any criminal case, to be a witness against himself," they had this very case of contempt full in their view. The power which they have forbidden did in this case exist in England; but even there it "is not agreeable to the genius of the common law in any other instance." What case so proper could they have had in view when they inserted this clause? They could never have intended that notwithstanding the provision, unless the accused would humbly crouch at the foot of judicial power, and swear that he had no intention to give the slightest offence to the judge, he should be liable to be severely punished. Such a doctrine would be repugnant to every feeling of a freeman.

Even the miserable pretext which existed for exercising this power in Pennsylvania and Tennessee, that the constitutions of these respective States had sanctioned a pre-existing "law of the land," which prostrated the barriers erected by these very constitutions for the protection of civil liberty, has no existence here. No law of the land for the United States existed previous to the adoption of the federal constitution. It declares that no man shall be compelled to bear witness against himself on a criminal charge; and I put the question home to each member of this high and honorable Court, whether the language must not be construed to extend to cases of this nature. Is there any thing else to which the provision can apply? This odious inquisition must certainly have been intended, as there is no other criminal accusation on which a man can, even by the common law, be required to bear witness against himself.

Let me here bring into the view of the Senate a fact on which I shall comment hereafter. The counsel has told us, that at first Judge Peck only intended to suspend Mr. Lawless; but in consequence of his refusal to have interrogatories filed, and answer questions upon oath, which might require him to bear witness against himself, and of his reading a paper to the court in the character of a protest or bill of exceptions, his punishment was aggravated by the disgrace of imprisonment.

[Mr. Wirt.—I spoke from the evidence.]

Yes, sir. With this constitutional charter in his hand, the Judge has branded Mr. Lawless with infamy, (so far as his sentence of imprisonment could do so) for refusing to give evidence against himself. But I shall treat more fully of this point hereafter.

The constitution further provides, that no person for the same offence shall be twice put in jeopardy of life or limb. But by the law of contempts, after a judge has first wreaked his own vengeance on the accused for the offence, considered as a contempt of court, the unhappy victim may afterwards be indicted for a libel, and thus again punished for the same offence.

The constitution of the United States does not contain the provision, which is to be found in almost every State constitution in the Union, that upon prosecutions for a libel, the truth may be given in evidence. The reason of this omission doubtless was, that as this instrument did not confer upon Congress any power to punish libels, there was no necessity for the introduction of such a clause. If the power exercised by the respondent does exist in the courts of the United

States, I presume no man will be hardy enough to contend that the truth of an accusation against a judge cannot be given in evidence in a summary prosecution for a contempt. What a spectacle would then be presented on such a trial! For example, I believe that a judge has in a certain cause decided absurdly, (and such a thing we know may happen.) I review his decision in one of the public journals, and prove that he has shewn himself to be a weak man; or I charge him with having been wicked and partial. If such be the fact, I have a right to establish it any where, and the truth every where ought to protect me from punishment.

I am called before this very judge, charged with a contempt of court, and the only issue to be tried by him is whether he himself is not weak or is not wicked, whether he has not made an absurd or a partial decision. What an exhibition would this be in a land of liberty! Could it ever have been intended to confer a power so absurd and so dangerous upon an American court of justice?

I now advance a little further in this argument, (although it is astonishing to me that any argument on such a subject can be necessary.) That sacred ægis—the liberty of the press—a right which Congress if they would, could not, and if they could, dare not infringe—shields every citizen of this land from the blow of such judicial tyranny. No free government can long exist without a free press. Power is constantly stealing on. One implication involves another, until liberty may be lost before the people know it is in danger. To preserve this invaluable boon, it ought to be watched with greater jealousy than ever was excited by the fabled guardian of the Hesperian fruit. Its safest protector is a free press; and the constitution of the United States has therefore declared, that “Congress shall make no law abridging the freedom of speech, or of the press.”

What was the intention of this provision? The framers of the constitution well knew, that under the laws of each of the States composing this Union, libels were punishable. They, therefore, left the character of the officers created under the constitution and laws of the United States to be protected by the laws of the several states. They were afraid to give this government any authority over the subject of libels; lest its colossal power might be wielded against the liberty of the press. They have guarded it with a wholesome and commendable jealousy.

In open violation of this provision, the sedition law was passed in 1798. This law, after having destroyed its authors, expired in March, 1801, by its own limitation. The gentleman who first addressed the court in behalf of the respondent has mistaken the argument of the managers in relation to this law. None of us ever contended that it was cruel and unjust in its provisions. It was more equitable than the common law, because in all cases it made an indictment necessary, and it permitted the truth to be given in evidence. The popular odium which attended this law was not excited by its particular provisions, but by the fact that any law upon the subject was a violation of the constitution. Congress had no power to pass any law of the kind, good or bad. It is now, I believe, freely admitted by every person, (I at least have not for several years conversed with any man who held a contrary opinion) that Congress, in passing this Act, had transcended their powers. I have no doubt that the motives of many of those who passed it were perfectly pure; but yet if any principle has been established beyond a doubt by the almost unanimous opinion of the people of the United States, it is that the sedition law was unconstitutional. Such is the strong and universal feeling upon this subject, that if any attempt were now made to revive it, the authors would probably meet a similar fate with those deluded and desperate men in another country, who have themselves fallen victims upon the same altar on which they had determined to sacrifice the liberty of the press.

Well, sir, and what then? It is contended by the respondent that although Congress could not bestow upon the courts of the United States the power of trying and punishing libels, yet that by implication he may exercise this authority and dominion over all men, who may dare to discuss his pretensions in the

public newspapers. That power which the legislature who created him could not confer upon him by express grant, he exercises by implication.

Shall then a petty judge—a petty provincial judge, (if it be lawful to use such language after the rebuke my colleague received) although Congress itself dare not pass a law for the punishment of libellers against its own members, or the President of the United States be permitted to sit as the sole judge in his own cause, and, in palpable violation of the constitution, fine and imprison at his own pleasure the author of a libel against himself? When the express power cannot be delegated, shall he take it by implication? Shall courts of justice exercise a power as a bare incident, vastly beyond what their creators could confer upon them?

If all courts do possess this authority, it may be wielded with vast power as an engine for the destruction of our liberties. We have always had in this country, and I suppose we shall always continue to have, angry political discussions. It would seem that such storms are necessary to purify the political atmosphere of the Republic, (though they are sometimes much more violent than agreeable.) Let me illustrate my views by putting a case in reference to the so much agitated question of our relations with the Southern Indians. This question has awakened intense feeling throughout the Union, and I doubt not has given birth to much honest difference of opinion. Some believe the President to be right in his views upon the subject, and others that he is entirely wrong. It would not become me here to express any opinion. But suppose the President of the United States were to institute suits against some one of the editors, who have attacked his character and assailed his motives, in relation to his conduct on the Indian question, what might be the consequence? The question then to be settled by such a suit would be, are these attacks true or false? Now you could not take up a paper in the District of Columbia, which would not contain one or more articles discussing the general question, and having a direct bearing upon the public mind in relation to the cause pending. These publications upon the principles on which Judge Peck acted would all be contempts of court. You might as well attempt to stop the flowing tide, lest it might overwhelm the temporary hut of the fisherman upon the shore, as to arrest the march of public opinion in this country, because in its course it might incidentally affect the merits of a cause depending between individuals.

Sir, is this a fancy picture? When a man, so distinguished as to be a prominent candidate before the people of the United States for the highest office in the country undertakes to redress his wrongs by an action for a libel, he attaches to himself the whole politics of the country, and thus all the publications in the papers of the United States on the subject out of which the suit arose are converted into contempts against the court in which it is pending.

I know something about a Governor's election in New York and Pennsylvania. The liberty of the press is on such occasions carried to its utmost limits. Charges are very freely made and very freely urged against the opposing candidates; and all the people of the state are deeply interested in knowing their truth or falsehood. The candidate who fears the public discussion of any charge made against him has nothing to do but bring a suit, and then according to the doctrine of contempts now asserted, all future publications upon that subject become contempts of court, and may be punished with severity by the judges before whom the action is depending. The current of public opinion must be stopped—the merits or demerits of the candidate must not be discussed—there must be an awful pause to await the event of a little libel cause in an inferior court. Such a doctrine cannot exist in this country. Carry it out to its practicable consequences and it becomes appalling. By a politic application of it, every judge in the land may become the tool of Executive power, or the instrument of preventing all attacks against his political favorites who may be candidates for office. These are not mere fanciful cases. They may occur in practice; and if the power should be sanctioned and established by the decision of this court, the day

may arrive when it will be resorted to for the most dangerous purposes. The time may come, when it shall be considered very necessary and proper to shield some future President from public discussion by the exercise of this power.

Why, sir, at this very time, from one end of the Union to the other, we find the public papers of a particular complexion ringing with attacks on the character and conduct of the Chief Justice of the United States, in relation to the Indian question now pending before the Supreme Court. I think these attacks are unjust, but to check them, would you silence the public press? Would you say that the Supreme Court ought to drag before it every editor in the country, and thus put an end to the discussion? I know that even if the court possessed this power, it would never be invoked by the present chief justice—a man upon whom any eulogy of mine would be lost. But if he resembled a Scroggs or a Jefferies, (and such men may yet hold that office) he would never rest content until he had inflicted vengeance, through the agency of this power, upon those who dared to attack his judicial character.

I have been considering the consequences of this power in regard to cases pending; but it would be infinitely worse in its application to cases which have been decided. The Supreme Court of the United States is vested with power, in the last resort, to construe the constitution. Constitutional questions are brought before it almost every term, involving great and extensive interests and in some cases the rights of sovereign states. Its jurisdiction is co-extensive with the Union, and from the very nature of things its decisions must agitate and inflame large masses of the people of this country. Judgment is pronounced, and the reasons for it go forth to the world in the form of an opinion. Is not this opinion as fair a subject of criticism as any other public paper? And will not and ought not such opinions to be freely criticized as long as liberty shall endure in this country? And yet upon the principles which governed the respondent's conduct, the Supreme Court possess the power to bring all the editors throughout the Union before them, who have dared to impute errors to their opinions, and punish them by fine and imprisonment at their pleasure. The bare attempt to exercise such a power would convulse the people of this country.

I recollect a case in my own state, which may serve to illustrate the absurdity of this claim of power. The Chief Justice of Pennsylvania delivered an opinion, that the Supreme Court of that state had no right to declare a state law unconstitutional. A United States judge took up this opinion, and in one of the periodicals of the day handled it very severely; more so, beyond all comparison, than Mr. Lawless criticized the Opinion of Judge Peck. If such a power had existed, here was a case for its exercise. The Supreme Court might have brought the District Judge of the United States before them on an attachment, and sentenced him to fine and imprisonment for scandalizing the chief justice, and endeavouring to bring him into odium and disgrace before the people.

If a judge be corrupt or partial in his judicial conduct, or should chance to be a fool, (a case which sometimes happens) it is not only the right but the bounden duty of his fellow-citizens to expose his errors. If a man should be notoriously incompetent for the judicial station which he occupies, though this may be no ground for an impeachment, yet it is a state of things on which the force of public opinion may rightfully be exerted, for the purpose of driving him from the bench. I admit that the case ought to be an extreme one to justify such a resort. But then, if this power to punish libels does exist, a judge may decide as he pleases without regard either to honesty or law; and then silence the public press in relation to his conduct, by denouncing fine and imprisonment against all those, who shall dare to expose the errors of his opinion. In such a case, upon the hearing before the judge, the greater the truth, the greater would be the libel. A weak judge, when his capacity is called in question, would always be the most cruel and oppressive.

As I have already referred to the Supreme Court of the United States, let me do it again. That illustrious tribunal, in the honest and fearless discharge of its

duties, has come into collision with many of the states of this Union,—with Pennsylvania, with Virginia, with Georgia, with Massachusetts, with New York, and with Kentucky. It has been abused and vilified from one end of the continent to the other. This has been its history since the foundation of the Federal Government. Has any man ever heard that the judges of this court claimed the power of punishing these revilers in a summary manner by fine and imprisonment? Have we, at any period of its history, heard the slightest intimation to that effect from any of these men? Not one. That court has often been in the storm. It has been assailed by the winds and the waves of popular opinion; but it has gone on in an honest and fearless course, and trusted for a safe deliverance to the good sense and patriotism of the American people. That tribunal needs no such power as has been claimed by this Judge in Missouri, and has never thought of resorting to the arbitrary and vindictive conduct, which has brought him to your bar.

I trust I have now succeeded in proving, that the courts of the United States can neither derive this power from the common law, nor from the Judiciary Act of 1789, nor from necessity; and that its exercise is in direct violation of the Constitution of the United States. Another question now presents itself, on which it may be proper to make some additional remarks.

Had Judge Peck power in this case to suspend Mr. Lawless from practising his profession? It is of importance to us who belong to the bar to know whether or not,—and to have the decision of this Court upon the question. If he had, the members of a profession which has ever stood foremost in this country, in the defence of civil liberty, are themselves the veriest slaves in existence. I believe that I have as good a right to the exercise of my profession, as the mechanic has to follow his trade, or the merchant to engage in the pursuits of commerce. I want then to know whether henceforward I must humble myself and become the sycophant of a judge, whom I may despise, under the penalty of being deprived of the right to practise my profession before him. If a judge be weak, or if he be wicked, his judicial conduct is as fair a subject of discussion among lawyers, as among any other class of citizens; and for exercising this right they incur no punishment, which cannot be inflicted on any other person. If this proposition be not true, they become the mere creatures of the court. Instead of being the firm and fearless asserters of their clients' rights, often in opposition to the preconceived opinions of the bench, they must cringe and assent to any and every intimation of the judge at the risk of their ruin. The public have almost as deep an interest in the independence of the bar as of the bench. The rights of the citizens, under the complete systems of modern times, can only be asserted and maintained through the agency of the profession.

Members of the profession may forfeit their right to practise, but this can only be done by the commission of some *professional* offence, or some crime of so black a character as shows them to be wholly unworthy to be trusted. For other offences they are subjected to the same punishments as their fellow citizens. Their official and their private acts are entirely distinct from each other. To show that Judge Peck had no right to suspend Mr. Lawless, I need not go further than 2d Petersdorff's Abridgement, 615, the book cited by the Judge himself. It proves conclusively that the high prerogative of striking an attorney from the rolls has never been exercised, even in England, except for grossly dishonest professional misbehaviour, or on a conviction of felony or other infamous crimes. This power has never been resorted to except in extreme cases. I admit that if, in this country, where the two professions of attorney and counsellor are generally united in the same person, an attorney in open court will manifest by his conduct a total want of respect for the judges, and will pursue a course tending to obstruct the public business before the court, they must from necessity possess the power of suspending him from practice. But it is not pretended that Mr. Lawless has brought himself within this rule. Was it ever heard of in England, that an attorney was stricken from the rolls of the court for writing and

publishing strictures no matter how severe upon the opinion of a judge? The research of the learned gentleman has not furnished us with a single case from the English books, nor a single dictum to that effect. If I write and publish an article, which a judge may choose to consider as a libel upon himself, is it not enough that he may appeal like other citizens to the laws of his country for redress, and have me fined and imprisoned for the offence? Shall he be permitted to take the law into his own hands, and add to this punishment a forfeiture of my means of subsistence, by taking away from me my profession? Even the punishment of a libel as a contempt, by fine and imprisonment, would be mercy, when compared with this power.

The Judge, in the same rule against Mr. Lawless, has embraced two things of an entirely different character. No two subjects can be more distinct, in their nature, than a rule to show cause why an attachment should not issue for a contempt, and a rule against an attorney, to show cause why he should not be stricken from the rolls. In the first case, the court must proceed without delay. Its process, or its lawful command, must be obeyed immediately, otherwise the progress of public business is arrested. If the order of the court be obeyed, either there is no punishment at all inflicted, or it is generally very slight. The suspension of an attorney from practice is of another character. The question then to be decided is, has his conduct been of such a character, as to require his expulsion from the bar? This is a question which need not be determined in a day or in a month. The spirit which dictated that provision of the common law, that the tools of an artificer shall not be distrained, ought to prevail upon such an occasion. When a man's all is at stake, or rather the means by which his all is acquired, there ought to be no haste in the proceeding, when no haste is necessary. But here this infuriated Judge had decided, from the very first moment, that Mr. Lawless should be suspended; and it has been alleged that it was not till after his refusal to answer interrogatories, that he determined to add the ignominious punishment of imprisonment.

And now we come to the case of Judge Conkling, of which so much has been said. The eloquent counsel seemed to take so much pleasure in referring to the report of the judiciary committee, in this case, and to look at me with such significant glances, that I had not the heart to interrupt his pleasure by letting him know, that I had nothing to do with that report, having been absent from the city when it was made. I never saw the report until this morning, and till then was entirely ignorant of the principles on which it was founded. The gentleman on my left, (Mr. Storrs) was also absent, as I am informed, having declined sitting upon the committee, for personal reasons.

But I shall not leave this report of the judiciary committee here. The case now on trial before the Senate, and that of Judge Conkling, are totally dissimilar. The good lady, Mrs. Bradstreet, or rather Mr. Tillinghast, (I cannot tell which) charged Judge Conkling, before the House of Representatives, with no less than thirty-eight judicial offences. If we had brought such a list before this Court, and each of them were to consume as much time as the single charge against Judge Peck has done, we might be occupied for years in the trial. The judiciary committee were unanimous in rejecting thirty-six of these charges. Concerning the two which remained, relating to Mr. Tillinghast's suspension, there was a difference of opinion.

It seems that Mr. Tillinghast, in open court, upon the trial of a cause, had drawn a most odious and revolting picture of a judge, which was intended by him, and understood by others, to be a delineation of the judge upon the bench. This was a direct and palpable insult, publicly uttered to his face. The judge, however, either did not understand it as it was meant, or determined to disregard it and suffer in silence. Tillinghast, some time after the session of the court had terminated, in a private conversation with the clerk, acknowledged that he meant the picture for Judge Conkling, and confessed the intentional indecorum of his language. The clerk warned him against using such expressions; but notwith-

standing, he requested the clerk to tell this conversation to Judge Conkling. On an affidavit of these facts, Mr. Tillinghast was brought before the judge, and on refusing to make an apology, was stricken from the rolls. For what? Was it for what he had said to the clerk out of court? No: but it was for the character which he had drawn in open court, in connexion with the acknowledgment he had made to the clerk, that it was intended as an insult to the judge. Though a majority of the committee expressed no opinion as to the legality of the judge's conduct, I am now willing to do so, and to declare, that, in my judgment, it was illegal. If the picture when drawn was not so distinct in its features, as to be recognised by the judge, or if he, perceiving the intended resemblance, chose to overlook the insult during the whole term at which it was committed, the time had passed by, and the liberty of speech protected the offending attorney. The judge could not at a future term institute proceedings and strike him from the rolls, in consequence of any private conversation he might have had with the clerk after the adjournment of the court. This is my opinion; but I never should have voted for an impeachment in such a case. Thirty-six of the charges were so frivolous as to be rejected unanimously by the committee, and the remaining two arose out of conduct well calculated to irritate and wound the feelings of the judge, and to induce him unconsciously to pass the doubtful limits of the law in the punishment of the offender. From the circumstances of the case, I could not have supposed that an intention to transgress the law was so clearly established, as to justify this tribunal in convicting the judge. Yet I believe that he acted improperly; and such should have been my report. In justice to myself I will also observe, that I entirely dissent from most of the reasoning contained in the opinion which he delivered, at the time the name of Mr. Tillinghast was ordered to be stricken from the roll.

A case has been cited from New Hampshire, and I would hope that there must have been some mistake in the report of it which has been read to the Senate. As stated, it presents a case of arbitrary oppression towards a member of the bar, unequalled even in English history. The judge I know to have been a very respectable man, and it is therefore the more extraordinary. It seems that an attorney, whose name was Freeman, in a conversation at a public tavern, observed that Judge Livermore was very arbitrary, and that he abused the lawyers, the parties, and the witnesses. He also inquired whether the judge ever studied, and expressed a belief that he did not read his books. This was a mere idle, loose conversation. For this language, which was carried by some tale-bearer to Judge Livermore, he struck the attorney from the rolls. Sir, what have we come to? In what state of society do we live, when such an act as this is cited before the highest tribunal of the nation, in justification of the conduct of a judge of one of the district courts of the United States?

I never had the pleasure of exchanging a word with the concluding counsel for the respondent, before the commencement of the trial; but I think I might venture to ask him, whether he had never, in familiar conversation, expressed opinions quite as derogatory to the character and attainments of judges, as those uttered by Mr. Freeman in relation to Judge Livermore. And who would endure it, that for such a conversation, the country should lose the distinguished professional services of that gentleman, and his family be deprived of his exertions for their support? (if they depend on those exertions, which I hope they do not.) Yet this case has been gravely cited to prove that Judge Peck had a right to punish Mr. Lawless by suspension.

As to the case from Tennessee; it probably arose from some misapprehension of the nature of the proceeding against Mr. Darby. The supreme court of that state, in their opinion, contend, that according to the doctrine of the English books, he had been guilty of a contempt, in publishing a libel against them; but instead of inflicting upon him fine and imprisonment, the only appropriate punishment for a contempt, they ordered his name to be stricken from the roll of attorneys.

[Mr. Grundy said, there was no proceeding in that case as for a contempt. Mr. Darby was stricken from the roll, on motion.]

Yes, sir ; but the court placed it on the ground of a contempt. I understand that in that state the law gives to courts the express power to strike attorneys from the rolls; but whether in this case they exercised it properly, I neither know nor care. It can have no influence upon the present trial.

What was the character of the libel against the court, does not appear from the report of the case ; but from what I have heard, I entertain no doubt it was of a very aggravated nature.

It is worthy of remark, that the court rested their power upon a provision in the constitution of Tennessee, similar to that contained in the constitution of Pennsylvania, which was used to shield C. J. M'Kean and the other judges, in the case of Passmore. The bill of rights, in both States, declares, that the accused shall not "be deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land."

But in concluding this part of my argument, I would again observe, that not a single case has been produced from England, (and if the counsel could have found one they certainly would have urged it,) in which the court of King's Bench, or any other court of that country, ever attempted to strike an attorney from the rolls, for publishing any thing derogatory to the court.

Having thus shown that the respondent has violated the constitution and laws of the country, I shall now proceed to discuss my second general proposition, which was, that he has done so with a criminal intention. This necessarily leads me into a discussion of all the material facts and circumstances of the case, as they have appeared in evidence.

[Here the court adjourned until tomorrow.]

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Saturday, January 29.

The Managers, accompanied by the House of Representatives, attended. The Respondent's counsel also attended.

Hon. Mr. BUCHANAN, one of the Respondent's Counsel, resumed and concluded his argument on behalf of the United States, as follows :

Without again adverting to the points which I discussed yesterday, I will now proceed to prove that the publication signed "A Citizen," is harmless in its character, and does not present an unfair representation of the Opinion of the court ; that it was such a publication as Mr. Lawless had a right to make, and that even if he were now on trial for it before a court and jury upon an indictment for a libel, he must be acquitted.

I know this part of the case will be from its nature uninteresting, but it shall be my endeavour not to be tedious ; and as I feel very strongly that the position I have taken is susceptible of demonstration, I ask the attention of the Senate to the argument by which I shall endeavor to sustain it.

On the 3d of February, 1795, Antoine Soulard, to whom the concession was made which gave birth to the proceeding in the present case, was appointed by the Baron de Carondelet "Surveyor of all the Districts of Illinois and New Madrid." On the 30th October, 1799, Don Zenon Trudeau, the lieutenant governor of Upper Louisiana, appointed Soulard his adjutant, or as he is sometimes called "the right arm of the Governor." It appears he was a meritorious officer, and discharged the duties both of surveyor of the province and adjutant. In consideration of *his public services*, lieutenant governor Trudeau, on the 20th April, 1796, made him a concession for 10,000 arpents of land. The existence of this grant was not disputed on the final hearing of the cause before Judge Peck. The question of concession or no concession had been previously submitted to

a jury, and they found that such a concession had been made in favor of Soulard. This fact is therefore taken for granted in the opinion of the court. A survey was made on this concession, by Don Santiago Rankin, the deputy surveyor, on the 20th February, 1804, and was duly recorded. From the final decree of Judge Peck in the cause, it appears he was then satisfied of these facts; although he now endeavors to cast a shade of suspicion over both the concession and survey. To prove the accuracy of this statement, I shall here quote a few lines from his decree. "And it further appearing, by the finding of the jury impannelled to try the issue directed in this cause, that such concession was made to the said Antoine Soulard, as in the said petition is stated. And it also appearing in evidence offered on the part of the said petitioners, that a survey of the said land was made, and a plat thereof recorded, as in the said petition is stated," &c.

On the fourth Monday of December, 1825, the court entered of record its final decree against the claim of Soulard. The fundamental doctrine on which the Judge rests this decree appears upon its face to be, that the concession had not been made, in conformity with the regulations of O'Reily, Gayoso or Morales, and that it was therefore "illegal in its origin and invalid." Now I apprehend, (though I am not going into any detailed argument on the subject) that the Supreme Court of the United States will not decide that these regulations furnished the only mode, by which a title to lands could have been acquired in Upper Louisiana. They have, I doubt not, been carefully examined by every member of the Court. I ask then does it not appear from their whole policy, as well as from their terms, that they were intended to apply to new settlers and their families—to emigrants;—and not to the old settlers—the ancient residents who were born in the province. Their policy is manifest. The Spanish government wished to encourage emigration from the British colonies, and afterwards from the United States to Louisiana. This is a well-known historical fact, and will not be disputed. With this view, these regulations provided for *the gift*, not for *the sale* of land. Onerous conditions, it is true, were imposed by Morales on these gifts; but still many people were induced to leave the United States and go into Louisiana, where land could be obtained for nothing. Now can it be supposed for a moment, that there existed no power in the governors of Louisiana to sell lands? or, what amounts to the same thing, to pay for public services by grants of lands? Spain has for more than a century been a needy government. The resources from her mines have not been sufficient to supply her wants. Under these circumstances, it would be one of the strangest freaks of despotism that history records, if the hands of the governors and lieutenant governors of this province were so tied up, that they could not pay the public servants of the crown in lands which were plenty, instead of money which was scarce. I believe it will be found, on the final adjudication of this cause, that the laws of the Indies in relation to the disposition of the public domain, with such modifications as the situation of Louisiana rendered necessary, were in force, as well as the regulations of the governors and intendant. In this I may be mistaken.

Had Judge Peck suffered the decree which he pronounced to stand upon the reasons appearing on its face, whether they were right or wrong, we should never have heard of this impeachment. But he was not satisfied to permit it thus to remain. Months after the date of this decree, and after the cause had been removed from his court, and whilst it was pending in the Supreme Court of the United States, the Judge published in a Missouri newspaper a very long and elaborate opinion in support of his decision. This publication was made at the request of some members of the bar (though not of Mr. Lawless), and it appeared in the Missouri Republican, printed at St. Louis, on the 30th day of March, 1826.

You have all read this Opinion. I have read it over and over again. I have carefully examined it, paragraph by paragraph, yet I must confess that the precise extent to which the Judge has decided the questions he discusses is beyond my ability to determine. The propositions run so much into each other, and there is such a want of precision throughout, that I believe few lawyers in the

country would undertake to say, in every particular, what the Judge did decide. In this sentiment I know that I do not stand alone.

But although any accurate analysis of the Opinion would be a work of much difficulty, it is easy to perceive that the Judge intended to cut up every Spanish land claim in Missouri by the roots. He does not leave one particle of ground upon which any claimant could rest a single hope. Their prospects, should all the principles of this decree be affirmed, must vanish at once into thin air. Instead of confining this Opinion to the case of Souldard, which was in several respects peculiar, he virtually decided against every possible concession, which could have been made by any lieutenant governor. Such a publication appearing in a partizan newspaper, under the authority of Judge Peck, was well calculated to produce a strong excitement throughout the State of Missouri. What came next in order? On the 8th of April, 1826, the article signed "A Citizen" appeared in "the Missouri Advocate and St. Louis Inquirer." Was it improper in Mr. Lawless to touch this subject? I may be wrong, but I hold it to be the imperative duty of an attorney to protect the interests of his client out of court as well as in court. The case of Souldard had gone up to the Supreme Court on appeal. It had ceased to be a pending cause in the District Court of Missouri. The cause was then pending in the Appellate Court at Washington. In this state of things, the very Judge from whose decree the appeal was taken comes out with a publication, called an Opinion, which went to destroy the land claims of all the clients of Mr. Lawless, root and branch. Under such circumstances, I insist that it was not merely the right, but the duty of Mr. Lawless to reply. I should have considered him derelict in that professional fidelity to which he had bound himself by oath, if he had suffered such a publication to remain unanswered. The effect of his silence probably would have been to render his numerous clients throughout Missouri and Arkansas the prey of speculators. We have it from his own lips, that to prevent this consequence was his chief reason for publishing the article signed "A Citizen."

It seems, from the evidence in this cause, that Judge Peck has adopted a singular practice, which I hope is confined to Missouri. After he has made his decree, and the cause is removed to an Appellate Court to be decided upon its merits, and whilst it is still pending there, he has got into the habit of publishing his Opinions in the newspapers. This is not the practice with us in Pennsylvania, though it may be elsewhere. Wherever it may exist I cannot but consider it a very bad practice; and I hold it to be the right of any attorney in such a case fully and freely, though in respectful language, to discuss the merits of such an Opinion. A judge surely has no peculiar right to spread his opinions before the world, particularly in a cause still pending in another tribunal, without being subject to have them examined and answered. If he will go into the newspapers, before the Appellate Court has either set its seal to his decision, or has reversed it, he must expect to receive newspaper play. He would best consult his dignity by waiting until the cause is finally decided.

Now I ask, is the article of Mr. Lawless a libel? I read in the English books that a publication attributing error even to Majesty itself, if couched in respectful language, is not a libel, although it be a fundamental principle of that government that the King can do no wrong. Vide 2 Campbell's Rep. 398. Holt's Law of Libels 109. 4 Blackstone's Com. 159, late edition. Although but a slender portion of liberty is enjoyed in that country compared with our own, yet the subject may discuss the public conduct of the King himself, and charge him with errors of judgment, provided no bad motives be imputed.

Every person must admit that the publication of Mr. Lawless is perfectly decorous, and every way unexceptionable in its language. This has not been denied throughout the trial. Indeed, considering his peculiar genius and temper, I am astonished he was the author of a production so dull, flat and uninteresting. It is wholly destitute of that zest, which a little spice of ill-nature would have communicated.

And can it be pretended that the article of Mr. Lawless attributes any bad motives to Judge Peck? Have the gentlemen ever contended that it did? Can any man who examines it say, that it contains one word or syllable or letter imputing or even hinting at any corrupt or improper motive?

But further, in England when mere error of judgment has been imputed to the King, even if it can be clearly shown that the author himself, and not the King, has been wrong; still such publication is no libel. All the subjects of the realm have a right to discuss questions of public policy; and they may charge his Majesty with as many errors as they think proper, provided no wicked or corrupt motive is attributed. This principle of the common law applies directly to the present case.

In regard to courts of justice, they need not be treated quite so tenderly as the monarch. In regard to them,—a writer may even censure their opinions without being guilty of a libel. “It is undoubtedly within the natural compass of the liberty of the press, (says Holt, in his *Law of Libels*, page 170) to discuss, in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error, and, provided it be done in the language, and with the views, of fair criticism, to censure what is apparently wrong; but with this limitation, that no false or dishonest motives be assigned to any party.” Now, judging the article of Mr. Lawless by this doctrine, if he were on trial on an indictment for a libel before the Lord Chief Justice of England, he must be acquitted. He has attributed no bad motives, he has used no indecorous expressions. He has not censured the Opinion of the Judge. His whole publication consists in an enumeration of errors, which he thought he had discovered in that Opinion.

And has it come to this;—that in our happy country,—the home,—the chosen sanctuary of freedom, a mere suggestion that a judge is not infallible amounts to the crime of a contempt, and that the attorney who dares to make it may be fined, imprisoned and suspended from his profession? We are not obliged to show, that Mr. Lawless was right and the Judge was wrong on the points about which they differed in opinion. If we were, it is my impression, that in regard to most if not all of them, we could establish this proposition.

But it has been contended, that although Mr. Lawless in his publication may have neither used improper language nor attributed bad motives, yet he has misrepresented the Opinion of the Judge. Is this the fact? The manager who preceded me has gone over the first nine specifications of error contained in the article signed “A Citizen,” and I shall briefly review the nine which remain.

The Judge himself, in his answer to the article of impeachment before the Senate has connected the tenth, thirteenth, and fourteenth specifications, and I shall so consider them together. They are in the following language:—

“10. That the complete titles made by Gayoso are not to be referred to, as affording the construction made by Gayoso himself, of his own regulations.”

“13. That the complete titles produced to the court made by the governor general, or the intendant general, though based on incomplete titles, not conformable to the regulations of O’Reilly, Gayoso, or Morales, afford no inference in favor of the power of the lieutenant governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.”

“14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the lieutenant governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.”

I think, upon the strictest scrutiny, that these three propositions will be found to contain a fair representation of the Opinion of the Judge. Mr. Lawless, for the purpose of proving that the lieutenant governors of Upper Louisiana had the power to make concessions of land to the ancient inhabitants of the province, independently of the regulations of O’Reilly, Gayoso or Morales, and even at war

with their provisions, invoked the very authors of these regulations themselves, and produced to Judge Peck these solemn and repeated acts, confirming titles which were founded upon such concessions. He proved by the conduct of the men who ordained these regulations, that they recognized another mode of obtaining grants of land, in Upper Louisiana, wholly distinct from that contemplated by their own ordinances. What more powerful appeal could be made?

The Judge in his Opinion expressly admits these facts, and states the argument of Mr. Lawless which was founded upon them. He says, (page 73) "but complete titles have been produced, to show, that, in some instances, the regulations have not been conformed to by the governor general, and by the intendant, in confirmations made by them; and it is thence insisted, that they were not in force in the province of Upper Louisiana, or that if they were in force there, they were only intended to provide for grants to emigrants and new settlers, and were not intended to provide for grants to the inhabitants generally; and that some law must be presumed, which authorised grants of land to the inhabitants generally, in pursuance of which the confirmations mentioned were made."

Now, what did the Judge decide upon these facts and after this argument? Did he not determine that these concessions of the lieutenant governors, thus perfected into complete titles by the governors general, afforded no sufficient rule of construction to guide the court to the conclusion, either that these regulations were not in force in Upper Louisiana, or if they were, that any other mode existed independently of them by which a title could be obtained? The effect of these concessions thus confirmed is explained away on the principle, that they must be considered as exercises of the dispensing power of the governors general in favor of individual grantees. They were acts of despotic power above the law, and therefore could not establish the existence of a power under the law. This was the very essence—the pith and marrow—of his decision.

In regard to these three specifications the Judge cannot complain, as he has of others, that they only present the naked point decided, without any of his reasonings or explanations. The second specification expressly states, that the reason why these complete titles are not evidence of a rightful authority in the lieutenant governors to grant lands is, that they "must be considered as anomalous exercises of power in favor of individual grantees."

Here allow me to read one paragraph from the Opinion.

"That the governor general, who exercised a legislative power generally, and particularly for the distribution of lands, should feel himself authorized to dispense with the observance of any of the provisions of his own laws, is not strange. Such a dispensing power is incident to the legislative department of every government. Legislation implies discretion in respect of the rules which are to be prescribed. The governor general, with whom it was to exercise the power to make the law, could change it, or could dispense with its observance, either on his part, or on the part of the claimant; and it is probable, that instances of the exercise of this dispensing power were not rare. That he should have been influenced by the particular circumstances of any case not within the law, or even by personal considerations of regard, in making grants, not provided for by his own laws, is a presumption more to be relied upon than that which is contended for on the part of the petitioners."

Now, let any member of this Court examine these three specifications carefully, and I will venture to say he can find no misrepresentation in them. If there is, I am wholly at a loss to discover it. Yet the respondent, still under the dominion of those feelings, which have brought him to your bar, says in his answer before this Court, "that these charges are not true. So far from it, they are diametrically opposed, in point both of fact and doctrine, to the grounds really assumed and maintained by the court." Did the respondent suppose that by using such language he could give additional weight to his answer? Throughout the whole of it, we have the specifications extracted by Mr. Lawless from his Opinion denounced "as gross and palpable misrepresentations," as suggestions of false-

hood and suppressions of truth, with other characteristics of a similar nature which I shall not repeat. He has exhibited here the same spirit, which first induced him to pronounce the article of Mr. Lawless false, calumnious, libellous and scandalous. Expressions are used in almost every page of his answer, which (in my humble opinion) policy as well as propriety ought to have forbidden.

The reason given by the respondent, why these three specifications are not true is, that he did admit the evidence for the purpose of raising a presumption in favor of the power of the lieutenant governor to make the grant in question. Do either of those specifications deny that this was the case? By no means. What Mr. Lawless complained of was, not that the Judge refused to receive the evidence; but that after it was admitted, he considered it of no avail. That although these complete concessions were received in testimony, their effect was afterwards destroyed, on the ground that they must have been individual acts of a supreme dispensing power, and therefore afforded no proof of the existence of any general law. The specifications do not deny the admission in evidence of these complete concessions for the purpose of raising a presumption; but they assert that in fact they raised no such presumption in the mind of the Judge, and were not referred to by him as furnishing "the construction made by Gayoso himself of his own regulations." In the language of the Judge, in the 25th page of his letter to the House, he "thought it more rational to refer the confirmation to the sovereign power of the confirming officers, than to infer from that act a power in the inferior, not found in the charters from which all his powers seemed to be derived." What more than this has Mr. Lawless stated in the specifications now before us. This sentence of the Judge condenses the meaning of the whole three, and shows that he was neither misapprehended nor misrepresented by Mr. Lawless.

I come now to the 11th specification. I know that they are all a barren waste, and I shall travel over them as speedily as possible. It alleges the Judge to have decided, "that although the regulations of Morales were not promulgated as law in Upper Louisiana, the grauttee in the principal case was bound by them, inasmuch as he had notice, or must be presumed from the official station which he held, to have had notice of their terms."

It had been contended by Mr. Lawless, that these regulations were never promulgated as law in Upper Louisiana. As to this fact the testimony was contradictory. In which scale the preponderance was, it is not now necessary to decide. If it were, I think it could be shown that the weight of evidence was against their promulgation.

The Judge does not decide, either that there was a promulgation, or that there was not. He evades this question by deciding, that whether or not, such a publication was proved as must have brought them to the knowledge of the ancestor of the petitioners, who was the surveyor of the province, and that was sufficient. If this be not his plain meaning, I do not understand the English language, (perhaps I do not.) I will quote the Judge's own words to those who understand it better.

"In answer to that portion of the argument, on behalf of the petitioners, which denies the force of law to the regulations of Morales, in Upper Louisiana, for their supposed want of promulgation, it is only necessary to remark, that such a publication is proved as must have brought them to the knowledge of the ancestor of the petitioners. The official station which he held does not permit us to believe, from the publication proved, that he could have been ignorant of the forfeiture to be incurred by a failure on his part to comply with the commands contained in these laws. It is, therefore, unnecessary to decide, whether, according to the principles of justice which prevail in our courts, this tribunal can regard a forfeiture as incurred, even under the Spanish government, and by a subject of that government, for disobedience to laws which had never been promulgated."

Is Mr. Lawless then incorrect in this specification? How does the Judge answer it? By a sweeping denunciation. "Here (says he) is another gross and

palpable misrepresentation." Now I call upon all who can read and compare two papers with each other to say, whether Mr. Lawless has not attributed to the Judge, that which the Judge did decide.

The Judge in his answer wishes to divert our attention from the main proposition to the mere conditional assumption in the commencement of the specification, "that although the regulations of Morales were not promulgated as law," and to convert this into an absolute declaration that he had decided they were not so promulgated. But who does not perceive that the leading and principal feature of the decision, and that which the specification intended to embrace, was, that Soulard being a public officer must have known of the existence of these regulations, and was bound to obey them, even though there had been no public promulgation sufficient to make them binding upon others? I will not follow my colleague (Mr. McDuffie) in exposing the absurdity of this principle. If I had been writing such an article as that of Mr. Lawless, I should have applied to this decision the proper term, and pronounced it to be absurd. But whether it be so or not, is not now the question. We are considering not whether it is wrong, but whether it has been misrepresented by the specification. The 12th specification is "that the regulations of Morales exclude all belief that any law existed under which a confirmation of the title in question could have been claimed."

Although this specification is in the very language used by the Judge himself, yet he pronounces it in his answer to be "another instance of the suggestion of a falsehood, arising from the suppression of truth." And what is the suppression of which he complains? It is that of the argument which brought him to this conclusion. It was the intention of Mr. Lawless in penning this article to make an abstract for public information of the principal points, which he thought had been wrongly decided in this very long Opinion. To have given the train of reasoning by which the Judge supported his different conclusions would have entirely defeated the object of the publication. He might as well have published the whole Opinion at once. And yet he is charged with the suggestion of falsehood by a suppression of the truth, because he gave the very point decided without adding the reasoning on which it rested. Those who were desirous of seeing that could refer to the Opinion itself, which had been previously published.

Now the point thus presented to the public, in the very words of the Judge, was the essence and spirit of his whole Opinion. It is the foundation upon which it all rests. It was introduced into the original decree long before the Opinion was published. Why does he now shrink from it? Is he conscious that he was wrong? And does he want to conceal his error under cover of an attack upon Mr. Lawless? He complains that the preamble to the regulations of Morales was not inserted in this specification. It would have been manifestly improper to publish this alone; because the Judge's decision, that "the regulations themselves exclude all belief that any law existed, under which a confirmation of the title in question could have been claimed," was his deduction from the whole regulations, preamble, articles, conclusion and all.

The Judge in his answer has grouped the 15th, 16th, and 17th specifications of the article together. They are contained in the following language:—

"15. That the uniform practice of the sub-delegates or lieutenant governors of Upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as a proof of law, usage, or custom therein."

"16. That the historical fact, that *nineteen-twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reilly, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles."

"17. That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution *ab intestato*, furnishes no inference in favor of those

titles, or to their claim to the protection of the treaty of cession, or of the law of nations."

Now I will venture to assert, and I believe every lawyer who has examined this case will concur with me in opinion, that let the final decision of the case of Soulard be made when and where it will, it must eventually depend upon the nature and extent of the practice referred to in these three specifications. No court acquainted with its duty will at this late day venture to destroy the titles of a whole province founded upon a uniform practice which has existed since 1765. Although the lieutenant governors may have had no legal authority in the commencement to grant concessions for land; yet it is now too late to disturb that question. In such a case the maxim would apply in all its force, that "*communis error facit jus.*" The peace and the property of society demand the application of this rule.

The Judge in his answer evidently approaches these specifications with an air of triumph. He alleges that no proof was given of the facts upon which they rest; and that no such assumptions are contained in his Opinion. What would have been his decision had these facts been proved, he says it is needless to inquire.

First, then, as to the 15th specification. The Judge or those who prepared his answer must have treacherous memories. Though he alleges that the facts contained in this assumption were not in proof, yet in the very page preceding he informs, us that the evidence alluded to in this very fifteenth charge was objected to by the district attorney of the United States, but was received by the court. Nay, more; the Judge says he admitted it "on the very ground that it raised a presumption in favor of the power of the lieutenant governor to make the grant in question." In his letter to the House of Representatives he connected this 15th assumption with the 10th, 13th, and 14th; and in all his reasoning upon them on that occasion, he never thought of denying the facts upon which either of them was founded. On the contrary, he makes it a point to declare, that he had admitted the evidence offered of the facts contained in the 15th assumption.

But even if he had not committed himself by his own solemn declarations, his denial would be of no avail. The proof contained in the record of Soulard's case is ample. The testimony of Col. Delassus—the last lieutenant governor of Upper Louisiana, establishes the practice beyond a doubt. The *Livre Terrien*—a book of record, contains a list of grants down to the year 1795, and they were all made by the lieutenant governors. Did the practice change after that date? Has there been or can there be shown a single concession of land in Upper Louisiana, made by any other authority than that of the lieutenant governor? But I proceed further, and will cite Judge Peck himself as my witness. When he decided the case of Soulard he had no doubt but that this practice had been clearly established. In his decree he says, "and it appearing that it was the practice of the lieutenant governors of Upper Louisiana to make concessions of land, in virtue of their office as such governors," &c. and afterwards in his Opinion he takes the practice for granted. And notwithstanding all this, we are informed by the Judge in his answer, that "the uniform practice alleged in the 15th charge was not in proof, and therefore that proof could not be disregarded." The Judge is also wrong in declaring that there is no such assumption as the fifteenth in his Opinion, "nor one word to countenance" it. On the contrary, taking this practice of the lieutenant governors for granted, he destroys its effect and puts it down; because of its supposed hostility to the regulations of O'Reilly, Gayoso and Morales. But I shall quote his own language. "The presumption (he says) which arises in favor of the validity of the acts of the supreme authority, especially such as the enactment of regulations and the acknowledgement of the authority of these for a series of years, is of a higher nature than that which arises in favor of the legality of a single act, or even a series of acts, such as concessions of land by the lieutenant governor; particularly when these acts are to

be subject to the approval and confirmation of that supreme authority, which gave those laws that were to regulate the subject of concessions."

The Judge ought to have left this 15th proposition in the same company with which it entered the House of Representatives. He cannot escape by merely changing its position, and informing the Senate, that as the facts contained in it had not been proved, it is needless to inquire what might have been the decision. Is there then any doubt of the existence of this uniform practice? And must not the cause of Soulard, in the end, be decided by its extent?

The facts contained in the 17th proposition are but corollaries from the 15th. If it be true, that all concessions of land in Upper Louisiana were made by the lieutenant governors, it follows, as a necessary consequence, that they must have been "treated and considered by the population and government of that province as property, saleable, transferable and the subject of inheritance and distribution ab intestato." The historical fact, stated in the 16th proposition, is extracted from Stoddard's History of Louisiana—a book which was before the Judge on the argument of the cause, and has been read to the Senate.

Mr. Lawless, in the 4th, 5th and 6th pages of his printed argument, placed these facts clearly and strongly before the Judge. They were main points. And if he has given no answer to these points, but has passed them over in silence; if he has disregarded them both in his decree and in his Opinion, is Mr. Lawless to be censured for stating in his specifications, that the Judge had assumed they furnished no inference in favor of the legality of such claims? If I were arguing a cause in Pennsylvania, depending upon an actual settlement, and I should contend, that it had been the uniform practice of that commonwealth to give a right of pre-emption to actual settlers, and the court should decide the cause against me without noticing this argument, should I not be justified in saying they had disregarded this practice as a proof of law, usage or custom?

But, says the Judge, if these facts were proved, how could I take them for granted? Were they not proved? I think the affirmative has been clearly shown from the testimony. But suppose they were not, for what purpose was the judge appointed? Who would think it necessary to prove as matter of fact to a judge what was the foundation of the titles to land in the country over which he was called to adjudicate? Was it not his duty to master this subject, before he took his seat upon the bench? The Act of Congress of 1824, under which he acted, called imperiously upon him to make himself acquainted with the land titles under the Spanish government. It is not possible he could have been ignorant concerning them, without shutting his eyes on all that was passing around him. This cause was argued in 1824, and again in 1825. He had before him both Stoddard's History and the printed argument of Mr. Lawless. That argument referred him to a list of cases on the records of the court of St. Louis, in which these unconfirmed concessions had been treated as property. The facts alleged in the specifications were not denied by Mr. Bates, the district attorney. All the inhabitants of the country knew them to be true. Here then was a Judge residing in a country, all whose original Spanish titles were founded on concessions from lieutenant governors, who must have daily witnessed around him sales and bequests and descents of these titles—and must have known that they formed the subject of a great portion of the landed transactions of the country; and yet this Judge, who has never pretended to deny the existence of these facts, comes before the Senate and says, what would have been their legal effect had proof of them been offered, it is needless to inquire. What judge in Maryland would think of receiving proof that the original titles of the people in that state were derived from Lord Baltimore, or in Pennsylvania that they came from William Penn? It would be equally absurd for a judge in Upper Louisiana to require proof that their original Spanish titles sprang from the grants of their lieutenant governors.

But, says the gentleman, the courts in England have refused to regard even Camden as authority for a historical fact. Be it so. Is this a mere historical

question—or is it not a question concerning what is the law of the country in which the judge resides? Who ever heard that any judge required this to be proved to him as a question of foreign law. It was his duty to be acquainted with the subject, and Stoddard's History contained no more than what he ought to have known, and what I have no doubt he did know without it.

If then there had been no express language in the Judge's Opinion upon which these specifications could have rested; yet as the propositions contained in them had been plainly presented to his view and strongly insisted upon in the argument, the very decree against the claim of Soulard, necessarily decided that they were to be disregarded. Without this assumption his decree would have been the reverse of what it was. Surely, when a party rests his cause upon a point, and the decision is against him, the judge must have assumed that this point ought to be disregarded.

The last assumption is, "that the laws of Congress heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles of a precisely similar character which remain unconfirmed."

The Judge declares in his answer that he made no such assumption. If he means that he made no such assumption in express words, it is true; but it is equally certain that in substance and in fact he has decided that the former Acts of Congress, under which many of these incomplete Spanish titles had been confirmed, afforded no protection to similar titles which remained unconfirmed. If this had not been his decision the title of Soulard would have been protected.

I think that on this point Mr. Lawless stands upon ground not to be shaken. The 2d section of the Act of 1824 prescribed, that the validity of the titles on which the Judge was authorized to decide should be determined "according to the law of nations; the stipulations of any treaty, and proceedings under the same; *the several Acts of Congress in relation thereto*; and the laws and ordinances of the government upon which it is alleged to have been derived." Now it is an established and admitted fact that incomplete concessions of a character similar to that of Soulard had been confirmed by the commissioners under previous Acts of Congress, over and over again. The Act of 1814, although it limits the power of the Board to a league square, yet recognizes these incomplete grants, and to that extent expressly authorizes their confirmation. From my present impressions, had I been the judge, I should have thought that as the Act of 1814 had positively sanctioned these titles to the extent of a league square; and as the Act of 1824 prescribed no limit in regard to the number of acres, the question was no longer open, and that if the concession were a fair one, I was bound to grant a confirmation of it as a matter of course. In my decree I might have referred to the Act of 1814, as the law under which such a claim was confirmed; and I thus answer the question asked by the Judge, to what law could he have referred as his authority in case his decree had been in favor of Soulard?

This point was strongly urged by Mr. Lawless. Its discussion occupies several pages of his printed argument. What answer does the Judge give to it in his Opinion? All that he says upon the subject is, "that the part of the Act which requires the court to determine 'the question of the validity of the title according to the several Acts of Congress,' &c. has been adverted to, on behalf of the claimants, but not seriously relied upon as furnishing the ground of a claim to confirmation in the present case. Upon this point it is only necessary to remark, that there is certainly no Act of Congress, which would authorize the confirmation of the present claim, or any part thereof."

Not seriously relied on! So far from this being the fact, it was relied upon as conclusive. The Act of 1824 did not like the former Acts limit confirmations to a league square; it was unlimited. No matter how many arpents the claim covered; if just, it might be confirmed. The principle had been settled by the Act of 1814 that these incomplete titles were valid, and yet the Judge makes a decision, which swept from his docket all such claims, at the very moment those

claimants, confiding in principles settled by former Acts of Congress, were looking to his tribunal for a decision which would secure their rights. After all this, he now complains of Mr. Lawless for informing the public, that he had decided that these Acts of Congress afforded no protection to the claims.

I hold in my hand a list of other errors alleged to be contained in this Opinion, which might be enumerated, but I shall not occupy the time of the Senate in reading it. I contend that Mr. Lawless had a right to make the assertion contained in the specification; and that in this as well as in all the others he has stated the truth and nothing but the truth. He has been guilty of no misrepresentation. The miserable excuse of the Judge in regard to the four last, that his Opinion passed them over in silence—although his decision was against them, cannot avail him before this tribunal.

Upon the whole, then, the respondent had no just cause even to be offended with Mr. Lawless on account of his publication.

I now come to the vital and essential part of this cause; and I do contend that if there were no evidence before the Senate but the Opinion of the court, the article signed "A Citizen," and the fact of its author's imprisonment and suspension, these would be sufficient ground to pronounce the respondent guilty. If he had the heart to proceed coolly and deliberately, without passion, and to cloak his malice under a fair and kind exterior, I should not believe him to be the better man, for being able so well to play the hypocrite. But the facts of this case leave nothing for conjecture. They speak in a language which cannot be misunderstood. It will now be my endeavor to present them before this Court, in a distinct and perspicuous manner, according to the order in which they occurred.

On Monday, the 17th of April, 1826, Judge Peck issued a rule against Stephen W. Foreman—the editor and publisher of the Missouri Advocate and St. Louis Inquirer, commanding him to appear on the next morning, and shew cause why an attachment should not issue against him for a contempt of court. The language of this rule is remarkable, and discloses the source of the whole proceeding. In it the Judge declares himself to be satisfied that the article signed "A Citizen" contained "a false statement" of a judicial decision delivered by him in the case of Soulard against the United States. He was not only satisfied in the first instance of the falsity of the statement, but that it tended "to bring odium on the court, and to impair the confidence of the public in the purity of its decisions."

In the circumstances in which the Judge was placed after he had determined to proceed, what ought to have been his course? He ought to have expressed no opinion; but merely called the editor before him on a general rule to show cause why he should not be attached for the publication. But before Mr. Foreman came before the court, or one word had been uttered in his defence, nay, before the issuing of the rule against him, the respondent had prejudged the cause. He had determined the publication to be "a false statement," "tending to bring odium upon the court and to impair the confidence of the public in the purity of its decisions;" and this prejudication he grafted into the rule.

And here let me pause for a moment. No man who had a proper regard for his character would ever sit in judgment in any case even between strangers on which he had previously formed and expressed a decided opinion. He would never commit himself so much. Even if he were conscious that he could banish former impressions from his mind and be impartial, still his course would be viewed with suspicion, and there are always men enough in the world to attribute evil motives to the most upright actions. But here the respondent, notwithstanding he was both the accuser and the judge, decided at the very onset that the article was false, and calculated to make him odious before the public.

In the case of Almon, Lord Mansfield declined to sit in judgment on his own

cause. Here, however, it may be said, that Judge Peck could not avoid it, as he was the sole judge of the court. Be it so. Then the necessity was still the greater, that he should have observed a prudent and impartial course, and heard every thing before he pronounced any decision. But without hearing any thing, and before the rule was issued against the party accused, he had prejudged the merits of the whole case, and decided that the publication was a contempt of court. From such a beginning nothing was to be expected but passion and tyranny throughout the prosecution. After this, the whole trial was but a mere mockery, a cruel farce. The Judge had foredoomed Lawless as his victim. In the very first stage of the proceeding his article was decided to be a contempt.

At the return of the rule on Tuesday, the 18th April, Mr. Lawless appeared as counsel for Mr. Foreman. Did not the scene now exhibit a strange spectacle in a land of freedom? On the bench sat the Judge for the purpose of deciding his own cause brought before him upon his own accusation, and if we are to believe the argument of his counsel, he had unlimited power to fine and to imprison Mr. Lawless at his own pleasure—to inflict any punishment upon him short of mayhem or death. His will was the law. At the bar stood Mr. Lawless, a victim destined for the sacrifice. Although this proceeding was in form against the printer, yet Mr. Bates has sworn that he then believed and still believes, Judge Peck as an individual did not doubt from the beginning but that Mr. Lawless was the author of "A Citizen." The rule against the printer was merely a mode of reaching the author.

The manner of the two men presents a perfect contrast. The high and gallant bearing which Colonel Lawless had sustained upon the field of battle covered before this judicial tyrant. (Why should I not call things by their proper names?) His manner we are told "was subdued," more than the witnesses had ever seen it. Instead of exhibiting the warmth and ardor of his native country, he became tame and spiritless. Whilst on the other hand, the calm cold manner of Judge Peck was changed into violence, passion and rage. We are indeed informed that he sometimes smiled, but it was only when Mr. Lawless, unable to conceal the author under the counsellor's robe, was betraying himself and rushing into the toils which had been prepared for him.

We are told that Mr. Lawless was heard before the Judge. But how was he heard? He began to demonstrate the truth of the article signed "A Citizen," but instead of being allowed to proceed in this, which was the vital part of his defence, he was interrupted at every step. According to Judge Wash, (the respondent's own witness) he used such language as this to Mr. Lawless. "In this you are mistaken;"—"this has no authority;"—"this not only does not present the Opinion of the court but is against that Opinion, directly in the face of it;"—"it is not true;"—"it is false." These interruptions were not merely occasional, but continued throughout the entire process of the argument. The Judge not only attempted to argue each point with him, as he proceeded; but when he was on one point, would confuse him by rudely directing his attention to another. And when he had no other reply at hand, he would tell him this is not true, "it is false." What kind of a hearing was this? What a spectacle was here for the American people!

It has been said that nothing is more common than interruptions of counsel by the courts. They are common, perhaps too common. In this manner counsel are often put off the train of their argument. But is it common in any civilized country upon earth, whilst a counsel is decently endeavoring to advocate a cause before the court, for the Judge to interrupt him—and contradict him in the coarsest language, and wrong him at every step, as Judge Peck did on the present occasion? Mr. Lawless at length became confused and embarrassed, and after struggling along through part of two days, he could no longer sustain himself, but took his seat before his argument was concluded. "This I inferred, (says Mr. Geyer,) from the point at which he quit, and the manner he dropped the papers in his hand."

But there is another fact immediately connected with this part of the case, which proves conclusively how very improper the conduct of the Judge must have been:—and one such fact is worth a hundred arguments. His particular friend—the District Attorney, a gentleman whose character is well known to the members of this Court, observing the influence under which he was acting, and dreading the consequences, felt it to be his duty to violate that decorum which forbids a member of the bar to speak privately to a judge in relation to a question pending before him, and to advise him “to let the matter drop as easily as possible.” This interference of Mr. Bates I have no doubt sprang from the best feelings and the purest motives. Still it shows how strongly he must have been impressed with the impropriety of the Judge’s conduct, when he ventured to give him such advice. What was the Judge’s answer? I will here read it from the testimony. “Pending the rule upon the printer, (says Mr. Bates) I was about to volunteer advice to the Judge, that in point of policy, it would be well to let the matter drop as easily as possible, if it could be done. But he gave me promptly to understand, that his course was taken, and that it was matter of duty which could not be omitted.” Yes! a matter of duty to rush on in his mad career against the faithful advice of his best friend.

There is another circumstance of a still stronger character, which the counsel for the respondent have not even noticed. Mr. Geyer appeared before this Judge in behalf of the printer, as a volunteer. The respectability of his character is well known to every member of this court. At that time a contest existed in Missouri whether the Constitution of the State ought not to be changed, so as to limit the judicial office to a term for years, instead of during good behavior. The celebrated letter of Mr. Jefferson to Kercheval had produced a strong disposition among the people to render the judiciary dependent, and reduce the period of judicial service. Mr. Geyer was a friend to the judiciary—a known advocate of the permanence of the judicial office. After he entered the house of Mr. Penrose, where the court was then sitting, that gentleman taunted him with the disposition to punish, manifested by Judge Peck, and urged it as an argument in favor of changing the constitution. Mr. Geyer, anxious to prevent a course of proceeding, which he feared would be seized upon to excite further prejudice against the judiciary, and raise the clamor still higher, appeared before Judge Peck as the advocate of the printer. He had never been asked to do so by any person; but as an honest and patriotic citizen, for the sake of his country and to sustain the truth and soundness of the opinions which he had espoused, he voluntarily interfered and did his utmost to arrest the Judge in his infatuated course. What, sir, must have been his conduct to create this state of feeling in Mr. Geyer? Here was a man of as high a character as any in Missouri—cool and dispassionate—who interposed merely to prevent the respondent from doing an act, which by its violence and tyranny might be a deadly blow against the independence of the judiciary. After all this, we have been told that it is necessary this Judge should escape in order to protect the character and standing of the judiciary. Escape from what? From the consequences of an act which before it was committed Mr. Geyer solemnly believed would sully the character of the whole judicial body to which he belonged. Actuated by these laudable motives, he made an argument which would have convinced any mind not wholly pre-occupied by prejudice. He used much policy. He made no attack upon the Judge’s vanity. He did not touch the article of Mr. Lawless, because he well knew that the Judge regarded the Opinion, which it alleged to be erroneous, as the apple of his eye. He would not have been heard patiently in any remarks to prove the truth of that article, or even that a single error existed in the Opinion. He steered clear of all the Judge’s prejudices. Admitting the misrepresentation and libellous character of the article, he contended it could not be punished as a contempt of court. What points did he urge in support of this proposition? 1st. That no cause was pending; and that the published opinion of a judge after a case had been finally decided, was a fair sub-

ject of criticism, and that the article was therefore only punishable as a libel. 2d. That such a power violated the constitutional guarantees of the freedom of the press and the trial by jury. Mr. Geyer presented the subject much in the same manner as I have attempted to present it before this court. Of his ability to do so with great force there cannot be the least doubt. He read the Constitution of the United States and the Bill of Rights of Missouri. He did not go to England for authority, but relied on the constitution of his country to protect the rights of the American people. To use his own language he "endeavored to impress the Judge with the danger of exercising a power by implication—not strictly necessary—which seemed to be so directly against the letter of the constitution."

But the Judge did not take a moment for reflection after the argument was concluded. He over-ruled it immediately, without assigning any reasons. So impatient was he, that he delayed the delivery of any opinion, until he could get the author of the article before him. The court then adjourned.

On the next day, Thursday, 20th April, 1826, Mr. Foreman, the printer, appeared, gave up the name of Mr. Lawless as the author of the article, and purged himself of the contempt. The manner of this purgation has a strong bearing on the subject before us. We are indebted for it to the testimony of Mr. Bates. Mr. Foreman declared on oath, "that he as editor had examined the manuscript as he commonly did the communications made to his paper, to ascertain that it was decorous in its terms and manner, that finding it unexceptionable in that respect, and having a responsible author, he published it, without knowing or inquiring into the truth or falsity of the statements it contained. And that in doing so, he had no intention to commit a contempt, or treat the court with disrespect." Here then was the editor of a paper, well acquainted with the land claimants and capable of judging the effect which the publication might have upon the society around him, who came into court and swore that he believed the article to be decorous and unexceptionable in its terms and manner, and that in publishing it he had no intention to treat the court with disrespect.—If the Judge had not been fixed as fate in his cruel purpose, all these circumstances combining would have induced him to pause and reflect. The advice of Mr. Bates, the powerful and conclusive argument of Mr. Geyer, the oath of Mr. Foreman, and the repeated declarations of Mr. Lawless himself, whilst arguing for the printer, of the absence of any intention, on the part of the author of the article, to misrepresent the opinion of the court, were all brought to bear upon his mind; but their only effect seemed to be the more violently to excite his passions and heighten his indignation.

A rule is made upon Mr. Lawless to appear *forthwith*. That which was bad enough in the first rule now becomes much worse. "The false statement" in it is now magnified into "false and malicious statements." The tendency of the article is not now merely stated as in the first rule; but the author himself is charged with an "intent, by its publication," to impair the public confidence in the upright intentions of the said court, and to bring odium upon the court; and especially with intent to impress the public mind, and particularly many litigants in this court, that they are not to expect justice in the causes now pending therein; and with intent further to awaken hostile and angry feelings on the part of the said litigants against the said court, in contempt of the same court." The conclusion of this rule is a still greater outrage. It calls upon Mr. Lawless "*forthwith*" to "shew cause why he should not be suspended from practising in this court, as an attorney and counsellor therein, for the said contempt and evil intent." Without one moment's delay, he is called upon to answer, why he shall not be deprived of the exercise of that profession on which he and his family depended for existence. It is not merely why he should not be fined and imprisoned for a contempt, but this mild, placid, dove-like Judge, as he has been represented, dictates also a rule against Mr. Lawless to show cause *forthwith* why in effect his wife and children should not be made beggars.

What! Is there any precedent of a proceeding like this? Had the Judge but taken time to refer to 2 Petersdorff's Abridgement—the book which he has cited here, he would have found that a rule upon an attorney to show cause why he shall not be stricken from the roll is a very different matter from an attachment. But his vengeance could not tarry. He was eager to inflict the double punishment of consigning Mr. Lawless to disgrace by sending him to the common prison, and depriving him of the power of practising his profession, so long as this land court should endure. And yet we have been talking about the *quo animo* of this transaction, and whether the whole might not have proceeded from a pure and disinterested, if not from a benevolent motive. A picture has been presented to us of a man filled with the very milk of human kindness—with a heart pure, tender and guileless as a child of three years old—and whose whole conduct has been so correct as to win for him the warm friendship of the counsel, who last addressed you in behalf of the Respondent. Of Mr. Lawless I will here take occasion to say what I believe to be strictly just. I profess no friendship for him, for my friendships are not quite so sudden; but from what I have seen of him (which has not been very much), he has exhibited the model of an Irish gentleman. That he has failings I have no doubt. I believe he has; but they proceed from the ardor and intensity of his feelings,—feelings which belong to the brave and gallant nation from which he springs. He may be hasty and impetuous, but a braver or a warmer heart beats not in a human bosom. I admire and I respect him, and am so much his friend that I wish to see him have justice, and so far as God shall give me ability, every effort of my mind shall be directed to the attainment of that object.

On the 26th May, 1724, the Act passed enabling the District Court of the United States for the state of Missouri to try the validity of these Spanish land claims. It required all claims to be presented to the Court within two years. Any claim thus presented and not decided within three years after the passage of the act, "on account of the neglect or delay of the claimant" was forever barred. The claims were to be filed before the 26th May, 1826, and to be decided before the 26th May, 1827. To suspend Mr. Lawless for eighteen months from 21st April, 1826, was to banish him forever from that court, if the law had not been afterwards extended.

Some evidence has been given, but for what purpose I cannot conceive, unless to mortify the feelings of Mr. Lawless, that he had but little business in the court, except that arising from the land claims. Be it so. He had devoted the whole energy of his mind to the investigation of the Spanish laws and customs, and of the treaties relating to these land titles. He naturally became concerned for most of the claimants and interested in their claims. They were that on which he rested his hopes of fortune. Under these circumstances this Judge called upon him to show cause forthwith why he should not be deprived of the opportunity of prosecuting any of these claims, and thus in fact lose nearly all his practice. Most truly may he be said to have been foredoomed. But we are told that the Judge did grant him a delay until the afternoon! This is most true. He actually extended the rule for half a day, to enable him to attend to some urgent business in another court!

After all these indications of the Judge's feelings, what could we expect from the trial itself? Could it have been any thing but what it was, an outrage on the constitution and laws of the country? It was then high time for Mr. Lawless to take his stand. He then resolved upon his course, and to that resolution he stood firm and steadfast. As an American citizen, I rejoice at the determination which he exhibited. After his argument in behalf of the printer had been over-ruled with contumely, after he had been publicly insulted and his character traduced, he acted as a man ought to have acted. Hitherto I have yielded, but henceforward I move not a step. I put it to each member of this Court whether it was not such a determination as he himself would have made? Mr. Lawless felt as he ought to have felt. He

then gave instructions to his counsel to make no apology. The time for apology was over. When arguing the question for the printer before the Judge, who then well knew that the article was written by Mr. Lawless, he repeatedly declared that the author had no intention to offend the court. These declarations were all made in vain; and the Judge had exhibited such a spirit that when he was called upon to answer in his own person, he felt it to be his duty to stand upon his rights as a man and as a citizen.

The trial commenced on Thursday afternoon. And how? Mr. Magenis took up the article and attempted to prove, that it contained no misrepresentation of the Opinion. The Judge immediately cried out, Stop, sir, that question has been already fully argued and decided on the rule against the printer. I shall hear nothing further upon that point. But had it been fully argued? No. Mr. Lawless had indeed attempted to argue it, but he had been interrupted and insulted at every step, until he became embarrassed and sat down in despair before his argument was completed. And how had the question been decided? It is true the argument had been immediately over-ruled, but no opinion was given. Besides, this was on the rule against Mr. Foreman. Was not the rule against Foreman distinct from the rule against Lawless? Was it the same cause? Foreman had purged himself of the contempt, and been discharged. Mr. Lawless was now the accused. Here was a new rule against a new man—the old one having been dismissed. Upon this new charge Mr. Lawless had a constitutional right to be heard by counsel. Yet this Judge determined that his Opinion should remain a mystery,—that it should not be analyzed and exposed to vulgar gaze. He stopped Mr. Magenis, and would not allow him to utter one word for his friend upon that point, which was all important for his defence against the prosecution. Has any case ever occurred in the United States where upon the trial of a criminal offence such a high-handed course was attempted?

But why should the Judge have considered one question as open, and the other not so? The counsel were not prohibited from arguing the question of jurisdiction. They were allowed to show that the proceedings of the court were unlawful and violated the constitution, though these topics had been discussed on the former rule both by Mr. Lawless and Mr. Geyer. These were still held to be open points. But when the Opinion—the sacred Opinion was approached, the Judge cries out, Forbear! You must not touch this monumentum ære perennius. You may argue as long as you think proper to show that I am trampling upon the constitution and violating the dearest rights of an American citizen. That point is still open. But the Opinion:—do not venture to discuss it. That door is forever closed.

Mr. Magenis and Mr. Geyer now argued the same questions, which the latter had argued on the rule against the printer. Mr. Geyer came better prepared to press his points than he had been before, and Judge Wash tells us his argument was methodical, logical and well digested. Colonel Strother then rose and began to violate his instructions by making an apology for the article. He was stopped and privately requested to take his seat. One of the counsel (Mr. Meredith) asked Mr. Geyer "what ground of argument was Colonel Strother taking, when you interrupted him?" The answer was, "He was taking none, as I thought. I considered him as making rather an apology than an argument. It was on that account that he was interrupted." I shall never forget the air and the manner with which Mr. Geyer declared in the conclusion of his testimony that he thought it not a case for apology.

Whether there was now a short recess of the court is uncertain. On this point the evidence is contradictory.

A spectacle was afterwards presented such as I trust will never again be witnessed in any part of these United States. The Judge took off his goggles, and bound up his eyes. God knows I do not attribute this weakness of his eyesight to him as a fault. I am sorry for his misfortune. But such was the

fact. He sat upon the bench blindfold. Mr. Bates the district attorney was then called upon to read the article of Mr. Lawless, paragraph by paragraph, and on each as it was read the Judge commented. And such comments! And that too from a court of justice! Such was the impression made on the bystanders, that one of the witnesses tells us, that among the multitude which thronged the court, he did not hear a single man say the Judge was doing right. Mr. Lawless, meanwhile, sat silent and submissive. He uttered not a word. He only showed by the flush upon his countenance the indignant feelings which were struggling in his heart. He remained until he could endure it no longer. But before he left the court house, he consulted with his counsel, whether his withdrawal could be construed into a contempt. What was the answer? Either that he was not obliged to remain there, and hear himself abused, or listen to such a torrent of abuse. It is stated in both ways by the witnesses.

As the Judge proceeded he became more violent. Judge Wash, his leading witness, admits that he "spoke in strong terms of the publication." He used the words "false" and "malicious." He frequently used expressions of this kind, "That is wholly unfounded." "This is clearly false and without foundation except in the malice of the author." And he says that remarks like these occurred throughout the whole course of the analysis of the publication. They were not merely occasional bursts of passion, but it was a steady current of malicious and abusive language. The epithets used were very various. The words "false," "scandalous," "libellous" "unfounded," "slanderous," "calumniator" were all used over and over again in the course of this harangue, which lasted for about two hours. We may form some faint idea of what must have been its tenor and spirit, from the expression used by the Judge in his answer to the article of impeachment. The terms embodied in that document have left a lasting monument to posterity of the temper and feeling under which this American judge must have acted.

The Rev. Mr. Horrall, a gentleman who was merely passing by accident and had never been in the court before, and whose high character places him above all suspicion, says, that the Judge appeared to be under vehement excitement. He used the words "slanderer," "falsehood," and "misrepresentation," and the witness thought he intended to apply these epithets to the author of the publication. But why need I enumerate all the witnesses, who have given testimony of a similar character? As if to cap the climax of abuse, the Judge declared that such a calumniator as the author of the article, had he lived in China, would have had his house blackened, as an emblem of the blackness of his heart. Even Judge Peck himself could go no further. A large majority of the witnesses state the expression in this or a similar manner. Two or three of them, however, say that the terms used were not directly and personally applied to Mr. Lawless, but they were used by the Judge as an illustration of his argument. In every material part of their testimony, however, there is no disagreement. Whether the one or the other version be the truth, there can be no doubt but that it was the Judge's intention the audience should point to Mr. Lawless, as the black-hearted calumniator whom he had described. Now I ask one and all of the members of this Court, whether, in the course of their experience, they have ever known a man convicted even of murder and brought before the court for his final sentence, to receive any thing like such a cruel and inhuman taunt, as that the very house in which he lived ought to be painted black, as an emblem of the blackness of his heart.

I may be wrong in another particular. I have inquired of many learned men whether they had ever heard or read of such a custom in China as that to which the Judge has adverted; and the answer of them all has been in the negative. I may be displaying my own ignorance, but I have certainly never met with any thing of the kind. The gentlemen on the other side have referred us to no book asserting the existence of such a custom. Still I might not be warranted in applying to Judge Peck the language which he used to Mr. Law-

less, and pronouncing this Chinese custom to be without any foundation except in his own malice.

When the dearest rights of an American citizen are at stake, I will not stoop to answer such observations as have been made by one of the gentlemen on this part of the case. What, sir, when this Court is solemnly engaged in investigating an outrage committed against the liberties of this country, shall we suffer our attention to be led away to a farcical scene in a play of Kotzebue? Do gentlemen believe they can laugh out of court a fact, which every man who has a heart must feel to have been the extremest aggravation of insult and cruelty. Sir, under such circumstances wit is out of place; and if, feeling strongly and as I think justly, I did often repeat the same question to the different witnesses, I did not expect to be treated with a sneer.

[Mr. *Wirt*.—The remark to which the gentlemen seems to allude was, I can assure him, perfectly sportive in its character, and that nothing like a sneer on the gentleman was thought of or intended.]

If so, I retract the remarks to which it gave rise.

It is scarcely necessary to waste a word upon the question whether Judge Peck was in a passion, whilst he was delivering this opinion against Mr. Lawless. All the circumstances of the case prove that he must have been. The mass of the testimony establishes the fact that he was vehement and excited to a degree beyond what the witnesses had ever seen him. Both Mr. Geyer and Judge Wash declare that they had never observed the Judge's manner to be so impassioned as on this occasion. Whether he was in a passion or not, is wholly immaterial; but were it otherwise, the fact has been clearly established. His passion is some little extenuation of his guilt. Had he done what he did coolly and deliberately, the evidence of his malignity would have presented a still darker hue.

I have now come to the last scene. An attachment issued against Mr. Lawless. He was brought into court in custody of the marshal. The Judge then, with a good deal of formality, (to use the language of Judge Wash) asked him if he wished to have interrogatories exhibited, and whether he would answer them if they were exhibited? To which he replied that he did not require any interrogatories to be propounded, and if they were he would not answer them.

Now, sir, after the Judge had occupied about two hours in proving that the article of Mr. Lawless was false, scandalous and malicious—that it had no foundation except in his own malice—and that its character was so infamous that even in China the man who could write it would have his house painted black to denote the blackness of his heart, and to warn the public against him; after he had thus held Mr. Lawless up before the assembled multitude, he asks him whether he will not answer interrogatories, and purge himself upon oath of the contempt. Sir, had he consented to answer them under such circumstances, the certificate of his naturalization which he has exhibited with a decent pride before this court ought to be destroyed, and the man who could have so disgraced it ought to be driven back to the country from which he came, there to crouch and fawn before a lordly aristocracy. But, no sir, the spirit of his "father-land" beat high in his bosom:—a spirit which the oppression of centuries has not been able to subdue. I trust and believe that rather than submit to such wantonness of tyranny, he would have yielded up his life as a sacrifice. Yet a gentleman whose name I believe is Carr has told us that he thought, at the time Mr. Lawless refused to answer the interrogatories, there was something contemptuous in his manner, and the witness has illustrated by exhibiting to the Senate the posture in which Mr. Lawless stood. He was asked whether Mr. Lawless had used any disrespectful language, and the reply was that his language was perfectly respectful, but there was a something in his manner which did not accord with that respect, which from the pre-conceived notions of the witness he thought due to judicial dignity.

I put it to the heart of every member of this most dignified Court to say,

whether under such aggravations he would have answered interrogatories? Did not the constitution protect Mr. Lawless? Was it not his right to refuse to be sworn in a prosecution against himself? Yet we have been told that for his refusal to answer he was imprisoned 24 hours, and that until he had refused, it was the Judge's intention to inflict no other punishment but that of a suspension from practice. Here then we have presented to our view an attempt made by an American Judge to compel an American citizen to be a witness against himself; and for no other crime but because he stood upon his constitutional rights, and determined that he would not be sworn, we see him doomed to imprisonment long enough to brand him with disgrace so far as this could be inflicted by such a sentence.

When Mr. Lawless was called upon to answer interrogatories, we are informed he was a good deal agitated. After his refusal, he read a paper to the Court which he desired might be entered upon the record. That paper is in the following language:—

In the District Court for the District of Missouri, sitting at St. Louis, on the 21st day of April, 1826, for the decision of land titles.

The United States }
 vs. }
 L. E. Lawless. }

Be it remembered, that on the day and year aforesaid, the said court called upon the said defendant to know whether if there were interrogatories filed in this cause he would answer them, which the said defendant declined for the following reasons, which he assigned to said court in the words following: First, I refuse to answer the above interrogatories, because this court has no jurisdiction of the offence charged upon me, in manner and form as the court has proceeded against me. Second, because the positions ascribed in the article signed "A Citizen" are true, and fairly inferred, and extracted from the Opinion of this court in the case of Soulard's widow and heirs *vs.* the United States, as published.

"To this request, (I use the language of Judge Wash) the Judge answered that it could not be put on the record, and that if it were it would answer no purpose, or something of that kind. On which Mr. Lawless remarked it was of no great consequence, and then threw the paper down and seated himself. Mr. Magenis then took up the paper and asked the Judge whether, if it should be signed by the by-standers, he would permit it to go on the record? The Judge appeared to me to hesitate, and seemed for some time at a loss, and then replied it would answer no purpose, and could not go on the record in that shape either." Whether this paper was called a Bill of Exceptions, or what name was given to it, the witness could not say.

I have been thus particular in stating this transaction from the lips of the principal witness of the respondent, because it has been much relied upon both by him and by his counsel. But with what justice, let Judge Wash himself determine. The following question was propounded to him by the court: "When Col. Lawless read the paper which has been called a Bill of Exceptions, was it pronounced by the Judge, or supposed by you, to be intended as a new contempt?" To which he answered, "I never regarded it in that light, nor was any thing said by the court that I remember, which induced me to believe that the court so regarded it."

Let me make a few observations in explanation of this part of the case. We have seen that under the law of Missouri a writ of error is allowed in cases of contempt, and the judges of the Court of Error may suspend the execution of the sentence by a supersedeas. Mr. Lawless therefore, in the hurry and confusion of the moment, must have thought that he might derive some benefit before a superior court from having this paper placed upon the record. It never

occurred to any of the witnesses at the time, that the reading of it was a contempt, and we have the oath of Mr. Lawless that he had no such intention.

Another singular practice prevails under the laws of Missouri, which they have borrowed from Kentucky. When a Judge refuses to sign a Bill of Exceptions, the party may appeal to the by-standers for their signatures. Mr. Magenis must have had this in his view, when he asked the court if they would permit the paper to go upon the record, if it were signed by the by-standers. Upon this proposition the Judge doubted. He at first hesitated, and seemed to be at a loss how to decide. But at all events, both the testimony of Judge Wash and Mr. Magenis prove conclusively, that no insult to the Judge was either given or intended by this proceeding.

The Judge without further delay pronounced the fatal sentence against Mr. Lawless of imprisonment for 24 hours, and a forfeiture of his means of livelihood for eighteen months.

Was not this a "cruel and unusual punishment?" Does it not violate an express provision of the constitution? Why should he not have been satisfied with the infliction of a fine? Why not punish Mr. Lawless through his pocket? It is not pretended that he had before ever shown any want of respect for that court. This was the first instance. Even if the Judge had possessed the power, a fine of 50 or 100 dollars would have answered every purpose of punishment, and would have been sufficient to warn others against offending in like manner. This in every point of view would have been infinitely better. But no! Mr. Lawless must be disgraced. He must be sent to gaol. He must never again appear in that court as the advocate of any of the land claims, to acquire a thorough knowledge of which he had devoted several of the best years of his life. I ask one and all of you to consider seriously the nature and extent of this punishment, and the provocation. Can it have proceeded from a pure motive and a virtuous intention? Was it merely to vindicate the character of the court? The honor of the judiciary?

But the vindictive feelings which urged the Judge to inflict this punishment had not cooled even twenty-two months after. Mr. Lawless then went from his home at St. Louis to attend the session of the District Court at Jefferson city, a distance of 140 miles. He was there comparatively a stranger. When he modestly presented himself for admission, the Judge immediately asked in open court, whether the period of his suspension had expired. Is there a man within the sound of my voice, who can for one moment suppose, that the Judge asked the question for the sake of information? Can that be possible? The punishment of Mr. Lawless was an era in his life; it was engraved upon his memory, and will remain there forever. Yet several months after this suspension had expired when Mr. Lawless, in a strange place, and before a multitude of people to whom he was unknown, asked for admission, he is treated with indignity. Judge Peck deemed it necessary and becoming his judicial character, to inform the multitude that he had affixed a stigma upon this man.

There is another circumstance to which I must advert before I conclude. A witness by the name of Walker has been examined. His testimony never would have been admitted by the Court, save on the principle that it might tend to show the feelings of Mr. Lawless, and thus prove that he was a prejudiced witness. Having been received upon this ground, it was afterwards used by the counsel for a totally different purpose. After Mr. Lawless had been goaded by oppression into madness, and was actuated by those feelings which naturally belong to an injured and suffering man, the intemperate language which oppression provoked and extorted from him has been gravely urged as an argument to justify his oppression. The effect has been relied upon to justify the cause.

Mr. Walker met Mr. Lawless in his garden in the Spring after his suspension and imprisonment. Every object around was calculated to remind him of the punishment he had endured and was still enduring. Whilst showing Mr. Walker his improvements, he spoke of the hardship of his suspension. He

observed that it had done him much injury and interfered essentially with his business. But for it, he said, his improvements would have been in a more advanced state. In the very bitterness of his soul, however, he was unwilling to take any unmanly advantage of Judge Peck. He exclaimed, that if the Judge, after his eye-sight should be restored, would meet him on the field of honor (of false honor, I admit), "he would let him off from going to Washington." This language, wrung from him in his own garden, is brought here by Mr. Walker, who was subpoenaed to prove it; and this is the manner in which the Respondent has been defended. Sir! no act of the life of Mr. Lawless subsequent to the punishment inflicted upon him can be proper evidence in this cause; but I am astonished, considering the well-known ardor of his temperament, that they have not been able to prove more declarations of a similar character. I have not a doubt but that he has a thousand times expressed the most indignant feeling at his persecution.

I have now nearly done with this case; and in conclusion I shall strongly express what I strongly feel. I do most solemnly believe if this Judge shall escape punishment, the description which has often been contemptuously applied to the power of impeachment, that it is but the scare-crow of the constitution, will hereafter be strictly just. But the acquittal of this man may have a still worse effect. If the power of impeachment presents no prospect to the people of removing an arbitrary and tyrannical judge, what will be the consequence? They will soon begin to inquire whether the judicial office ought not to be limited to a term for years. At the commencement of this trial, I should have shrunk with horror from such a proposition. But if there be no other alternative;—if the people must either be cursed during a long life with an arbitrary and oppressive Judge who has trampled upon their rights, or the constitution must be so amended as to limit the term of office of the inferior judges, I should choose the last alternative, as the least of two very great evils. I say the *inferior* judges. God forbid that ever such a provision should extend to the Judges of the Supreme Court of the United States.

Impressed with a solemn belief of the Respondent's guilt, I now respectfully ask his conviction. I have no regrets to express, no apologies to offer for the part which I have taken upon this trial. I have been acting in an office wholly unsought by myself and ungrateful to my feelings; but yet I enjoy the proud consciousness of reflecting, that I have done my duty. I have urged the Respondent's conviction with no feeling of personal animosity; but in the strong belief, that mercy to him will be cruelty to the American people. I ask for his conviction in the name of the judiciary, whose pure character he has sullied, and whose independence he has endangered. I ask for it in the name of the people of the United States, whose constitution and laws he has violated by tyranny and oppression. Should he be acquitted, I shall bow with the most profound respect to the judgment of this Court; but I shall never cease to believe, that it will establish a precedent dangerous in the extreme to the rights and liberties of the American people.

On motion of Mr. Webster,

Resolved, unanimously, that the Senate will, on Monday next, at 12 o'clock, proceed further in the trial of the Article of Impeachment exhibited by the House of Representatives of the United States against James H. Peck, Judge of the United States District Court for the District of Missouri.

The Court then adjourned accordingly.

Monday, January 31, 1831.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

The Managers, accompanied by the House of Representatives, attended. James H. Peck, the Respondent, and his Counsel, also attended.

On motion of Mr. TAZEWELL,

Resolved, That this Court will now pronounce judgment in the case of James H. Peck, Judge of the United States District Court for the District of Missouri.

The Article of Impeachment was read by the Secretary.* The Vice President then took the opinion of the members of the Court respectively, in the form following :

“ Mr. Senator ———, how say you ? Is the Respondent, James H. Peck, guilty or not guilty of a high misdemeanor, as charged in the Article of Impeachment ? ”

Those who pronounced him “ Guilty ” are,

Messrs. Barnard, Brown, Clayton, Dickerson, Dudley, Ellis, Forsyth, Hayne, Iredell, Kane, King, Livingston, McKinley, Poindexter, Robbins, Sanford, Smith of Maryland, Smith of South Carolina, Troup, Tyler, Woodbury.—21.

Those who pronounced him “ Not Guilty ” are,

Messrs. Barton, Bell, Burnet, Chase, Foot, Frelinghuysen, Grundy, Hendricks, Holmes, Johnston, Knight, Marks, Naudain, Noble, Ruggles, Seymour, Silsbee, Sprague, Tazewell, Webster, White, Willey.—22.

Whereupon,

The Vice President declared that “ James H. Peck, Judge of the United States District Court for the District of Missouri, is **ACQUITTED** of the Charges contained in the Article of Impeachment exhibited against him by the House of Representatives.”

The Court then adjourned *sine die*.

* See it at large, page 49.

A P P E N D I X .

[MR. WIRT'S Argument was not received in season to be inserted in its proper place. It here follows:—]

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

Saturday, Jan. 22, 1831.

WILLIAM WIRT, Esq., one of the Respondent's counsel, now opened his Address to the Court, on behalf of the Respondent.

Mr. President,—I regret that I have been the unwilling cause of so much delay in the progress of this trial, and I very sincerely thank the honorable Court for the humanity of the indulgence which they have extended towards me. I ought, indeed, to thank them for it in behalf of my client, rather than of myself, and more still in behalf of the public justice and honor of our common country, since it is to the lofty determination to do justice, and with this view, to hear fully and deliberate impartially before you decide, that we ought to ascribe the exemplary patience which has been manifested on this occasion. The case, indeed, is one which justifies and demands all the attention which has been bestowed upon it. The honorable managers are unquestionably right in representing it as a case of great importance to the public, for it involves on one hand the liberty of the citizen, and on the other the independence of the judiciary. And although this, I acknowledge, is a matter of minor consideration, yet I may be permitted to add that, to the individual accused, it is a case of inexpressible solemnity.

He is, as you perceive, in the meridian of life. The trial involves his character, his future utility, the proudest and best feelings which belong to the human heart, the sympathies of his relatives and friends, and, I may be excused for adding, the solitudes of some of the best friends of our common country, who look at the impeachment, and the original motives of those who have procured it, not with an enemy's but with a patriot's eye. In such a case I need to offer no apology for that portion of your time which has been and will still be occupied by my learned friend and associate, and myself. We have no pleasure in consuming your time, but it is our duty to place the defence of our client fully and fairly before you. We desire to do nothing more. And if we pursue the opening arguments of the honorable managers more closely than may seem necessary to some of the Court, it will be remembered that it would be presumptuous in us to slight any topic which the learned and honorable managers may have deemed it important to press on the consideration of the Court.

It is from this deference to the honorable managers that I deem it proper to notice some topics which have been introduced by them, and which as they have no bearing on the merits of the case, must, I cannot but think, have been introduced for effect. In noticing them, I beg to be understood as intending to treat the honorable managers with all possible respect. With those of them who have already addressed you I have the pleasure of a personal acquaintance, and I know too well the intellectual and moral qualities which adorn them to impute to them any motives unworthy of their character and station; for it would be unworthy of both to seek to crush, by the weight and authority of their names, an innocent individual. And yet, Mr. President, I cannot but think that topics have been introduced which might have been omitted without detracting from the justice or dignity of the prosecution. Thus it has been emphatically stated by one of the honorable managers, that the *House of Representatives, by a large majority, in which party had no share*, had voted this *impeachment*. What was the object of this remark? Why was it thought necessary to introduce it here? Does it belong to the merits of the question before you? Is it a fit subject of inquiry, here, whether the House of Representatives were hasty or deliberate in their proceedings, or whether party had or had not any share in their decision, or by what majority that decision was made? Would the counsel of the respondent be permitted to aver that the proceedings of the House were rash and precipitate, that the impeachment was carried by a storm of declamation, in which the voice of reason, justice, law and humanity were drowned, and that many of those who voted the impeachment have already regretted their votes, and, on a full hearing of the evidence, anticipate with confidence an acquittal of the respondent? Sir, we know too well what is due to the honorable House of Representatives, to this honorable Court, and to ourselves, to be capable of any such *indecorum*. The House of Representatives have, no doubt, done their duty: but what at last is the House of Representatives in this proceeding? Surely nothing more than the grand inquest of the nation. Their vote of an impeachment is nothing more than the finding of a bill by a grand jury. And let me ask the honorable manager from whom this remark fell, whether, sitting on that bench which he so long adorned, he would permit a prosecutor, on the trial of such an indictment, to go back to the proceedings in the grand jury room, to descant on the dignity of their character, on the calmness and deliberation with which they had investigated the subject, on the majority by which they had found the Bill, and on the total absence of all political party feeling in their proceedings? Would he not as a judge feel it his duty to arrest a prosecutor on the threshold of such a declamation, and to tell him that it had nothing to do with the trial before the court; that such a topic was improperly introduced, and ought to have no influence either with the court or jury; that the finding of the Bill was nothing more than an accusation, and no part either of the law or evidence by which the case was here to be decided; that they had nothing to do with the grand jury or what passed in their room, or their character or motives; that the trial was *now* to be met by the law and the evidence, and the prosecutor must prove the accused guilty by the law and evidence to be exhibited in open court, without seeking to borrow any influence from the proceedings of the grand jury, or to help out the infirmities of his proof by a reference to their character and standing? Sir, there can be no doubt that such is the course which the honorable manager would take when presiding as a judge over a criminal trial. And what greater propriety can there be in urging such a topic here? Sir, if this case is to be tried by the character of the accuser, the House of Representatives of the United States, it is needless to go farther. Evidence and law and argument, on the part of the accused, will be utterly unavailing to protect him; for no one can gainsay the high character of the House of Representatives; no American, at least, will call it in question. There is no American who is not proud of that high character, and does not consider it as a part of his noblest inheritance.

But the honorable House of Representatives can have no wish to throw the weight of their character into this impeachment against the accused. It is not, it cannot be their wish to crush this unfortunate man by the mere weight of their character. They cannot have come here to demand the sacrifice of a victim whom they have foredoomed. They cannot seek to make you the mere executive ministers of their vengeance. No, sir! they know too well their own high duties and the meaning of an impeachment under the constitution of the United States. They know that an impeachment affirms nothing more than that, on the *ex parte* proof before the House, the case was worthy of trial; and they have sent the Respondent here to be tried. This honorable Court knows well that the proceeding before the House was not a trial, from which this is an appeal. This is the place of trial, and here, the case is to be for the first time tried, on the evidence on both sides. The whole responsibility for the trial is here. No part of it rests on the House of Representatives. It is for the single purpose of this trial that the House of Representatives has preferred the impeachment at your bar. Not for the mere form and mockery of a trial. Not to register their edict and proceed to execution. But for a trial in the spirit of the constitution, against a citizen of the United States; a trial simply on the law and on the evidence in which the character of the accuser is to have no weight. Sir, this is a *criminal trial*. What is the fundamental and universal principle of such a trial? That the accused is to be presumed innocent until the contrary is proved. But if the topic which I am resisting is to have weight, this principle is reversed; and the accused is to be presumed guilty, because he has been accused by the House of Representatives of the United States. The character of the accuser is to supply the place of proof. The *onus probandi* is shifted from the accuser to the accused, and he is to be presumed guilty until he shall establish his innocence. Sir, I hope we shall hear no more of the majority, or the motives by which this impeachment was voted by the House. They are to be presumed to have done their duty in preferring the charge, and we have no doubt that this honorable Court will do their's in trying it. Sir, the honorable managers have already advantage enough in their numbers and talents, and in that silent prejudice which is always at work against any man, however innocent, who has the misfortune to fall under an accusation from any quarter. It is enough that this unfortunate man stands here, unknown, and almost alone, a stranger from the Western wilds, to breast the storm of this impeachment. With what little mercy it has beat upon him you have witnessed, in part. He trusts to this honorable Court for a fair trial, and relies upon the correctness, the innocence and purity of his conduct for an honorable acquittal. Give him such a trial, and his innocence will be manifested to this Court and to the world. Let him be tried by the law as it is, not as gentlemen may think it ought to be. Let him be tried by the evidence in the cause as it has been placed before the Court, not by that dramatic exhibition of it which the eloquent managers have been pleased to present. Let him be tried by the simple and naked facts, as they fell from the lips of the witnesses, not by those poetic paraphrases and glosses by which they have been rhetorically distorted and discolored—not intentionally, no doubt, but from that fatal sorcery which genius often exercises over the mind of its possessor. And finally, sir, we beg that the respondent may be tried by his own case alone, and may not be involved in the guilt of all the judicial tyrants that have ever degraded the English bench. We have had glowing pictures of those tyrants presented in succession—the staring and bloody Jeffries, the fierce tumultuous Scroggs, the cruel and unrelenting Bromley—and it seems to have been expected that the indignation naturally excited in our breasts by the rehearsal of their cruelties and enormities, was all to be transferred to the respondent, and placed to his account. He protests, with reason we humbly think, against any such transfer. He desires to be tried by his own case, and not theirs. It has been thought rather hard that the sins of the fathers should be visited on their

children ; but as none of the blood of either Jeffries, Scroggs or Bromley flows in his veins, and their sins have been expiated by themselves, more than a century ago, he is not able to perceive the justice of visiting their turpitude on his head, or even throwing upon his case a color borrowed from theirs. He is perfectly willing to answer for his own acts, but protests most strenuously against any rhetorical extension of his liability for the acts of others.

Mr. President, something is continually occurring to humble the vanity of man with regard to his boasted intellect, and to draw a sigh of regret from every reflecting bosom at witnessing the inability of human reason to contend with human prejudice. That the weak, the vicious and the interested should be the victims of this prejudice is too common an occurrence to excite surprise ; but that the strong, the enlightened, the virtuous should suffer the same kind of eclipse is a practical lesson on human infirmity well calculated to teach charity to us all. Seeing as we do, every day, what opposite conclusions are drawn, and sincerely and honestly drawn from the same premises, and how much of feeling is blended with the best operations of our reason, what candid man is there among us who can arrogate to himself the exclusive right to take the moral chair, and to arraign the motives of his neighbor. I have labored to look at the evidence in this case as abstractedly and disinterestedly as if I were myself to pass judgment upon it ; and thus looking at it, I have listened with perfect amazement, to the feelings of horror expressed by the honorable managers at the contemplation of the same picture which has left me perfectly placid and serene. How can I account for this but on the presumption that there is some cloud of prejudice, on the one side or the other, which intercepts the view, and prevents us from seeing things as they really are. I look in vain at the evidence for any thing to justify those rhapsodies of horror which have been so profusely poured forth here ; and as I cannot see this horror in the picture, I am forced to conclude that it exists only in the imagination of the beholder. There is certainly some fatal prejudice at work on the one side or the other. It may be on my own. I am fully aware that the relation of advocate which I bear towards the respondent, and those kind and friendly feelings which the long and close intimacy generated by this prosecution has produced between us, and which I think it will be impossible for any man to refuse to him after such an intercourse, may have disqualified me for judging fairly of his case. On the other hand, it seems to me that the honorable managers have come to the examination of this case under so strong a prejudication of the guilt of the respondent, that the most trivial circumstances loom into consequence before them, and chaff and straw become a forest uptorn by a hurricane and darkening the light of the sun. This honorable court will judge between us. But after hearing the evidence, noting it carefully, and, so far as I could, *verbatim*, after reviewing it as I have done, again and again, to what other cause than some fatal prejudice can I ascribe it, that this man, whose character you have heard from the most respectable gentlemen in Missouri, should have been held up before this Court, day after day, as a "*judicial tyrant*," "*a monster infuriated by the malignity of his passions*," "*a madman, blind with rage, striding over the fallen constitution and laws of his country, to grasp his victim and inflict vengeance upon him, for no other offence than presuming, in respectful language, to question the correctness of one of his judicial opinions.*" Yet all this and much more has been said, and said with invocations and appeals to the Almighty such as were never before heard within these walls, and I humbly trust will never be heard again. Not only has this unfortunate man been thus held up before this honorable Court and before the crowded galleries that have continually attended this trial, but I perceive by the public papers that this hideous caricature has been sent throughout the nation with all the wings that genius and eloquence can give it. It has been seen by thousands who will know nothing of the evidence, and who will, of course, take the picture as true, on the credit of the honorable manager by whom it has

been emblazoned; and long ere this, I do not doubt that many an anxious father in the remotest parts of our country has been addressing his son, with this paper in his hand—"See here, my son, what a horrible being the Senate of the United States have now before them—see what a monster a man may become by the unbridled indulgence of his passions—take warning by this—and if your country should ever elevate you to office and honor, beware of your passions—beware of pride, revenge and cruelty, lest you become such another monster as this, and bring down the gray hairs of your father with sorrow to the grave. Even this wretch, Peck, may have had respectable parents, and may have been once their darling hope and joy—yet we see how he has blasted their hopes, turned their joy into sorrow, and covered all his connexions with shame and confusion."

How long must it be before this cruel error can be corrected? How long must it be before the people of the United States can be made to understand that some of the most enlightened and respectable gentlemen of Missouri have come before this Court and deposed, upon their oaths, that this alleged monster is one of the most mild and patient of men—meek and kind and charitable in private life—gentle, respectful, polite and courteous on the bench—and in the simple and touching language of one of those witnesses, Judge Kerr, "so amiable, as to be *very dear* to all who know him." Sir, even the witnesses against the respondent admit that such is his general character. While some of them say that he was *warmer than usual* in the particular instance under consideration, they all agree that his usual temper and manner are marked with great mildness, patience and courtesy both towards the bar and the suitors before him. Sir, with this evidence before me, to what else can I ascribe that tragical and horror-stricken exhibition which has been made of the respondent by the honorable managers, than to some dark and immovable cloud of prejudice which hides his real character from their view.

Sir, there have been other topics urged by the honorable managers which lead me to the same conclusion, and on which as they approach nearer to the question before the honorable Court it becomes my duty to animadvert. The respondent has been denounced by the honorable managers, in the most vehement language, as an enemy to the freedom of the press—that sacred birth-right of us all. Not only as an enemy, but an open and presumptuous reviler and scoffer at the liberty of the press. Among other atrocities imputed to him, this "judicial monster" is depicted as walking over the prostrate liberty of the press. "Does *he*" said the honorable manager, with an expression of scorn and contempt so bitter that I should be sorry to be able to imitate it, "Does *he*, a *petty provincial Judge*, expect to be able to *sneer* the liberty of the press out of this Court and country?" No, sir. He does not expect it; he does not wish it; he has never attempted it. We were told by the honorable manager that the respondent had said that "*the liberty of the press* was a mere *theme for declaimers—a hobby for demagogues.*" Mark the expression. Where has he said this? Not *here*, certainly. This is not pretended. But we are told that the sentiment is to be found in his defence before the House of Representatives. The counsel for the respondent were at a loss to understand why that document was offered in evidence by the honorable managers. The object is now apparent. It was to become the text of these remarks, *in odium*, against the respondent. Now, sir, in direct but respectful contradiction to the honorable manager, I aver that there is no such sentiment in that defence. That it does not contain one expression of disrespect to *the liberty of the press*; but that, on the contrary, it eulogizes it, *as the greatest of blessings*; that it no where represents *the liberty of the press* to be a mere *theme for declaimers, a hobby for demagogues*; that the whole censure which it expresses is not *on the liberty of the press, but on the abuse of that liberty—on the licentiousness of the press*; that the taunt to which the gentleman alludes is not at the liberty of the press, nor at those *declaimers or demagogues*, who sometimes find it a convenient theme;

but at those *libellers*, who live by its *licentiousness*, and seek to prostitute the name of the liberty of the press, as a cover for their crimes. As we are directly at issue on this point, and the honorable manager has referred you to the document itself to support this serious charge against the respondent, permit me to read from that paper the only two paragraphs which contain any allusion to this subject of the liberty of the press: they will be found in page 39 of the document, and are in the following words. [Here Mr. Wirt read as follows:]

“It is said that in punishing this publication as a contempt, the Judge has invaded the liberty of the press. What is the Liberty of the Press? In what does it consist? Does it consist in a right to vilify the tribunals of the country and to bring them into contempt, by gross and wanton misrepresentations of their proceedings? Does it consist in a right to obstruct and corrupt the streams of justice, by poisoning the public mind with regard to causes in these tribunals, before they are heard? Is this a correct idea of the liberty of the press? If so, the defamer has a charter as free as the wind, provided he resort to the press for the propagation of his slander; and under the *prostituted sanction of the liberty of the press*, hoary age and virgin innocence lie at his mercy.—This is not the idea of the liberty of the press which prevails in courts of justice, or which exists in any sober or well regulated mind. *The liberty of the press is among the greatest of blessings, civil and political, so long as it is directed to its proper object, that of disseminating correct and useful information among the people. But this greatest of blessings may become the greatest of curses, if it shall be permitted to burst its proper barriers.* The river Mississippi is a blessing to the country through which it flows so long as it keeps within its banks, but it becomes a scourge and destroyer when it breaks them.”

Again:—“The liberty of the press has always been the favorite *watchword of those who live by its licentiousness*. It has been, from time immemorial, is still and ever will be the perpetual *decanatum*, on the lips of all *libellers*. Oswald attempted to screen himself under its ægis, in the case which has been cited from the 1st Dallas. But the attempt was in vain. The court taught him the difference between the liberty of the press and the licentiousness of the press; and in his farther attempt to raise an impeachment against the judges for that sentence, the House of Delegates of Pennsylvania confirmed the wholesome lesson. If, indeed, the liberty of the press were a panoply broad enough to cover every thing done in its name, nothing in the form of a publication could ever have been punished as a contempt of court. In all the reported cases in which these publishers have been called to answer for a contempt, wherever the defence has appeared in the report, it is the liberty of the press that is the perpetual theme. It is uniformly claimed to be the right of the citizen to question the acts of all public men, and the changes are perpetually rung on that great *palladium* of human rights and human happiness—the liberty of the press; as if human rights and human happiness could be promoted by the prostration and destruction of courts of justice, or by poisoning their streams in the fountain head. It is unnecessary to pursue this subject. *The Judge has never pretended that his opinions are not to be questioned.* He insists, however, that they are to be questioned, only, according to the laws of the land. One mode of questioning them under these laws, is by appeal to a superior court; and, after the subject matter shall have been finally decided, another mode of questioning them is by respectful discussion, either in the public prints or elsewhere. In the present case, the first mode of questioning the Opinion, that by appeal, had been adopted. For the second mode, that of respectful discussion, the case was not ready, because the subject matter had not been disposed of finally; and even if it had been, it has been shown that there was no semblance of investigation in this article, no pretence of discussion of any kind. It was sheer misrepresentation; and it does not follow that because an opinion of a court may be respectfully discussed, it may, therefore, be misrepresented; much less that it may be so misrepresented as not only to

impair the confidence of the public in the dignity, intelligence and purity of the tribunal, but to render both the judge and the court objects of universal contempt, scorn and ridicule: and least of all, that in doing this, a strong prejudice shall also be infused into the public mind with regard to causes still pending in the court."

These are all the passages in the document which contain any allusion to the liberty of the press, and I would thank the honorable manager to lay his finger on any one sentence which indicates the slightest disrespect to the liberty of the press. Where is it said that the liberty of the press is a mere theme for declaimers or a hobby for demagogues? There is no such thought, there are no such words here, unless the honorable manager considers *libellers* and *slanderers* to be synonymous with *declaimers* and *demagogues*—a point which I have no interest in disputing, farther than to insist that it was manifestly not the intention of the respondent in any one of these passages. His words are—"The liberty of the press has always been the favorite watchword of all who live by its licentiousness. It has been, from time immemorial, is still, and ever will be the perpetual *decanatum* on the lips of all libellers." Is not this true? I appeal to the reading and observation of every member of this honorable Court. The whole invective of these paragraphs is directed against the *licentiousness* of the press, as contradistinguished from its *liberty*. Is not the distinction a solid one? Or does the honorable manager consider the *liberty* and the *licentiousness* of the press, as one and identical? His mind, I am sure, is too correct for this. Where I ask him has this *petty provincial Judge* attempted to *sneer the liberty of the press out of this Court and country*? Is it proved by the solemn declaration of his Opinion that "the liberty of the press is among the greatest of blessings civil and political—so long as it is directed to its proper object, that of disseminating correct and useful information among the people? Or does the honorable manager consider it as one of the valuable functions of the liberty of the press to disseminate incorrect and pernicious information among the people—that is, to propagate falsehood and calumny? The restraint proposed in the passage is a restraint only upon falsehood and calumny. It leaves open to the press all that is true and all that is useful. Does the honorable manager conceive that it would promote the peace, the good order and the happiness of society that there should be no restraint on the press whatever? Then let him repeal the whole body of our laws which relate to the matter of libel. Nay, if restraint be offensive, let there be no laws at all, for all law is so much restraint. Let us relapse into a state of nature, and let each man take care of himself as well as he can. Mr. President, there is no good that does exist or can exist, unless guarded by restraint. The best things that we enjoy, the noblest qualities that we possess become vicious by excess. Mercy degenerates into weakness, generosity into waste, economy into penury, justice into cruelty, ambition into crime. In advancing this sentiment, can any man justly accuse me of hostility to those virtues which I would restrain from shooting into vices? Yet, in sound logic, there would be quite as much candor and justice in such a charge as in accusing the respondent of hostility and contempt towards the liberty of the press, because he has said that if unrestrained it must degenerate into licentiousness. Sir, this principle of restraint has the sanction of Almighty wisdom itself, for it is impressed on every part of the physical as well as the moral world. The planets are kept in their orbits by the restraint of attraction; but for this law, the whole system would rush into inextricable confusion and ruin. Does it detract from the simplicity, the beauty, the grandeur of this system to say that one of the laws which upholds it is the law of restraint? Is it not to the restrained position of the earth that we owe the revolution of the seasons with all their appropriate and successive enjoyments; and to its restrained revolution towards the sun that we owe the relief of day and night, the seasons of labor and repose? What hinders the vine from wasting its juices in wild and fruitless luxuriance, but the restraint of the pruning-hook and the discipline

of the training hand? What hinders the product of that vine from becoming a universal curse, but the restraint of temperance. What gives to civilized society its finest charm, but the restraints of *decorum*, of mutual respect, of honor, confidence, kindness, hospitality? To what do we owe the very proceeding in which we are engaged, and the advantage of calm and regular discussion, but to the restraints of the constitution, of settled rules of proceeding, and of that courtesy and forbearance which we are happy to interchange with our honorable opponents? Look where you will, then, sir, above you, around you, below you, you see that the great conservative principle is restraint—that same restraint which holds human society itself together. And does it derogate from the value of the liberty of the press, or is it, in fair reasoning, any impeachment of a man's respect for it, to say that *that*, like all other human blessings, requires the purifying and conservative principle of restraint? and yet this is the head and front of the respondent's offending in this particular; and it is for advancing this sentiment that the fiery tempest has been poured upon his head. Sir, I must take leave to say, and I am guilty of no disrespect in saying it, that the respondent feels as deep a reverence for the liberty of the press as its loudest panegyrist can vaunt. For it is not always those who are loudest of speech or most profuse of tongue that feel the deepest love. There be those who, when they hear these burning and impassioned bursts of eloquence in favor of that popular topic, the liberty of the press, are ready to exclaim with poor Cordelia :

"Then poor Cordelia!
And yet not so; since, I am sure, my love's
More richer than my tongue—"
"Unhappy that I am; I cannot heave
My heart into my mouth: I love your majesty
According to my bond; nor more, nor less."

Sir, there was no occasion for this panegyric on the liberty of the press where none deny its value. It could answer no other purpose, and could have been intended to answer no other than to point and inflame this undeserved invective against the respondent. Sir, he values this great blessing as highly as the honorable managers themselves, and he proves it by the sentiment which seeks to guard and preserve it, in its purity, uncontaminated by the unhallowed touch of prostitute libellers, and sordid and unprincipled slanderers. But from this plain and manifest perversion of his sense in this particular, this honorable Court will judge of the fairness which may be expected in the examination of the rest of this case.

Sir, another charge has been drawn from this same document against the respondent. He has been held up to you as being conscious of his guilt and having attempted to buy off the impeachment by the consideration of his having decided the land causes before him, in favor of the United States. "Did he dare to expect," asked the honorable manager, with a look of the darkest indignation, "that the House of Representatives was to be bribed by dirty acres, to suffer him to trample on the rights of the citizen at pleasure, and to escape the punishment which he so richly deserved?" No, sir, he did not expect it; he did not ask it, he did not dream of it. If he did, he is the most vile and degraded of wretches, and one of the most consummate fools, withal, that ever appeared before a court of justice. But where has he said this? I took the liberty to interrupt the honorable manager, for the purpose of requesting that he would refer to the part of the defence on which he founded this charge, and was referred to the closing paragraph. The honorable Court will be pleased to observe that so far from the remotest intimation of any consciousness of guilt, the whole defence is occupied with proving that the published article of *Lawless* was a contempt of the court, and that upon the clearest authorities, English and American, the respondent, composing the federal court of Missouri, had a right to consider it as a contempt and to pun-

ish it as such. Having thus vindicated his own innocence, by showing that he had done his duty towards the public, he adverts very slightly to the interested and sordid motives by which his accuser and his accomplices were actuated in preferring this charge—the hope of displacing him and procuring a successor better suited to their views, by being less stern and inflexible in the discharge of his judicial duties. The defence closes with these words: “Upon the whole, Judge Peck declares *that in this whole proceeding he was actuated, solely, by a sense of official duty.* He considered it his duty to sustain the dignity and authority of the court over which he had been appointed to preside. He considered it due to the government which he represented; *due to the tribunal,* and due to the suitors whose rights were committed to its protection, to punish this contempt as he did punish it. He did consider himself and does still consider himself as sustained at every step by the highest authority. He believed it, conscientiously, to be his solemn and imperious duty to make the example which he did make, more especially in relation to the country in which he holds his courts, and the nature of the claims which he was called upon to adjudicate, and which had produced this agitation. If in so doing, he has erred, he has erred in company with judicial characters with whom any judge may be proud to associate, and he has yet to learn that such an error would be a high misdemeanor in the sense of the constitution of the United States.” Does this lofty and animated assertion of having done his duty, and of being sustained at every step by the highest authority, look like a sneaking confession of conscious guilt? The man that really thinks so, must be a stranger to the language and the spirit of conscious innocence. Having thus asserted his own innocence—he turns upon his accusers in the following language: “Judge Peck is perfectly aware of the purposes to be answered by his removal, and is, therefore, not at all surprised at the pertinacity with which it has been sought for these last four years. Whether these purposes are such as the interests of the United States call upon them to countenance by ordering further proceedings in this case, is a question for others, not for Judge Peck. Confident he is, *that if he had been made of more pliant materials, and could have reconciled it to himself to consult his repose, rather than his sense of duty, the House would not have been troubled with this inquiry.*” Was this a proposition to buy off an impeachment by a corrupt decision of these land causes in favor of the United States? Is not the assertion that he was persecuted for having done his duty honestly and firmly as a Judge? Is not the question of interest put to the consideration of the House, the question whether it be the interest of the United States to give their countenance to a prosecution against one of their judges for having done his duty honestly and firmly? Whether it be the interest of the United States to lend their aid to a plot to remove a judge whose only fault is that he is too honest, firm and inflexible for a certain class of interested suitors before him, in order that his place may be supplied by one better adapted to the purpose of the plotters—one *made of such pliant materials* as to be willing to *consult his repose at the expense of his duty?* The implication is not that his place *would, in fact,* be so supplied, but that such is the wish and object of his persecutors. The assertion is that he had done his duty honestly and firmly; that for so doing it the design was to remove him; and that the hope of his persecutors was that they would get his place filled by some one of more flexibility and better suited to their purposes: and the question submitted to the House is whether it was the interest of the United States to lend their countenance to the persecution of an honest man and a faithful officer for so vile a purpose. Is this the language of bribery and corruption? Sir, it is the language of a man indignantly asserting his innocence, and turning upon his accusers to exhibit the baseness of their motives and conduct. The hunted lion that turns upon the dogs that pursue him and rends them to pieces, may as well be accused of an attempt to bribe off the hunters. Sir, it is the language of an honest man, and

an American citizen, firm in conscious integrity, proudly standing at bay against the pack that yelps around him, and appealing to the justice, the honor and wisdom of his country. It is a language not to be misunderstood by any man of a corresponding spirit; and baleful indeed must be that prejudice which can read in it a consciousness of guilt and a poor and mean attempt to bribe the House of Representatives into peace by dirty acres. Let candid and honorable men read it and decide for themselves.

Sir, there was another remark of the honorable manager which I feel constrained to notice, and I do it with deep regret. It relates to an incident which I am told occurred while I was confined to my bed. The respondent being deprived of one of his two counsel, and opposed as he was to five managers on the part of the House, selected no doubt for their superior talents, had deemed it necessary, it seems, to take some part in the argument of a question of evidence before this honorable Court. The situation was a novel one to him. Held up, as he had been, for many days in succession before this high Court, before these crowded galleries and this assembled multitude, as "a judicial monster," "a petty provincial tyrant, frantic with the malignity of his passions, blind with rage," thus caricatured, impaled and crucified before this nation, he rose with lacerated feelings, and was agitated. Innocent and simple-hearted as a child, as he is known to be by all who know him, the image of his aged and only surviving parent occurred to him, and, in these circumstances of humiliation and distress, he was thrown for a moment off his guard, and his emotion was betrayed by the tremor of his voice and a starting tear. Was it wonderful that it should be so? Was it not most natural and excusable. And, yet in allusion to this incident, over which common humanity would have drawn a veil, the honorable manager, in a deliberate and set speech, has accused him of shedding "feigned tears," "crocodile tears" before this Court and nation, to move them to compassion! Does the honorable manager recollect the prosecution of Sir Walter Raleigh, by the Attorney General Coke? Does he remember the spirit in which that prosecution was conducted? Does he recollect that the merciless Coke, unmoved by the affecting circumstances in which that gallant soldier and accomplished scholar and gentleman was placed, had publicly stigmatized him as *a spider of hell*? If he recollects these things, as I presume he must, I will then ask the honorable manager which of the two men he had rather be, with posterity, the persecuted Raleigh, or the persecuting Coke? Mr. President, I have the pleasure of a personal acquaintance with the honorable manager, and I know that unkindness and barbarity are far removed from his heart. What then but some unaccountable prejudice could have led him so far to forget what was due to himself, and to impute to such a man as J. Peck has been proved to be, so poor an artifice? For has he not been proved to be *a gentleman*, both in his principles and manners—pure, amiable, candid, ingenuous, courteous and kind—a man of uncommon firmness too, as every man is who possesses, as he does, the *mens sibi conscia recti*; but yet *a man*, and subject to all the emotions of wounded honor and disparaged character to which the best and bravest of men are subject?—The fact seems to be, Mr. President, that the honorable managers having predetermined to portray him as a monster, are determined to find him one in all that he says. He will have, I trust, a cooler and a steadier judgment here, and be tried by the evidence instead of the imaginations of his accusers.

Sir, I have felt myself constrained to notice these remarks, because they have gone forth to the world, and if uncontradicted must do great wrong to the respondent. It is my wish to follow them up as speedily as possible, and to crush them before they shall have gained too firm a lodgement in the public mind. I wish it had been possible to send forth the antidote at the same time with the bane. But this could not be done. For it will be long before this trial can appear, with all the evidence, and longer still before it can reach the hundreds and thousands who will have read in the public papers the pungent remarks on

which I have been commenting. Nay, this will never be done; for many read newspapers who do not read books, and especially law books. But I shall at least have the satisfaction of having endeavored to set the matter right before the honorable court and all who hear us. I hope it will be seen and understood that he is not the "monster" that he has been represented to be; that all the degrading sentiments and unmanly conduct attributed to him, are the work of heated imaginations, without any foundation in fact, and I trust I shall shew before I close this address that he has said nothing, written nothing, done nothing, either here or elsewhere, which may not be averred without a blush, by the most honest and enlightened man in the community.

[Mr. Wirt was proceeding with the merits of the case, when, on the motion of Mr. Webster, the court adjourned until Monday.]

Monday, January 24.

[Mr. McDuffie explained, by saying that the remarks to which Mr. Wirt had alluded had found their way into the newspapers without any agency of his.]

Mr. Wirt. I had not the slightest suspicion that the honorable manager was concerned in the publication of those remarks; and I am now the more sure that he was not, because I find in the papers of the morning something like a sketch of my own observations on Saturday, certainly inserted without any instrumentality of mine.

Mr. President, I come now to the immediate question before this honorable Court, and I will endeavor to argue it with as much plainness, simplicity and brevity as I can.

The first object in every discussion is to ascertain *the true question*, and to keep the eyes of our understanding steadily fixed upon it throughout. Until this shall be done, we are in danger of going far and wide of the mark, of arguing to no purpose, or of losing ourselves in unprofitable and pernicious declamation. It is the more important in this case to fix the true question, because, to our surprise, we find the honorable managers differing among themselves in their views of it.

We consider the trial of this impeachment as resting on the same ground with the trial of an indictment at the common law. In the case of an indictment, the offence must be an indictable one. The party must be tried for the offence indicted, and for no other. And if the evidence do not fasten that charge on him, he must be acquitted, whatever other impropriety of conduct it may establish.

The issue to be tried in *this case* is formed by the article of impeachment, and the answer and plea to that article. The charge in the *caption* of the article is of *high misdemeanors* in office, in the terms of the constitution of the United States.

The specification of these *high misdemeanors* is

1. Of an *arbitrary, unjust, oppressive arrest, under color and pretence that the party had committed a contempt of the court.*

2. Of an *unjust, oppressive and arbitrary sentence of imprisonment, and of suspension from the practice of the law, under the like color and pretence.*

3. The whole being charged to have been done *with the intention, wrongfully and unjustly to oppress, imprison and otherwise injure the said Luke E. Lavless, under color of law.* The offence charged then is compounded of an *unlawful act, done with a guilty intention.*

The respondent has answered, denying the charge in both its aspects; of an *unlawful act*; and a *guilty intention*. The burthen is on the managers to make good the charge, both as to the *illegality of the act* and the *guilt of the intention*. It is not enough for them to prove that the act was unlawful (though *this* I apprehend is beyond their power) but they must go farther, and prove that this unlawful act was done with a guilty intention. Even if the Judge were proved to have *mistaken the law*, that would not warrant a conviction, unless the *guilt of intention* be also established. For a mere mistake of the law is no *crime* or *misdemeanor* in a judge. It is the *intention* that is the essence of every crime.

The maxim is (for the principle is so universally admitted that it has grown into a maxim) *actus non facit reum nisi mens sit rea*.

Sir, if the impeachment had not contained the charge of *the guilty intention*, the respondent, under the advice of his counsel, would have demurred to it; not by a special demurrer to the *form*, but a general demurrer to the *substance*: for the *intention* is the *substance* of the crime. The honorable managers who prepared this article of impeachment were perfectly aware of this, and have, therefore, very properly charged the *intention, in express terms*. Sir, it is a *material* part of the charge: and what it was *material to charge*, it is *material to prove*. Let them then prove, first, that the respondent acted *unlawfully* in pronouncing the sentence which he did pronounce; but if they *can* make out this proposition (which we conceive to be impossible), they have something more behind, for they have charged that in acting thus unlawfully, he did it *with the intention wrongfully and unjustly to oppress, imprison and otherwise injure* the said Luke E. Lawless, *under color of law*. Now if the respondent thought that he was acting lawfully, and so acted with the intention to discharge what he conceived to be his duty as a judge, he cannot be guilty of this charge; for he could not have taken this step with the *intention wrongfully and unjustly to oppress and injure Mr. Lawless, under color of law*. The charge necessarily implies that the Judge was conscious he was usurping a power he did not possess; that he did it *wilfully, knowingly*,—and that he did it *with the intention charged, wrongfully and unjustly to oppress Mr. Lawless, under color of law*. Now, sir, this proposition the honorable managers are bound to establish, in both its terms, by the evidence in the case. It will not be enough for them to excite a suspicion, to raise a doubt upon the subject—to leave the minds of the honorable Court *in equilibrio*: they must cast the balance distinctly, remove every reasonable doubt, and place the *illegality of the act, and the guilt of the purpose, beyond question*, before they can expect from this honorable Court a sentence of guilty.

One of the honorable managers, seeming to perceive the impossibility of satisfying any candid mind that the respondent was guilty of the intention charged, endeavored to escape this rule of the criminal law, by contending that if they fixed on the respondent the commission of an unlawful act, the guilty intention charged in the impeachment followed as a necessary implication of law. This I deny: for then every mistake of law on the part of a judge would become a crime or a civil injury, for which he would be personally responsible. The honorable manager sought to illustrate his proposition by the cases of murder and forgery. “If, said he, a party be proved to have committed a deliberate murder, will he not be presumed to have intended to commit murder? Is separate proof of intention ever required in such a case? Or if a man be proved to have committed forgery, will not the law infer the intention from the act?” This is *plausible*; let us examine its *solidity*: it is the proposition which they *must* maintain, and from which alone they can have any hope of success in this case. Is it sound?

They ask, first, if a man be proved to have committed a *deliberate murder*, whether the law requires any separate proof of a guilty intention? Certainly not. Why? Because he cannot be proved to have committed a *deliberate murder*, without having fixed upon him *the proof of the guilty intention*; for that guilty intention is a necessary part of *the proof of a deliberate murder*. But that is not a case in which the law *infers* a guilty intention from the *simple act*. *Murder is not a simple act*. It is a technical term, presenting a *compound of act and intention*: the *act* is the *killing*; the *intent*, is of *purpose* and with *malice aforethought*. But let us take *the act*, by itself, and see whether the law will supply, by implication, the guilty intention. The analysis will prove the fallacy of the proposition attempted to be maintained by the honorable manager, and establish the solidity of the principle for which we contend.

The simple act is *killing* a reasonable being in the peace of the country. If

on mere proof of the *act of killing*, the law would *imply the guilty intention*, then *all killing* would be *murder*. But is it so? We know that it is not. Every lawyer is familiar with the three great divisions of homicide, into *felonious, excusable, and justifiable*. He knows that the first, *felonious homicide*, is again subdivided by the *criterion of intention*: that the first grade is of *murder*, which is done *of purpose and with malice aforethought*, the punishment being death; the second *manslaughter*, in which there is the want of that deliberate and guilty intention, but which being done suddenly and in the heat of passion, the offender has the benefit of clergy. Then there is excusable homicide, as killing in self-defence, or by misfortune; and justifiable homicide, as where the killing is in execution of the sentence of law or for the prevention of crime. In all these cases the simple act is the same—it is the killing of a human being. What is it that shades off this same act from a crime of the deepest die, through all its gradations, till it becomes not only innocent but an act of merit? *It is the intention*. If one man poison another *of purpose and with malice aforethought*, it is murder. But a mother poisons her child, by giving it arsenic, through mistake for magnesia. She has done it *with deliberation and with the exercise of her best judgment*. The *act* is the same in both cases—it is the killing by poison. Why is it *crime* in the one case and *no crime* in the other? Because of the *difference of intention proved*: not a different intention implied by law; but a different intention established by proof.

Take the other illustration put by the honorable manager, the case of *forgery*. What is *forgery*? It is the *fraudulent* making or alteration of a writing to the prejudice of another man's right. The *fraudulent intention* is here again an essential part of the crime. It must be done to the prejudice of another man's right. But the act of imitating the hand-writing of another, so as to deceive even the man himself and lead him to admit it to be his own, may be done and is often done, without a crime. It is done through playfulness, and is rendered innocent by the absence of all *fraudulent intention*, all intention to prejudice another man's right.

It is true, that if a man be proved to have made or altered a writing to *his own emolument and to the prejudice of another man's right*, and the proof stop there; the *forgery* is *proved*, because the *fraudulent intention* is apparent in the *proof of the facts* already exhibited. But that is not the case of an *intention* implied by *operation of law*: it is the case of an *intention proved by the facts in evidence*. The facts are utterly inconsistent with an innocent intention; and are consistent only with a guilty one. But permit me, under this head of forgery with which the honorable manager has furnished us, to put another case, rather closer in point of analogy to the case at bar. Let us suppose that the man accused of forgery holds a power of attorney to use the name of his principal in a great variety of specified cases; and suppose that some of the specifications of his powers are so equivocally worded that he might well have supposed himself authorised to use it in the case charged as a forgery. How would the court presiding at the trial charge the jury in such a case? would they say, "Gentlemen, take the power of attorney and examine it; and if *you think*, on a fair construction of the instrument, that it gave him no authority to use the name of his principal in this case, he is guilty of forgery, and you must find him guilty?" No, sir. The court would take the instrument into their own hands. They would scan its terms. They would tell the jury, that the power was so ambiguously expressed, that the man might well have supposed himself authorized to do the act which he had done; that if he could *reasonably* be believed to have *supposed himself so authorized*, which, under the circumstances, he might well have done, he was guilty of *no crime, because the act did not make him guilty unless his intention was guilty*, and that, in such a case, to doubt was to acquit. Even if the court themselves, in such a case, should be of the opinion that the letter of attorney did not, on a correct construction, authorize the act which had been done, they would then say that he had done an *unlawful act*, and, in a *civil*

suit, they would set it aside as against his principal, because it had not been done within the scope of his authority. But could they, in such a case, come to the conclusion that he had done a *criminal* act, and punish him for it *criminally*? Never, so long as a *fair doubt* could exist as to the *guilt of his intention*.

Transfer this reasoning to the case at bar. The respondent's counsel entertain no doubt that, under the laws of the land, he possessed the power which he exercised, on this occasion; that the case was a proper one for its exercise; and that it was exercised in good faith under a conscientious sense of duty. They believe that the case stands authorized and justified by all the principles and all the precedents which have been placed before you, both in the English and American books. The honorable managers, on the other hand, say that they differ with us in this opinion: that these authorities gave him no such power: that they extend but a little way; and that the respondent passed the line drawn around him by the books. Now, suppose that this honorable Court should be of the opinion that the respondent had not the power which he has exercised; that the judges, whose example he has followed, mistook the law of contempt; that elementary writers, hitherto received as authority in our tribunals, have carried the powers of the court too far: or suppose they should think that the respondent has misconstrued the authorities; that they do not, in reality, go the full length to which he has carried the power; yet if they shall, also, believe that from the existing state of the authorities, elementary and reported, and from the course pursued by other courts, in like cases, both in England and the United States, the respondent *might have believed* he had the power, *might have thought the case* a proper one for the exercise of the power, and *might have been influenced* by a sense of official duty in doing what he did: is it possible that, under circumstances like these, you can affirm, on your judicial oaths, not only that he had no power, but that *he knew* he had no power, and must have *consciously and intentionally usurped the power for the guilty purpose of oppressing Lawless*? Sir, can it be denied that such is the state of the authorities that any professional man, of the first science in his profession, might, with all his heart and conscience, have fully believed and affirmed the existence of the power? I will venture to assert that you may consult one hundred of the most eminent lawyers in this country on these authorities, and that a great majority of them will express an opinion in favor of the power. Permit me to ask this honorable Court—the authorities have all been read before you—would it detract from the reputation of the first lawyer in the land to express the opinion that, according to these authorities, the power to punish such a contempt exists in our courts? You might differ with him in the opinion, but would you pronounce him ignorant of his profession—nay more—would you pronounce him a *scoundrel* for having given such an opinion? Yet this is the drift of the argument on the other side. You are called upon to pronounce Judge Peck to be a *criminal*, for doing no more than what he saw had been done not only in England but in all the courts of the United States. Yes, sir—in those states which have been the loudest and strongest in favor of the liberty of the press and the right of trial by jury, this power has been exercised by the courts. Look at Virginia. Is there a state in the Union more truly republican, more lofty and high-minded, more ardent in the assertion of all popular rights? Yet, in that state, you have seen, sir, that this same power has been asserted and exerted by her courts and declared to be indispensable to the protection, independence and utility of those tribunals. Now, sir, with such a host of precedents before him, was it strange that Judge Peck should believe the power to exist? and if he might have so believed, can you infer from the simple act of its exercise, a *criminal intention*? For this is the argument which I am now resisting: the argument being that if he had not the authority of the law for what he did, there is no necessity to inquire into intention; because the act being unlawful, the guilty intention follows as a necessary consequence. I say, on the contra-

ry, that the question of legal power in this case, is a question on which the most enlightened men of the profession may honestly differ in opinion; and in this, I consider myself as making a very liberal concession, because I really think the power so clearly asserted by all the authorities, that, but for what we have heard, we might well have anticipated an entire unanimity of opinion in its favor. But it is enough for my argument to say that it is a power with regard to which enlightened and honest men may well differ in opinion: for if they may *honestly* differ, there can be no *crime* or *misdemeanor* in holding and acting upon either opinion. Yet by the argument which I am resisting you are called upon to say that if, on *your construction* of the authorities, Judge Peck had not the power which he exercised, it follows as a legal consequence that he acted with the *criminal intention* charged in the article of impeachment. No, sir: a judge may mistake the law, and still be an honest man. How often do we find the most upright and enlightened judges differing in their opinions on questions of law? The one side or the other must be mistaken, for both cannot be right. The one side or the other must be for doing what is unlawful. But does it therefore follow that the side which is in error is *criminal*?

Nay, we have sometimes even a whole bench admitting the error of a former decision, and solemnly retracting that error: but who ever supposed that they were *criminal* either in the first opinion or the last? The law is not one of the exact sciences. You cannot reduce its principles to demonstration. Differences of opinions among its professors are proverbial. It is for this reason that appellate courts are instituted. We see the opinions of inferior courts reversed every day; and this not only in civil but in criminal matters. But no one ever thought of impeaching an inferior court because it had mistaken the law: and yet, according to this argument they ought to be impeached in every such case; because an unlawful act, we are told, necessarily involves a criminal intention. I respectfully insist, therefore, that although you should differ with Judge Peck and his counsel with respect to the extent of his judicial powers, and think that he had not the power to punish the conduct of Mr. Lawless as a contempt of court, it does not follow that he is guilty of the misdemeanor charged in the impeachment; because the inquiry still remains whether this was an honest mistake of judgment, or whether he acted with the guilty intention charged in the impeachment; and that this guilty intention must be placed beyond doubt before you can convict him, because the principle of the criminal law is that to doubt is to acquit. I insist, too, that this guilty intention is not to be *inferred* from the alleged incorrectness of his judicial opinion, but must be satisfactorily proved by the evidence in the cause. The honorable manager, I humbly conceive, then, was rather unfortunate in his illustrations from the cases of murder and forgery. He did not perceive that the very terms in which he stated his propositions, involved that very *proof of intention, as a fact* which he supposed *the law would raise by implication*.

On this same subject of *intention*, I infer from a remark made by another of the honorable managers (Mr. Storrs) in one of those incidental debates on the evidence of which we have had so many, that he thinks he may fairly turn on the respondent a principle urged by him against Mr. Lawless in his defence before the House of Representatives—to wit, that every man is presumed to intend the *natural consequences* of his own actions. Nothing is more true than this principle; but the honorable manager must, I think, have laid aside his usual discrimination when he supposed it applicable to the question now before us. It relates to the *physical, practical consequences* of an action which, in the ordinary course of nature, must follow it. These a man is always presumed to intend. Yet his *moral* guilt or innocence may remain unsettled, and always do remain unsettled, unless the *consequences be such* as could have been connected *only* with a guilty intention. The man who, in open day, presents a gun at the breast of another, which he knows to be loaded, and discharges it, must be presumed to have intended to kill him, because that is the natural con-

sequence of his act. But the moral and legal guilt or innocence of the act remains to be settled by other considerations. The man whom he has slain may have been an assassin who had come to murder him, or a robber who was in the act of breaking open his house to plunder him; or a criminal who was resisting, to death, the service of process; in all which cases, though he did intend the *natural consequences* of his own act, he is held excused or justified by the law. Hunters, in the imperfect light of the dawn, or of the twilight, have been known to draw the trigger on each other, in the forest, under a mistake that they were the game of which they were mutually in pursuit, and *death, the natural consequence*, has followed; yet there has been no legal or moral guilt in the act, because there was no such *intention*. The respondent in his defence before the House of Representatives applied the principle thus: the natural effect of such a publication as that of Mr. Lawless was to bring the court into open disgrace and contempt before the public, and to prejudice the minds of the community with regard to causes still pending in court: and these being *the natural consequences* of such a publication, Mr. Lawless must be supposed to have *intended them*, because every man is supposed to intend the *obvious and natural consequences* of his own actions. The argument, I humbly apprehend, was perfectly fair, and fixed, in that case, the guilt of Mr. Lawless; because those consequences were such as could be connected *only* with a guilty purpose; they were *moral consequences* and *guilty in themselves*. But let us see with what candor this principle can be turned on Judge Peck to the end of fixing guilt on him? The *natural consequence* of his order to imprison Lawless for twenty-four hours, was that *he should be so imprisoned*; he is, therefore, to be presumed to have *intended that consequence*; the *natural consequence* of his order of suspension from practice for eighteen months, was that he should be *so suspended*, and he is therefore to be presumed to have *intended that consequence*. This I admit. He intended that he should be imprisoned: he intended that he should be suspended from practice.—But this is not the *intention charged in the impeachment*, and *which is here in question*; the intention here charged is *wrongfully and unjustly to imprison and injure him, under color of law*; and unless *intentional wrong and injustice* can be predicated of every order of imprisonment and suspension, *as a natural consequence*, I do not see how they can be predicated of this order. Does the honorable manager intend to argue that the judge had no *lawful authority* to pass the sentence which he did; that the imprisonment and suspension being without authority were *wrongful and oppressive*; and that this wrongful and oppressive imprisonment and suspension, being the natural consequences of the Judge's unlawful act, must be presumed to have been intended by him? Does not the gentleman perceive that by this process of reasoning he is begging the whole question; first, that the Judge acted without authority of law; secondly, that *he knew* he was acting without the authority of law; for it is only by the assumption of both these positions that he can arrive at his consequence of an *intention wrongfully and unjustly to oppress and injure*. For he surely does not mean to contend that *every unlawful imprisonment* flows from *intentional oppression* in the judge who has ordered it. How often has bail been refused through the mistake of judges, when it ought to have been allowed, and the consequence invariably is an *unlawful imprisonment*? How often have men been discharged on *habeas corpus* who have been wrongfully imprisoned through the mistake of judges? Would the gentleman apply his argument to such cases? Would he say that *wrong, oppression, and injustice* are the natural consequences of *such mistakes*; and that as every man is presumed to intend the natural consequences of his own actions, therefore those judges (admitted to have acted under *an honest mistake of their duty*) must be presumed to have *intended to wrong, oppress, and injure* the man whom they have sentenced?

Does he not perceive that by such an argument he would be maintaining a solcism in terms, and that the whole fallacy arises from the misapplication of a

principle perfectly true and sound in itself? Every man must, indeed, be presumed to intend the *natural* and *practical* consequences of his own actions. But the *moral character* of his actions takes its color from his mind; and the act, whatever it may be, does not make him guilty, unless his mind be guilty. If the consequences which he aims to produce are *necessarily immoral, in themselves*, his mind is guilty, and imparts its guilt to his action. But, if intending to do right, he does, through mistake, what is wrong, what kind of logic is that which would seek to fasten upon him by induction a guilty intention against the very terms of the hypothesis? Although it be true then that every man is to be presumed to intend the *natural consequences* of his own actions, and therefore that Judge Peck must be presumed to have intended that Mr. Lawless should be imprisoned and suspended from practice, it does not follow that he *intended wrongfully and unjustly to oppress and injure him*; because *wrong and injustice are not the natural consequences of the honest delivery of an official opinion by a Judge*. The very reason why a man is presumed to intend the natural consequences of his own actions, and is held responsible for them, is because he must have foreseen these consequences at the time of his action. But can a judge be presumed to foresee that wrong and injustice will follow from his pronouncing an opinion, which he honestly believes to be a correct opinion and to be demanded by his official duty? The question carries its own answer with it, and fairly exposes, I conceive, the misapplication of this principle to the point under discussion.

We are not now discussing the question of fact. Whether Judge Peck erred or not in the expression of his opinion, and even if he did err, whether his error was so palpable that he must have been conscious of it, or whether the case was attended with any circumstances which will justify this honorable Court in pronouncing the respondent guilty of the intention charged, will constitute a subsequent part of my inquiry. We are now engaged in settling the preliminary principles of the discussion, and fixing the true question before the Court; and I insist that the guilty intention charged by the article of the impeachment is an essential part of the offence and must be clearly and distinctly made out by the proof, before the honorable managers can call for the conviction of the respondent.

I insist, farther, that even if the honorable managers could succeed in proving that the Judge was not warranted by the laws of the land in punishing the publication of Mr. Lawless as a contempt, the *guilty intention* would still remain to be proved. For I deny the proposition that the law will annex, by implication, a criminal intention to every opinion of a judge which is shown to be erroneous. And while I admit that every man is presumed to intend the natural consequences of his own actions because he must have foreseen that they would follow, I deny that the respondent is to be *presumed* to have intended *wrongfully and unjustly* to imprison, oppress and injure Luke E. Lawless, by the sentence which he pronounced, because *wrong and injustice are not the natural consequences of a judicial opinion honestly expressed*, and, therefore, could not have been foreseen by the respondent, when he pronounced that opinion, even although the opinion may here be held to have been erroneous. And I contend that even although the Judge should be shown to have acted erroneously in point of law (which I confidently believe cannot be shown) yet, unless the principles of the criminal law are to be, now and here, for the first time torn up and reversed, the Judge is to be presumed to have acted innocently and honestly, until the contrary shall be established by the proofs.

But I find that I have not yet done with these preliminary principles; for another of the honorable managers (Mr. Wickliffe) has advanced a proposition so novel and so directly confronted by all the authorities, that had it not been for some other things that I have heard in this case, I should have heard it with unmixed surprise. The honorable manager tells us that "he cares not for proof of intention: that he cares not whether the Judge acted wrong from

ignorance or intention. That ignorance of the law is no excuse in an unlearned layman much less in a learned Judge. That every man is presumed to know the law, and *a fortiori* a judge whose office it is to understand and administer the law. If therefore a judge through ignorance of the law has done that which he had no power to do, he is just as guilty in the eye of the law, as if he had sinned intentionally against the light of knowledge."

Then according to this process of reasoning a *mistake of the law* by a judge is an impeachable offence! But is it possible that the honorable manager can mean to contend that a judge is answerable, either *civilly* or *criminally* for an *error of judgment*: that he can be either *sued*, *indicted*, or *impeached* for such an error? If such be his meaning, he is in direct conflict with all the authorities on the subject. The question is not a new one. It has been long since settled both in England and in the United States; and I am not aware that, for many centuries any judge or advocate has, even by inadvertence, sanctioned or even countenanced the position which has been thrown out by the gentleman. From the reign of Edward III to the present day, the current of authorities is clear and uniform the other way; and establish, beyond controversy, the principle that the judge of a court of record is not answerable either *civilly* or *criminally* for a mistake of judgment in his judicial character. The English authorities are reviewed by Chief Justice Kent, in the case of Yates and Lansing, 5 Johnson's Reports, 291. The case was that of a civil suit against Chancellor Lansing for having punished, as a contempt, an act which had been finally decided by the high court of error and impeachments not to be so punishable. In the page to which I have referred Chief Justice Kent announces in the following terms the proposition which he establishes by the English authorities.

"The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice. *Jurat accedere fontes atque haurire.*" Having gone through some of the authorities in the year books, he proceeds thus in page 292:—"These cases, and many more opinions of the like effect which could be gleaned from the year books, conclusively show that judges of all courts of record, from the highest to the lowest, and *even jurors, who are judges of fact*, were always exempted from prosecution, by action or indictment, for what they did in their judicial character. It did not escape the discernment of the early sages of the law that the principle requisite to secure a free, vigorous and independent administration of justice, applied to render jurors as well as judges inviolable: and I fully acquiesce in the opinion of Lord Chief Justice Wilmot that '*trials by jury will be buried in the same grave with the authority of the courts who are to preside over them.*' Chief Justice Kent then proceeds to examine the authorities subsequent to the year books, and in the course of this review comes to the case of Hammond and Howell, to his remarks on which I beg leave to call the attention of the Court.—In page 293—"But the case of Hammond vs. Howell (1 Mod. 184. 2 Mod. 218) deserves our particular notice, as being peculiarly weighty on the point before us. This is the case to which I have already alluded for another purpose. The defendant was recorder of London, and, as one of the judges of *oyer and terminer*, had *fined* and *imprisoned* the *plaintiff*, because he had brought in a *verdict*, as a *petit juror*, contrary to the *direction of the court and the evidence*. If ever a case was calculated to awaken sensibility and to try the strength of the principle, this must have been one. It arose soon after the decision in Bushel's case, in which it was agreed by all the Judges, that a juror was not finable for his verdict. *The act of the defend-*

ant was admitted to have been illegal, and no doubt it struck the whole court as a high-handed and arbitrary measure. The counsel for the plaintiff admitted the weight of the objection that an action would not be against a judge of record, for what he did *quatinus* a judge; and he endeavored to except this case from the general principle, by contending that what the defendant did, was not warranted by his commission, and that, therefore, he did not act as judge. But the court did not yield to such miserable sophistry; for they held that the bringing of the action was a far greater offence than the imprisonment of the plaintiff, for it was a bold attempt both against the government and justice in general. They said that no authority or semblance of an authority had been urged for an action against a judge of record, for doing any thing *as a judge*; that *this was never before imagined*; and no action would lie against a judge *for a wrongful commitment, any more than for an erroneous judgment*; that *though the defendant acted erroneously, he acted judicially, and if what he did was corrupt, complaint might be made to the king, and if erroneous, it might be reversed.*" The complaint to the king here contemplated is with reference to an impeachment or removal: and the court observe that the case put as rendering that course proper was if the judge had acted *corruptly* in doing what he had done; that is, with a *wicked intention to oppress, under colour of law.* In the farther progress of the same opinion, Judge Kent cites the case of *Grovenvelt vs. Burnwell.* (12 Mod. 386. 1 Salk. 396. 1 Lord Raym. 454) in which Sir John Holt, after stating this exemption of the judges from all liability for mere error of judgment, concludes "*that it would expose the justice of the nation, and no man would execute the office of judge, upon the peril of being arraigned by action or indictment for every judgment he pronounces.*" "I shall close this review of the cases, says Judge Kent, with noticing one arising in an American court. The case I allude to is that of Phelps and Sill, lately decided in the Supreme Court of Connecticut. (1 Day's cas. in error, 315.) From the characters composing that court, I think the decision entitled to great consideration. That was a suit against a judge of probate for omitting to take security from a guardian, and the court held that the action would not lie. They said that "it was a settled principle that a judge is not to be questioned in a civil suit for doing, or for neglecting to do a particular official act, in the exercise of judicial power. That a regard to this maxim was essential to the administration of justice. If *by any mistake* in the exercise of his office, a judge should injure an individual, hard would be his condition if he were to be responsible for damages. The rules and principles which govern the exercise of judicial power are not *in all cases obvious*; they are often complex, and appear under different aspects to different persons. No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decision might offend."

"Judicial exercise of power, continues Judge Kent, is imposed upon the courts. They must decide and act according to their judgment, and, therefore, the law will protect them. The chancellor, in the case of the plaintiff, was bound in duty to imprison and re-imprison him, if he considered his conduct as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his court, as he was bound in any other case to exercise his power. He may possibly have erred in judgment in calling an act a contempt, which did not amount to one, and in regarding a discharge as null when it was binding. This court may have erred in the same way; still it was but an error of judgment, for which neither the chancellor nor the judges of this court are or can be responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. The penalty is given only for the voluntary and wilful acts of individuals, acting in a private or ministerial capacity. It is a mulct, and given by way of punishment. The person who forfeits it, must knowingly, contrary to the act, re-imprison, or cause the party to be re-imprisoned.

There must be the *scienter*, or intentional violation of the statute; and this can never be imputed to the judicial proceedings of a court. It would be an impeachable offence, which can never be averred or shown, but under the process of impeachment."

What does the judge declare would be an impeachable offence? The acting with knowledge (*scienter*) that the judge was violating the law—"the intentional violation of the law." The chancellor, he says, was bound to imprison the party if he considered his conduct as a contempt of the court. He might have been mistaken in considering that as a contempt, which, in truth, was not one. But this would have been a mere error of judgment for which he was not answerable even *civilly*, much less *criminally*. If he knew it was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offence. Here is the very doctrine for which we are contending, that it is the guilty intention which forms the gist of the charge in every impeachment, and that a mere mistake of judgment is not an impeachable offence.

Chief Justice Kent winds up the able opinion which we have been considering with these emphatic remarks—"No man can foresee the disastrous consequences of a precedent in favour of such a suit. Whenever we subject the established courts of the land to the degradation of private persecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon every thing sacred in society, and to overturn those institutions which have been hitherto deemed the best guardians of liberty."

Will it be said that Judge Kent is here speaking only of a private suit? And is a judge answerable *criminally* for an act, for which he would not be answerable even *civilly*? Is it less calculated to subdue his independence to hold him answerable to an impeachment for a mere error of judgment? What man would hold the office of a judge under such a responsibility? Sir, if it had been supposed possible to sustain an impeachment for an error of judgment, chancellor Lansing would not have escaped the experiment. The case was one of extreme excitement. The chancellor had committed Mr. Yates for a contempt. Judge Spencer, holding the commitment illegal, had discharged him on *habeas corpus*. The chancellor holding the discharge to be illegal, again committed him. Judge Spencer, again discharged him on *habeas corpus*. The chancellor, the third time, ordered him to be imprisoned. From this last order, Mr. Emmet, as counsel for Yates, moved the Supreme Court of the State for a *habeas corpus*. The relief was refused by the Supreme Court, and the commitment by the chancellor sustained. The case was carried by writ of error to the high court of errors and impeachments, where the judgment of the Supreme Court was reversed, and Yates was discharged.

Yates was a man, it appears, of respectable standing, a master in chancery: both he and his counsel were manifestly much exasperated by the treatment he had received; and the conflict of opinion and action among the judges had roused all their feelings to a high pitch. The Chancellor had now been convicted by the court of *dernier resort*, of having punished as a contempt an act which was not a contempt. According to the principle advanced on the other side, whether he had done this through ignorance or intention, he was equally liable to impeachment. If such had been the opinion in New York, no man who follows these cases through the Reports of the State from the 4th to 9th Johnson's Reports, and observes the spirit in which the controversy was carried on, can doubt that resort would have been had to the process of impeachment. But it seems to have entered into no one's mind that an impeachment would lie. The utmost that was dared was to attempt to make the chancellor answerable *civilly*, in damages; and even this attempt, though carried through the whole range of the State courts, was finally repelled.

I have examined, with all the attention and care in my power, the various cases

of impeachments of judges, both in England and the United States, and I have not observed that *any counsel, even under the severest stress of the evidence*, has taken refuge in so bold a proposition as this which we are considering—that *error of judgment is an impeachable offence*—on the contrary, I think it will be found on the strictest perusal of all the cases that have been cited, that the counsel on both sides, have uniformly proceeded on the concession that the *guilty intention is the gist of the impeachment*. I will not detain you with an analysis of the cases with a view to this point—they have been already analyzed and are fresh in your recollection; and if the honorable managers who are to reply, have any thought of maintaining this novel proposition of their colleague, I ask them to refer to any passage in those trials, or to any authority of credit which lends to it even the weakest countenance. The honorable managers have referred to a private opinion of Mr. Erskine on another part of this case.—Permit me to give you his views on the question now under consideration. It is in his speech on the trial of the printer, John Stockdale, for a libel, and will be found in page 374 of the first volume of his speeches. [New York edition of 1813.] It is as follows:—

“The sum and substance, therefore, of the paragraph is only this: that *an impeachment for error in judgment, is not consistent with the theory or the practice of the English government*. So say I.—I say, without reserve, speaking merely in the abstract, and not meaning to decide upon the merits of Mr. Hastings' cause, that *an impeachment for an error in judgment is contrary to the whole spirit of English criminal justice*, which, though not binding on the House of Commons, ought to be a guide to its proceedings. *I say that the extraordinary jurisdiction of impeachment ought never to be assumed to expose error, or to scourge misfortune, but to hold up a terrible example to corruption and wilful abuse of authority by extra legal pains*. If public men are always punished with due severity, when the source of their misconduct appears to have been *selfishly corrupt and criminal*, the public can never suffer when *their errors are treated with gentleness*. From such protection to the magistrate, no man can think lightly of the charge of magistracy itself, when he sees, by the language of the saving judgment, that the only title to it is an honest and zealous intention. If at this moment, gentlemen, or indeed in any other in the whole course of our history, the people of England were to call upon every man, in this impeaching House of Commons, who had given his voice on public questions, or acted in authority, civil or military, to answer for the issues of our councils and our wars, and if honest single intentions for the public service were refused as answers to impeachments, we should have many relations to mourn for, and many friends to deplore. For my own part, gentlemen, I feel, I hope, for my country as much as any man that inhabits it; but I would rather see it fall, and be buried in its ruins, than lend my voice to wound any minister, or other responsible person, however unfortunate, who had fairly followed the lights of his understanding and the dictates of his conscience for their preservation.

“Gentlemen, this is no theory of mine; it is the language of English law, and the protection which it affords to every man in office, from the highest to the lowest trust of government.—In no one instance that can be named, foreign or domestic, did the court of king's bench ever interpose its extraordinary jurisdiction, by information, against any magistrate for the widest departure from the rule of his duty, without the plainest and clearest proof of corruption: to every such application, not so supported, the constant answer has been, Go to a Grand Jury with your complaint. God forbid that a magistrate should suffer from *an error in judgment, if his purpose was honestly to discharge his trust*. We cannot stop the ordinary course of justice; but wherever the court has a discretion, such a magistrate is entitled to its protection. I appeal to the noble Judge, and to every man who hears me, for the truth and universality of this position.

And it would be a strange solecism indeed to assert, that in a case where the Supreme Court of criminal justice in the nation would refuse to interpose an *extraordinary* though a legal jurisdiction, on the principle that the ordinary execution of the laws should never be exceeded, but for the punishment of malignant guilt, the commons, in their higher capacity, growing out of the same constitution, should reject that principle, and stretch them still further by a jurisdiction still more *eccentric*.—Many impeachments have taken place, because the law *could not* adequately punish the objects of them; but who ever heard of one being set on foot because the law upon principle *would not* punish them?—Many impeachments have been adopted for a *higher* example than a prosecution in the ordinary courts, but surely never for a *different* example. The matter, therefore, in the offensive paragraph, is not only an indisputable truth, but a truth in the propagation of which we are all deeply concerned.”

Thus much for the purpose of showing that the *guilty intention* charged in the impeachment is not matter of form but matter of substance; that it is a distinct and substantial charge; that it is the *mal a mens* which constitutes the very essence of the crime, and must be made out to the perfect and undoubting satisfaction of the Court before a sentence of guilty can be pronounced; that to establish it, it is not enough to prove that the act done was without the authority of the law, for that this intention cannot be inferred from the mere illegality of the act; that mistake is no crime, and that so long as the act can, upon the evidence, be referred to mistake, a court of criminal jurisdiction will no more *presume* a guilty intention than a court of conscience will presume a *fraud*; and finally, that the *guilty intention* must be made *manifest by the evidence beyond a reasonable doubt*, before a sentence of guilty can be pronounced. Indeed I understood the learned manager whose science and talents so long adorned the bench of New York, to have admitted what his colleague denied, that mere proof of an unlawful act would not suffice, unless connected with proof of a guilty motive.

It is true that a judicial act may be so grossly and palpably illegal as to render it impossible to refer it to mistake, more especially if there be any proof of previous malice on the part of the judge against the defendant. For example, if, on a trial for murder, a judge were to instruct the jury that malice aforethought was no essential part of the crime; that there was no such thing as *chance medley*, no excuse from self-defence, such a palpable violation of the known and settled law of the land to procure the conviction of an *enemy*, would well justify the conclusion of a malignant and guilty intention. But on a nice question of law, where amid the conflict, or apparent conflict of numerous authorities, different opinions may be fairly and honestly entertained, in such a case as this, to infer a guilty intention from a mere difference of opinion, would be an injustice so crying and horrible that every man would start back from the decision, with dismay and execration.

I admit, also, that a case may be conceived in which a judge may exercise even a legitimate power with such an enormous disproportion of severity, as, connected with proof of previous hostility against the individual, could leave no doubt of the criminality of the intention, and expose him fairly to an impeachment for a corrupt abuse of his powers; as if on a conviction for a common assault and battery a judge were to fine a defendant to the whole amount of a large fortune, or imprison him for life.

I admit, therefore, that a conscious usurpation of power for the guilty purpose of oppression, or an exercise of lawful power with excessive severity for the same guilty purpose, will equally expose a judge to impeachment. But in either case the *guilty purpose* must be placed beyond reasonable doubt by the facts of the case. It must not, in the first case be a mere difference of opinion with regard to the existence of the power, in a case fairly susceptible of a difference of opinion; nor, in the second, a mere difference of opinion with regard to the just *quantum* of punishment deserved by the case, as to which men equal-

ly honest may well differ. But the case must be so *grossly enormous* as to be unsusceptible of an honest difference of opinion either as to the power or the punishment, and incapable of being rationally referred to any other than a guilty purpose.

And, again, sir, the case intended to be relied on must be charged in the impeachment. The impeachment must charge one case, and the proof seek to make out another. The high misdemeanor charged in the impeachment is that alone which is to be tried and decided, and not another and a different misdemeanor which is not charged. The articles of impeachment, like the indictment at common law, is intended to apprise the defendant of the charge against him, in order that he may come prepared to meet it. He is not to be charged with one offence by the impeachment, and, then, on the trial, to be surprised by an attempt to prove another.

Now, here, the article of impeachment charges him with usurping a power which he knew that the law did not give him, for the purpose and with the intention of oppressing the individual. He is apprised, therefore, that on the trial he will be required to show his authority in law to do what he did, and to repel any proof that may be offered to fix upon him a guilty intention. This is the specific offence charged in the article of impeachment. But he is not charged *with the exercise of lawful power, with such severity as to establish a corrupt and criminal intention, and, therefore, this question is not open for trial under this impeachment.* It is for the purpose of accuracy, merely, that I mark this distinction. For if the Judge had power to inflict punishment at all in this case, I think it must be manifest that there is nothing in the degree of the punishment that was inflicted from which a dispassionate mind can extract the inference of a guilty intention.

The impeachment thus presenting the charge of an unlawful act, done with the unlawful intention charged, we are to inquire—I. Was the act unlawful? which resolves itself into these questions.

1. Had the Judge, under the laws of the land, the power to punish as a contempt a libellous misrepresentation of his Opinion? and if he had,

2. Was the publication in question a libellous misrepresentation?

The first head of inquiry raises the question of the power of the courts of the United States to punish contempts. This ground has been so ably pre-occupied by my learned friend and associate, in the argument by which he has done so much honor to himself, and so much service to his cause, that I am in danger of repeating to disadvantage what he has urged so luminously and forcibly. I have no enjoyment in being either the hearer or teller of a twice told tale, and will endeavor to tread off from his path as far as possible.

It is objected that the power of courts to punish contempts is a *criminal common law power*. But the courts of the United States, it is said, are courts of *limited and special jurisdiction, which have no criminal common law power; ergo, they have no power to punish contempts.*

To which I answer that the first error of this syllogism is in the *major* proposition, in considering the power to punish contempts as derived from the common law of England, and as belonging to the criminal branch of that common law.

The common law of England is said to be a body of *immemorial* usages and customs. But these usages and customs were once in their cradle. They did not ripen into *immemorial* usages and customs, till the memory of their origin was lost. But Courts existed when these usages and customs were yet in their cradle; and these courts, *in their very origin*, possessed this self-protective power to punish contempts: they could not have existed without it. This is the universally admitted principle of all who have ever, heretofore, written or spoken on this subject.

That *courts of common law* have always exercised this power, is no proof that the power itself is *merely a common law power*: to justify such a conclusion the

power should be shown to have been *confined exclusively to courts of common law*. Were this, indeed, the case, it might well be treated as a *strict common law power*. But we know that it is not the case. We know, on the contrary, that it has been exercised, *just as immemorially and universally, by courts which are not courts of common law*; for example, *by courts of chancery and by ecclesiastical courts*, which are courts proceeding by the *civil* and the *canon law*, by *admiralty courts, which are courts of the law of nations*; and by *parliament*, which is a court not governed by either of these systems of law, but springs from the British Constitution; having no other law but the *lex & consentendo parliamenti*.

To ascribe the power to punish contempts, then, to the *common law* of England, is to give it a false origin. It has a higher origin than that, and has been correctly referred to that *universal law* which confers on every body, collective or individual, the right of *self-defence*. It is not, then, a *common law power*.

Nor is it a branch of the *criminal jurisdiction of a court*, in the correct legal sense of these terms. This has been repeatedly denied. Judge Haywood, of Tennessee, denies it, as we have seen in the case which has been read; and he sustains that denial by an argument to which I have yet heard no answer, and, I believe, shall hear none: which is, that *if this power belonged to the body of criminal jurisdiction, its exercise would be confined to the courts which possess such jurisdiction*; whereas we see it in full and undisputed exercise by tribunals which have no such jurisdiction, as by courts of chancery, by the House of Commons in England, and by the House of Delegates and House of Representatives of the state and federal governments, in our own country.

The *major* proposition, therefore, of the argument we are considering, which assumes that the power to punish for contempts is merely a *criminal, common law power*, is not sustainable, but is altogether fallacious.

The *minor* proposition that the federal courts are courts of limited and special jurisdiction, and have no jurisdiction of *crimes at the common law*, becomes, therefore, of no avail in the argument. Its importance depended on the truth of the *major* proposition, which has been shown to be false.

But is this *minor* proposition itself true, *in relation to the question before us*? That the federal courts are courts of special and limited jurisdiction, and have no jurisdiction of crimes at the common law, *proprio vigore of the common law itself*, is conceded. This is the proposition maintained by Mr. Madison's justly celebrated report in 1799. But let that report be fairly examined, and it will be found that instead of being at war with the argument which we are maintaining, it sustains every proposition for which we contend. The principle asserted in that report is that *the common law of England is not in force in the United States as part of the law of the United States*. The instruction given to the Senators to Congress from Virginia, is "to oppose the passing of any law founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States, *excepting from such opposition such particular parts of the common law, as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government—and excepting, also, such other parts thereof as may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated.*" While the report affirms, then, that the common law, *in mass*, is not in force, *proprio vigore* under the government of the United States, it admits that there are *parts of that law* which have a sanction from the constitution, as being necessarily comprehended in the technical terms used by that instrument in expressing the powers delegated to Congress. Part of that law, therefore, has been introduced and implanted in our government by the constitution of the United States itself. Thus, Art. II. § 4. The President, Vice President, and all civil officers, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors." The constitution itself defines

treason, but it does not define *bribery* ; nor does it define those *other high crimes and misdemeanors* for which these officers may be impeached and removed.

Now what does the constitution mean by the expression *high crimes and misdemeanors* ? It has a meaning : what is it, and where are you to look for it ? The *phrase* is obviously borrowed from the *common law* : this instrument thus, by its own terms, connects itself, in this instance, with the common law, and authorizes you to go to that law for an explanation of its meaning. In the very proceeding, therefore, in which you are now engaged, the common law is in force for the definition of the *high crime* or *misdemeanor* which you are called on to punish.

The constitution, in like manner, secures *the trial by jury* : where do you get the meaning of a *trial by jury* ? certainly not from the civil or canon law or the law of nations. It is peculiar to *the common law* ; and to *the common law*, therefore, the constitution itself refers you for a description and explanation of this high privilege, *the trial by jury*, and the mode of proceeding in those trials.

The constitution declares that the judicial power of the United States shall extend to all *cases in law and equity*, arising under this constitution, &c. Now to what body of law will you look for this distinction between *cases in law and equity* ? Surely to the common law and to the chancery of England. You find the distinction in no other law. Does not the constitution itself then refer you to the English archetype of *courts of common law* and *courts of equity* as the models for the American courts called into being by your constitution ?—Do we not know, sir, that all our judicial systems in the several colonies were originally copied from the English model ? The convention, which framed the constitution, saw all these systems then in action, in the several states, on the general plan of the English judiciary. Our people were all accustomed to these systems, and to none other. What was more natural, what more prudent and proper than that the constitution, being about to call into action a new system of courts under the national authority, should look to the same source and take their plan from the same prototype ? Hence they gave us *courts of common law*, and *courts of equity*. Now, when a *court of common law*, or a *court of equity* was instituted under the constitution, whither were they to look for their guidance in the exercise of their powers but to the English originals to which they were thus manifestly referred by the constitution itself ?—Let me not be misunderstood. I do not mean that they could respectively assume *the whole extent of jurisdiction* exercised by the English courts of common law and the English court of chancery. Their *jurisdiction* is restricted by the constitution itself. It is confined, in terms, to cases arising under the constitution, laws, and treaties of the United States. But we are not now talking of *jurisdiction*. *Jurisdiction* is confined to pronouncing the law in *controversies between the parties in court*. Thus, under the constitution, the jurisdiction of the federal courts is sometimes limited by the subject matter of the controversy, sometimes by the character of the parties. But I am speaking of *the mode of doing business* in those courts, and the *power of self-protection* possessed by the courts themselves, *as courts*. And I insist, that with reference to this subject, the moment that a *court of common law*, or a *court of equity* is established under the authority of the constitution, its modes of proceeding and its powers of self-protection arise with it ; and that the *very name* by which it is called into being, authorizes it to look, at once, to the English archetypes for its government in these particulars.

The distinction between the *jurisdiction* of a court, and its *incidental power of self-protection*, is a clearly and strongly marked distinction. You see it exhibited by the Supreme Court in the case of the U. S. vs. Hudson and Goodwin. 7 Cranch 32. In that case the court disclaim *all common law criminal jurisdiction* ; but they claim the *self-protective power now in question, as indispensable to the exercise of their legitimate jurisdiction*. “ *Certain implied powers, say they,*

must necessarily result to our courts from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases, we are of opinion is not within their implied powers."

Now if all our federal courts of common law and equity necessarily possess this power of self-protection, of punishing contempts, where are the judges to look for the law and doctrine of contempts but to the English books from which the very models of the courts themselves are taken? They draw all their practice, all their modes of proceeding, all their principles of order from these courts. They do it necessarily, for they have no other sources of instruction to which they can look. All our judges do it, as you have seen by the cases which have been read to you. In the State as well as the Federal Courts they do it continually. What else can they do? And shall a man be impeached, stripped of his office, and blasted in his character, for following the authorities to which the constitution itself thus refers him by the baptismal name of his tribunal, as a court of common law or a court of equity?

I hold, therefore, sir, that if this power to punish for contempts had been shown to be a common law power merely, the courts of common law of the United States have the right to exercise it on the very distinction admitted by Mr. Madison himself. And I beg leave to add, sir, that with regard to this gentleman, the honorable managers can pronounce no eulogy which I shall deem excessive.

But it is objected that the power of the Federal Courts to punish for contempts is expressly limited by the 17th section of the judiciary act. This section declares that all the said courts shall have power to grant new trials, to administer all necessary oaths and affirmations, to punish by fine and imprisonment, at the discretion of the said courts all contempts of authority in any cause or hearing before the same, and to make and establish all necessary rules for the orderly conducting business in said courts, &c.

Without detaining the Court with a discussion on the extent of the power involved in this section—the power to punish by fine and imprisonment, at their discretion, all contempts of authority, &c. which is open to grave discussion, let us try the force of the argument which is founded on this provision. I understand it to be this: that the legislature having acted upon the subject by an express grant of the power, with the annexation of a given punishment, there is an end to all implied or tacit power in any other case, upon the maxim that *expressum facit cessare tacitum*. I should be glad to know, *en passant*, whence the gentleman derived this maxim and this rule of construction? I am afraid they will be obliged to acknowledge themselves indebted for it to that same common law, which seems to be so hateful to them. But to return.

The error of the argument is in the inaccurate statement of the premises. It is true that where a new power is granted, which would not otherwise have existed, and which, therefore, depends for its existence solely on the grant, it is strictly limited by the terms of the grant, and cannot be exercised in any other case nor in any other manner than the grant prescribes; and the reason is that as it owes its creation solely to the grant, it must necessarily exist as it has been created, and can exist in no other way. But if the reason ceases, the consequence ceases with it. If the power would have existed without the statute, or if it existed before or independently of it, then a statute containing a mere affirmative declaration with regard to it, without negative words, is never considered as a limitation of the power, but is simply regarded as a mere general recognition of its independent existence—in technical language as a mere declaratory act—an act declaratory of the pre-existing law. Let me take an analogy from the common law. "A statute made in affirmance of a pre-existing

common law power, *without any negative*, express or implied, does not take away or alter the common law power. 2 Institute 200. Thus, at the common law, the sheriff might call in the *posse comitatus* of the county to assist him in the service of *any process*. With this power in full pre-existence at the common law, came the statute of Marlbridge, c. 21, and the statute 2. Westminster, c. 39, by which it was provided "that after complaint made to the sheriff, he may take the *posse comitatus*, and *make replevin*:" whereupon, the question was gravely made whether since the legislature had now interfered, and expressly limited the use of the *posse comitatus* to the *writ of replevin*, it did not take away the right to resort to it for any other purpose—on the very maxim relied on here, that *expressum facit cessare tacitum*. But it was held that the statutes being merely affirmative of a pre-existing power, although they affirmed that power merely in part, yet as they contained no negative or prohibitory words (such as "in no other case") the power remained as it stood before, good to the whole extent, and that the sheriff might still resort to the *posse comitatus* for the service of *any kind of process*.

This example illustrates the distinction between a legislative act which, *for the first time, calls a new power into existence*: and a legislative act, *declaratory of a power which existed or would exist independently of that act*. In the first case, the legislative act gives the whole extent of the power: in the second, it does no more than to recognize its existence; and its character, scope, and extent are to be sought for in the sources from which it sprang, and the precedents which have governed its exercise. Now it is true, that prior to the judiciary act of 1789, in which this section is found, the courts of the United States did not possess a general power to punish contempts, for the simple reason that prior to that act there were no such courts. It was that act which called them into organized existence. But it is equally true that the moment those courts were called into existence and clothed with jurisdiction over any subject, this power to punish for contempts and all the other powers enumerated in this 17th section rose at once into existence with those courts, without any aid from this section. As the supreme court said in the case of the United States against Hudson and Goodwin, they are powers *necessarily inherent in every court from the very nature of its institution*. For can any rational man doubt that if that 17th sect. had not been engrafted on the judiciary law, the mere act of creating *courts for the trial of causes*, would necessarily have conferred on them the power to grant new trials, to administer oaths, to punish for contempts, and to make rules for the regulation of their proceedings? Nay, it is admitted by every gentleman who has spoken on the other side, that if the judiciary act had been entirely silent on the subject, those courts would have had the very power to punish for contempts which is declared by that 17th section, for that such a power is *necessarily inherent in every court of justice*. The statute, then, does not *create the power*; for it would have existed without it. It is a mere affirmative recognition of a well-known power, and one absolutely necessary to every court of justice. The section has not the air of a section calling into existence a new power. The form of expression adopted by it shows that it was intended as nothing more than a simple reference to the ordinary powers which belong to every court of justice, without the slightest manifestation of any design on the part of Congress to fix the precise limits of either power. These powers were known to belong to the familiar practice of all courts, civil, ecclesiastical, of common law, of equity, and of admiralty; and the section is a fair warrant to the corresponding courts of the United States to look to the practice of the courts in England for the regulation of this power.

But it is said that this section is, at least, a limitation on the kind of punishment which shall be inflicted for a contempt, to wit, *fine and imprisonment at the discretion of the court*. The argument is that the Judge being tied down by the section to *fine and imprisonment*, transcended his power by suspending Mr.

Lawless from practising at his bar. But of what value is this argument when the honorable manager admits, in the next breath, that there is another part of the same judiciary act which authorizes not only a temporary suspension, but a final and permanent expulsion from the rolls of the court. He admits that this is a necessary consequence from the power of admission of attorneys; for that the power to admit necessarily carries with it the power to exclude. Nay, he admits more—he admits and truly admits that if there had been no such express power in the law, it is a *necessary power* in all courts, to say who shall or shall not stand at their bar as officers of the court: that it is necessary to the vindication of their own dignity and authority to have the power of striking from their rolls unworthy members of the profession. And is not contemptuous conduct towards the court a sufficient ground for silencing any attorney? Was it not the very ground on which Mr. Tillinghast was struck from the rolls, with the sanction of the committee of the House of Representatives to which his case was referred? And is it only for contempt in the face of the court that such a procedure can be justified? Mr. Tillinghast's was not contempt in the face of the court. The offence consists in the public degradation of its authority. Whatever may be the decorum of an attorney's conduct in court, if, through the medium of the press, he reviles their *conduct*, misrepresents and ridicules their decisions, and, to the utmost of his ability, hands them over to the contempt and detestation of the public, destroying, as far as he can, all their weight, respectability and utility, and making them a mark for the finger of scorn—is such a man to be permitted to stand at the bar of the tribunal which he has thus labored to cover with disgrace! The judge who would permit it is unworthy of his place. But I am anticipating what more properly belongs to another head of inquiry.

Let us return, for another moment, to the 17th section. I wish merely to add that it has received a construction by the Supreme Court of the United States in the case of Anderson and Dunn, which has been already cited. For that court has held, as the honorable managers themselves have admitted, that the power would have existed without the section, *and that the power extends to cases not enumerated by this section*. If Judge Peck, therefore, was mistaken in the opinion that this section neither created nor limited this power, he erred in company with the Supreme Court of the United States, and we are yet to learn that a *mistake in such company* is ground for an impeachment.

But permit me to invite the attention of the honorable Court more closely to the admission of the learned and honorable managers, to which I have already slightly adverted—the inherent power of all courts to vindicate themselves against insult and contempt. “It cannot be controverted, says the learned manager from New York (Judge Spencer) that such a power exists; and it arises from this, that wherever an authority of any kind is conferred, all the powers necessary to its effectual exercise are conferred with it.” I believe I have quoted his words. He admits it. Here, therefore, is an acknowledged source of this power, which stands clear of the common law and clear of the judiciary act. Where then was the necessity of all the discussion to which we have been doomed to listen about the common law and the judicial act as the sources of this power? They may be thrown entirely out of view: yet we shall still have this separate and independent source—the universal and inherent power of all courts to vindicate themselves against insult and contempt.

But while the learned manager acknowledges the existence and derivation of this power from this source, he adds that we shall differ about the extent of the power. *We shall differ!* The learned manager speaks of it as if it were an original and gratuitous admission on his part, with regard to a *new power*, whose extent was now for the first time to be settled by this impeachment. Whereas he has admitted no more than has been openly and uniformly affirmed, from time immemorial, by the most illustrious judges that have ever adorned the bench: and with regard to the extent of the power, it is so far from be-

ing a new question which is now for the first time to be settled by speculative reasoning, that it is as old and well established as the courts themselves. For whence, let me ask, has the honorable manager derived the knowledge of this necessary and inherent power? Certainly not from abstract speculation, *a priori*, in his closet. No sir; he will not affirm this. He has drawn it from the English and American books, and has felt its truth confirmed by his own experience and observation. And such being the fact, when a question arises as to the extent of the power, and the cases to which it is applicable, to what sources of information can we more properly and wisely look, than to those from which we derive the knowledge of the existence and necessity of the power itself. The same judicial history which gives us the origin and cause of the power, gives us, also, the cases in which it has been found *necessary* to apply it. These examples show the *principle* of the power, *its aim and object, and its extent*. It is the *principle* explained and illustrated by its *practical application*: and its *existence and mode of operation* are imparted to us by the same authorities. We cannot gain the knowledge of its existence, without learning its extent on the same page. And the question before a court of impeachment for an alleged abuse of the power is not how far the power *ought* to extend, but how far it *does* extend by the established law. Whatever, therefore, may be the opinion of the honorable manager as to the restraints which it would be salutary to lay upon this power, the question is, what *are* the restraints which have been *actually* laid upon this power, by courts of acknowledged authority. If the law as it stands be disapproved, it is in the power of Congress to change it. But they will do this by a legislative act—not by a judicial sentence, as a court of impeachment. This would be *ex post facto with a vengeance*, in which there would be neither justice nor mercy.

The honorable manager tells us that while he admits the existence of this power, he would carry it only so far as it is *necessary* to the effectual exercise of a court's jurisdiction: and this *necessity* extends no farther than to the removal of obstructions to the actual exercise of its powers, as by punishing contempts in its face, and resistance or disobedience to its process. But he insists that this *necessity* does not extend to the punishment of constructive contempts, such as the *libellous misrepresentation* of the proceedings and opinions of a court in a *past case*.

This is the *opinion* of the honorable manager as to the extent of the *necessity* of this power. But he will permit me to say, and he cannot deny, that it is not the opinion of many, very many other great and good men, both in England and the United States. For they have thought it *necessary to the official exercise of a court's jurisdiction*, that it should maintain the respect and confidence of the country in which its jurisdiction is exerted: that all contemptuous writings, misrepresenting the proceedings of a court and exposing them to public scorn and ridicule, go at once to destroy the utility and defeat the very object of the institution, and therefore fall within the very *necessity* from which the power takes its rise and on which it is bottomed.

But the power being admitted to exist, of necessity, to some extent, where was Judge Peck to look for its limits but in those very authorities which assert the power, which set it forth at large, and show the cases to which it has been applied in practice? Suppose a lawyer called upon to give an opinion, in the line of his professional duty, on the extent of this power: how would this honorable Court expect him to go to work? What is the universal practice of all lawyers when an opinion is asked from them on a question of law? Do they not go to the books and rely upon their authority; to the English and American books; to elementary writers and adjudged cases; to see what all writers of acknowledged authority have thought and said, and all respectable courts have decided on the question in hand? Knowing that the maxim of courts is, *stare decisis*, and being asked for an opinion which they believe will stand the test of a judicial decision, must they not see what the past decisions have been, and

take them for the guide of their judgment? Is not such the uniform and approved course of all enlightened jurists in such a case? How do the courts themselves act on such an occasion? Their duty is *non jus dare, sed jus dicere*—not to give the law but to pronounce the law, as they find it already written. *Ita lex scripta est.* And is Judge Peck to be held *criminal* for pursuing a course universally practised and approved by all lawyers and all judges under similar circumstances? When he saw the power stated by elementary writers, of the first eminence, as a necessary incident to all courts; when he saw those writers declaring it to extend to the punishment of *contemptuous writings* with regard to courts, or the judges acting in their judicial capacity; when he saw the power not only asserted in theory but applied in practice by the highest names for talents and learning and virtue that ever adorned the English bench; when he saw the same power in full exercise in every state court on this continent, from New Hampshire to Missouri; when he saw it recognized by the Supreme Court as an existing, necessary and indispensable power in the federal tribunals, in common with all other courts; and when he saw it stated to be a power which he had not only the right to exercise, but which it was *his duty* to exercise, *his duty to the nation whose officer he was*;—was it for him to set himself in array against this host of authorities, and to declare that the power did not exist? Would this have been to obey the judicial maxims *stare decisis*—and *ius dicere, non jus dare*?

Let it be remembered that he had not the benefit of the private opinion of the honorable managers. He was driven, therefore, to his books. His books, indeed, informed him, as the honorable managers have admitted, that the power existed from its necessity; but they, also, informed him that this necessity extended much farther than the honorable managers admit; for they expressly informed him that it extended to all false and libellous writings tending to destroy the respectability, and, with it, the utility of courts of justice. And we insist that in assuming and exercising the power as he did, instead of acting *unlawfully*, as the impeachment charges, his conduct stands upon the clearest authority of the law.

Before I proceed to the books for the extent of this power, let me endeavor, sir, to take off some of the *odium* which has been unjustly attached to it. It is an extremely mistaken view of this power to suppose it intended to *erect the courts and judges into a privileged order* and to *set them up*, as it has been said, *above the heads of the President, Senate, and House of Representatives.* This is one of those *argumenta ad homines* which might have been spared, without detracting from the dignity of the prosecution. If seriously urged, as matter of grave argument, it proceeds from extreme inaccuracy of legal perception, as to the character, purpose and application of the power. Sir, it is not a *personal power to the man* who holds the office of judge. If the insult be a *personal one, merely*, it cannot be punished in this way, though the *person* insulted be a *judge*. For a *personal libel*, he can proceed only, *like all other citizens, by a personal action*, in which personal damages are recovered, or *by indictment*, in which the fine goes to the state. This is the admission of all the judges who have ever been called to consider the subject. You will find Hardwicke, Wilmot, and all the English as well as American judges *marking this distinction, and marking it strongly.* It is only for scandalizing *the court, as a court*, and on account of their *judicial acts*, or scandalizing *the judge*, on account of an act *done in his judicial capacity*, that the attachment for a contempt will lie. And it is not, as Judge Dade, Judge Haywood, and all the other judges, foreign and domestic, say, it is not *for themselves* that this power is conferred; it is *for the public, whose officers and servants they are*; and because it is of the utmost consequence to the people themselves who have erected these tribunals and to whom they belong, that they should command the deference, respect and confidence of the community. For these men are placed in these offices as the *conservators of the peace and order of society*: to settle quietly and peaceably those controver-

sies among individuals which, if there were no such *peaceful arbiter*, would end invariably in quarrels and bloodshed, and be settled by *the law of force*. But to the successful performance of this duty it is indispensably necessary that they should be held in respect by the community with regard to which they are to perform this part of mediators and peacemakers. For, say these wise and learned judges, English and American,—and they speak a practical truth acknowledged in all ages,—if every disappointed suitor shall be permitted, with impunity, to revile, insult, and traduce the tribunal which has been appointed by the people to decide his controversy, all the respect and authority of those tribunals will soon be at an end, their utility will be destroyed, the very purpose of their institution frustrated; *and with them will fall the authority of the laws themselves*.

Thus it is not *for the judges, individually*, and for the purpose of erecting them into a *priviledged order*, that this power is conferred. It is *for the people, themselves*, to whom these tribunals belong. It is for the sake of the public peace and order of society. It is to secure the respect and obedience of the community to the laws which these tribunals are appointed to administer.

Now, sir, if such a power be necessary in the stronger government of England, how much more necessary is it *here, where we have no superior but the laws*, and where the peace and happiness of society depend, entirely, on the strong, and faithful, and fearless administration of those laws.

It is asked—“Shall the judges, a mere emanation of the executive will, nominated by the president and appointed by the senate, possess a power denied to their superiors, who created them?”

This question involves a constitutional mistake. The judges are not *an emanation of the executive will*, but of *the will of the people*. It is the will of the people that there shall be judicial tribunals. The constitution, framed by the people of the United States, declares that there shall be such tribunals, and this for the public good. The president and senate are merely the agents appointed by the people to select the individuals who shall discharge the duties of those tribunals; and when thus appointed, the powers and duties of those tribunals are prescribed *by the laws of the land; not by the president and senate*. The relation, therefore, of *creator and creature* does not exist between the president and senate on the one hand, and the judges on the other; and the argument founded on this fancied relation falls to the ground.

Whether the president and senate possess the power to punish for contempts, is a question which it will be time enough to moot when it shall arise for decision. The question now before us is, whether *courts of justice* possess this power? And this question is to be resolved by the laws which govern those tribunals; not by an examination of the powers of other departments of the government so differently constituted and addressing themselves, by their action, to such different purposes.

There are peculiar reasons why courts should be armed with this power of self-protection. It is remarked by Judge Dade, as it had been remarked by all the judges and jurists before him, and particularly by the celebrated authors of the Federalist, that the judiciary is confessedly the weakest branch of every government. It has no patronage, no offices of honor or profit to confer. “It has,” says Judge Dade, “neither wealth, force, nor patronage.” It is supported entirely by the respect and confidence of the community. Deprived of these, all their usefulness is gone.

And then, again, the official duties of the president and legislative branch of the government keep them comparatively far removed from the people. They deal in high and general legislation, and stand aloof from the action of individual resortments.

The judges, on the other hand, are let down among the very body of the people. Their functions are to settle the controversies of excited and exasperated individuals, in the midst of whom they hold their sessions. They

operate directly upon their interests and passions, and are forced to live in the storm of angry feelings, which their decisions, however just, seldom fail to provoke. Do we not see, then, in their peculiar situation, a strong reason for the necessity of the power of self-defence and self-protection? In every case that they decide, they are sure to disappoint the one party or the other; and in proportion as expectation has been raised, and cupidity excited by the magnitude of the interest at stake, will be the probability that the tribunal will be vilified and insulted on account of its decision. How is such a mischief to be repelled, such a degradation averted? Is the judge to sue and to indict; to incur the never-ending expense and vexation of private actions and public prosecutions? Is he to be forever running, as Judge Haywood says, from court to court throughout his circuit, dancing attendance on grand juries and petit juries from day to day, and week to week, in maintaining controversies in which he has no other than the common interest of any other citizen, and deserting in the mean time his own appropriate duties as a judge? Sir, what will become of your judicial tribunals, if you place them on this footing? Who will accept or hold an office beset with so much contumely, insult and debasement, expense and vexation? Certainly no man who has a proper sense of the dignity or duties of a judicial tribunal, or a proper respect for himself.

But the honorable managers ask us what then? Where is this matter to end? Will you confer such a despotic power on judges to seize whom they please? Are the judges to be made parties, witnesses and judges in their own cause, and the dearest rights and liberties of the people to be placed at their arbitrary discretion?

It cannot have escaped the observation of the Court that in all the reported cases which have been read to you, this is the constant objection made to the power, which is as constantly over-ruled. Is it not over-ruled by the admissions of the gentlemen themselves, that this formidable power is indispensably necessary to all courts of justice to a certain extent? To the extent which they admit, it is liable to all the objections which they have enumerated. The judge is party, witness and judge *in his own cause*, if the cause of *the public*, which he represents, can, with any propriety, be called his own cause. The check upon its *abuse* is in the very process of impeachment. The existence of the power and its abuse are different matters. We are *now* upon the question of the existence of the power, and the extent of the power is fixed by the highest and most venerated authorities.

The possibility of a power's being abused is no argument against its existence. If it were, it would go to the destruction of all power, since there is none which may not be abused. But the interests of society demand that powers should be confided. There can be no society, no government without it. This very power or something equivalent to it, has been found necessary in all ages and all countries to guard judicial tribunals from insult. Thus, in Greece and Rome, officers of peace and justice were always held sacred, and the most august and solemn ceremonies were invented to clothe them, before the people, with a religious sanctity which could not be violated without a species of sacrilege. So, in the patriarchal ages, the head of the tribe was regarded as the representative and covenant friend of the Deity. Parental authority, itself, is founded upon this same necessity of maintaining peace and order among its subordinate members. No society can exist without confiding to some tribunal a power to decide all controversies which may arise between the members of the society, and investing that tribunal with a dignity and veneration which shall command the public respect and confidence. It is to this purpose that the summary process of vindicating themselves against insult by attachment has been confided to courts of justice.

And what, after all, is this terrible power which gentlemen have pourtrayed in such frightful colours? What says Lord Chief Justice Wilmut on this subject? "It only puts the complaint into a mode of trial, *where the party's own oath will*

acquit him; and in that respect, it is certainly a more favorable trial than any other; for he cannot be convicted if he is innocent, which, by false evidence he may be by a jury; and if he cannot acquit himself, he is but just in the same position as he would be in, if he was convicted upon an indictment or information; for the court must set the punishment in one case as well as the other: they do not try him in either case; he tries himself in one case, and the jury try him in the other."—Wilmot's Opinions, p. 257-8. And is not this perfectly true, sir, in the practice upon attachments in this country? The party called before the court upon an attachment is made his own witness in his own cause. If he be innocent, he will have no difficulty in disclaiming the contempt, and averring his innocence. The question is the *quo animo*: his purpose is known to himself; and he is permitted to purge himself by his own avowal. If a man has inadvertently taken a step which subjects him to the imputation of a contempt of court, when in truth he had no such design, what indignity can an ingenuous mind feel in explaining the transaction and disavowing any intention of contempt towards the public tribunals of his country. In the private intercourse of gentlemen such an explanation is not thought derogatory. A brave, generous and honorable man feels no difficulty in making it even in private life. Nor can I imagine that any well-regulated mind, conscious of its innocence, would feel the slightest difficulty in making it to a court of justice: on the contrary, I should imagine that such a one would be gratified with the opportunity of avowing its innocence. And on such an avowal we know that there is, at once, an end of the proceeding.

But we are told that this obnoxious power of proceeding by attachment for a contempt took its rise from the statute of *scandalum magnatum*. If it did, it had a much more scandalous origin than has hitherto been ascribed to it. The honorable managers seem determined to put the power into the very worst company they can find, and to disgrace it by the associations into which they have forced it—the seditious law—the Star-Chamber, and now the statute of *scandalum magnatum*. This last is a perfectly new idea. The statute of *scandalum magnatum* was passed in the reign of Richard II.—whereas the power of proceeding by attachment for contempts is coeval with courts of justice themselves.

[*Mr. Storrs*. I did not say that the power of punishing for contempts had its origin in the statute of *scandalum magnatum*. I said that the power of general libel came from that statute.]

Mr. Wirt. I shall not stop to examine the accuracy of this proposition, because I am unable to perceive its influence on the question before the Court. The question now under consideration is the power to punish for contempts; and this power was in existence, long before the statute of *scandalum magnatum*, and stands upon a totally distinct and separate footing. The statute of *scandalum magnatum* is comparatively a modern statute.—It was intended to give to the *magnates* of the land a power of personal action for slander denied to the plebeians. The distinction between a proceeding under this statute and that of an attachment for contempt, and the total absence of all similitude and analogy between them, cannot be placed in a stronger light than it has been by Lord Chief Justice Wilmot in the opinion before quoted. The counsel for Mr. Almon had, it seems, insisted in that case, that there was no necessity to resort to the extraordinary process of an attachment for contempt, because Lord Mansfield, the object of the libel, had a remedy on the statute of *scandalum magnatum*. To this Lord Wilmot answers (p. 258), "An action of *scandalum magnatum* is only to redress the private injury: compensation and not punishment is the object of it; and though some judges may have sought pecuniary satisfaction, yet others have thought more liberally and disregarded all private emolument or gratification for the personal injury, and resented the indignity as the cause of the public; and the conduct of the court of common pleas in respect to the libel published by the court-martial, is an authority in point upon this part of the case." The

two proceedings are so widely separated in their character and look to objects so totally distinct, that I am unable to discern the bearing, either in law or logic, which the statute of *scandalum magnatum* has on the question before us. As a topic in *odium* it may have been skilfully enough thrown in; but if such were the purpose, I have no fear of its effect before this enlightened and august tribunal.

If the *origin* of this power to punish for contempts be deemed worthy of inquiry by this honorable Court, I know not to what quarter they can more naturally look for information than to the examination which Lord Wilmot has made of the subject. He was put upon the inquiry in Almon's case by a suggestion of the counsel that the power took its rise from the statute of Westminster, c. II. and this suggestion was founded on a supposed *dictum* of Chief Baron Gilbert. But Lord Wilmot shows that Gilbert was misunderstood; that he himself corrects and explains his own *dictum*; that from the very structure and purpose of the statute of Westminster, it was impossible to derive this power from it, and that the power was in practical existence before the date of that statute. And he comes to the conclusion, which is here admitted in argument by the honorable managers, themselves, that the power is coeval with the first foundation and institution of courts of justice, and a necessary incident to every court, whether of record or not. "I have examined very carefully, says Lord Wilmot, to see if I could find out any traces of its *introduction*, but can find none. It is as ancient as any other part of the common law: there is no *priority* or *posteriority* to be discovered about it, and it, therefore, cannot be said to invade the common law, but to act in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society."

Lord Chief Justice Wilmot had means of investigating the origin of this power which we cannot possess. He had access to the original rolls of the English courts, to the remotest times. His character is that of an able and honest man, a firm and faithful patriot, and as true a friend of English liberty and of the right of trial by jury as any other man that ever existed in that nation. The honorable managers have thought it necessary to the success of this prosecution to cast a cloud over his name and authority. They have, indeed, done the same by every British jurist whose authority stands in the way of their argument.—Sir, I cannot make a better wish for my country than that her benches were filled with such men as Wilmot, Hardwicke, Blackstone, and the other illustrious names that have found so little quarter in the animadversions of our opponents. With regard to Wilmot, he was so far from being that tool of the court which he has been represented to be, that the most striking trait of his character was his habitual resistance to all high-handed and arbitrary measures. He was not, indeed, an incendiary or a demagogue: he had too much real elevation of character for that. But he was no tool of a court, no minion of power, no brawling or obtrusive candidate for office or honor. The remarks made upon him have induced us to look into his character, and it is one of the most winning that ever was presented by a public man; modest to an extreme, retiring, shrinking from the honors that were continually pressed upon him, refusing, with firmness, again and again, the great seal of England, when voluntarily and even importunately tendered to him; and overcome at last to leave the seclusion of a country life to which he was most ardently devoted, only by the zealous and persevering solicitations of his friends and the most earnest appeals to his patriotism to take the judicial offices in the King's Bench and Common Pleas, which he held, in succession. On the bench he was the very soul of truth and candor and impartiality; and this character was, on every hand, accorded to him by all parties. One of the honorable managers, with the view of lessening the weight of the judicial opinion on which we rely, has represented this spotless and excellent man, as

the apologist of that execrable engine of arbitrary power, *general warrants*; and to give color to this accusation has cited and noted two or three sentences of his charge to the jury in the case of Wilkes against the Earl of Halifax. It is a little remarkable that the biographer of Lord Wilmot has selected that very charge as a proof of the noble impartiality with which he held the scales of justice between the crown and the subject, and still more extraordinary that even the popular vehicle in which the honorable manager found the charge and the very pages which he cites, contain the most marked compliments to that identical charge, though it seems not to have suited the purposes of the honorable managers to call the attention of the Court to these. The work cited is the 19th volume of Howell's State Trials, pages 1406 to 1416, where the account of the trial is given as an extract from *the Gentleman's Magazine*. It is headed—“Extract—The following account of the trial is given in *the Gentleman's Magazine* for November, 1769, p. 556.” And it proceeds thus: “Came on, in the court of common pleas, before Lord Chief Justice Wilmot, the long-expected trial between Lord Halifax and John Wilkes, Esq. relative to the seizure of his papers and the imprisonment of his person. Sergeant Glynn, counsel for the plaintiff, opened the cause, and, in a very elegant and spirited manner, explained the unconstitutional nature of the injury. He was answered by Sergeant Whitaker, who endeavored to prove that what the defendant did was not of that unconstitutional nature as had been represented, but that it was *merely official and authorized by an invariable succession of precedents from the earliest times*.”—Then, after a brief statement of some of the evidence, the report proceeds—“The jury who served upon the trial, *after a most excellent charge from the Lord Chief Justice to give liberal but not excessive damages*, found a verdict for plaintiff, with £4000 damages.” And this compliment to this *most excellent charge*, be it remembered, is from a pen manifestly friendly to the plaintiff, Mr. Wilkes, as the whole statement demonstrates. Again, in a subsequent passage, it is stated that “some alteration is said to have happened in court, between Colonel O——w (Onslow) and a very popular sergeant, of which the judge expressed his dislike, in very significant terms, and threatened dismissing the court upon a like offence. His Lordship's behavior, throughout the whole of the very delicate affair, gave very general satisfaction. *Nothing could exceed his Lordship's impartiality in summing up the evidence, nor anything be pronounced more spirited*.” A sketch of the charge itself is there given, and it is worth while to read the passage immediately preceding the two sentences, which I find pencil-marked, (I presume by the honorable manager) for the purpose of seeing how far Lord Chief Justice Wilmot deserves the imputation of being the apologist of that arbitrary measure, *general warrants*. The passage is this—“The substantial part of this action is for taking his (Mr. Wilkes') person and papers without legal authority. Now there can be no doubt whatever but that the imprisonment of his person and the seizing of his papers was illegal, because there is no doubt but the warrant, whereby the plaintiff was imprisoned and his papers seized, was illegal; it has undergone the consideration of this court, and, likewise, of the court of King's Bench, and has very properly been deemed so by every judge who has seen it; and there is no pretence or foundation for the defendant in this cause” (Lord Halifax) “to make any stand against the action by way of justification, in the way he has done, because it clearly and manifestly is an illegal warrant, contrary to the common law of the land. And if warrants of this kind had been found to be legal, I am sure, as one of the plaintiff's counsel observed, it is extremely proper for the legislature of this kingdom to interpose and provide a remedy; *because all the private papers of a man, as well as his liberty, would be in the power of a secretary of state, or any of his servants. The law makes no difference between great and petty officers. Thank God! they are all amenable to justice, and the law will reach them, if they step over the boundaries which the law has prescribed*.” Is this the language of

a tool of power, a minion of the court, an apologist of *general warrants*? Was not the applause bestowed on this charge by the patriot pens of the day well and properly bestowed? Now come the passages which are marked in pencil. It will be observed that Sergeant Whitaker, the counsel for Lord Halifax, had insisted that the measure was not unconstitutional; that Lord Halifax had not been moved by private and personal malice against Mr. Wilkes; that he had acted *officially*, and that the step which had been taken "was authorized by an *invariable succession of precedents from the earliest times.*" These precedents had been laid before the court and jury, and it was proper and necessary for the Chief Justice, in summing up the evidence to the jury to notice them. This he does in the following manner.—"But though this warrant is illegal, yet it appears from the evidence that it was not of the defendant's own original framing; it was in conformity to many precedents in the Secretary of State's office from the time of the revolution."

[The precedents were then read, about forty in number, and many more were produced. The evidence was stated and the proofs referred to, that the plaintiff had obtained a verdict of £1000 against Mr. Welsh for the seizure of his papers. The learned judge then proceeded.]

These are the two sentences which are pencil-marked; and *thus detached from the charge*, they give the judge the appearance of having, himself, stated this point and these precedents in extenuation of Lord Halifax's conduct. But the point had been previously stated, as I have shown, by the counsel of Lord Halifax, and the judge would not have deserved the noble compliments paid to his impartiality, if in his charge to the jury he had omitted to notice this part of the evidence. He proceeds, therefore, thus—"The purpose of bringing this evidence is to endeavor to take off the imputation of malice; and to show you that it was not done without precedents; and that if it was wrong, it was at least a *precedented mistake*. Now, in the first place, it appears most clearly that the plaintiff has been taken up *unlawfully*, has been imprisoned seven days, has had his papers seized, examined and rifled; that these papers have been, likewise, improperly and illegally taken notice and made use of; and, by the letter that has been read to you, it appears that such of them only were to be returned as could not tend to prove the charge against him." Then, after giving the evidence, with a most striking candor, he returns again to these precedents, thus—"The warrant being clearly unlawful, you will consider of the damages. If the defendant had set up *this mint*, and had first invented and *coined the warrant*, it would certainly have been a prodigious aggravation: but you see from the evidence that the office has been in the habit and practice of granting these warrants from before the revolution to this time: they have been issued in the meridian of the constitution by its best friends, and the greatest lawyers, and have never before undergone any animadversion; and therefore whatever error this gentleman has been guilty of, he has erred with all the secretaries of state from that time." (This last sentence is, also, pencil-marked.) The Lord Chief Justice proceeds—"There is not the least foundation to presume any evil design in the defendant, against the liberties of the people. The secretaries of state are not bred to the law—and it would be an act of injustice to consider a *precedented mistake* as a *tyrannical, depraved, corrupt* act of oppression: and you find from the evidence that they applied from time to time to the lawyers of the crown; and when some question arose about the warrant, and a warrant was proposed with Mr. Wilkes' name in it, it was opposed by the solicitor of the treasury, who said, "This is the course of office; it has been approved of by the crown lawyers, and I cannot consent to any innovation." "*But*" proceeds his Lordship, "*however the proceedings might be in the course of office, it was certainly illegal: you must therefore find a verdict for the plaintiff, and give him such damages as, under the circumstances of this case, you are of opinion he is entitled to. I will go further and say, that you are not to confine yourselves strictly to the imprisonment of seven days and the mere seizing of his papers; but you should*

give liberal damages: by liberal, I do not mean excessive. 'Excessus in jure reprobatur,' the law always condemns excess: it must be within the rules of reason: the circumstances are to govern it, and, as nearly as you can, you will give that satisfaction and compensation which may bear a proper proportion to the injury, and to the nature of the injury received, under all its circumstances."

Such is the charge which even the partizans of Mr. Wilkes regarded as a noble display of impartial justice, as an excellent charge, than which, nothing could be pronounced more spirited; and which is here, for the first time, condemned, for the purpose of impairing the authority of Lord Wilmot's opinion in relation to the power of attaching for a contempt of court. The justice of the censure is submitted with confidence to this enlightened tribunal.

But his opinion in Almon's case has been, also, the subject of criticism and even of ridicule, for its supposed absurdity and aristocracy. As the opinion has the most decisive influence on the question before this honorable Court, I persuade myself that I shall be excused for inquiring how far it stands justly exposed to their criticisms.

One of the honorable managers was at first amazed, and then amused, and finally inexpressibly diverted at one of Lord Wilmot's positions, "that a libel upon a court is a reflection upon the King, and virtually imputes to him a breach of his coronation oath."

It is the remark of an acute observer (William Gerard Hamilton) that "by taking only the first and last part of what is said, and passing over all the intermediate links which connect them, an argument is made to appear extremely ridiculous." Mr. Lawless, in his printed paper, has furnished us with some very striking proofs of his proficiency in this art. And it is only by a similar process that ridicule can be attached to Lord Wilmot in regard to the positions that have been mentioned. Introduce the connecting links, and all the ridicule vanishes; the conclusion becomes sensible and sound. Observe the effect, sir—"By our constitution the king is the fountain of every species of justice which is administered in this kingdom. 12 Co. 25. The king is 'de jure' to distribute justice to all his subjects; and because he cannot do it himself, to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath, and sit in the seat of the king 'concerning his justice.'"

The arraignment of the justice of the judges, is arraignment of the king's justice: it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them.—(page 255.) Such is the light in which he presents the principle which has been thought so very ridiculous. The arraignment of the justice of the judges is arraignment of the king's justice: it is an impeachment of his wisdom and goodness in the choice of his judges. Is not this true?

Again, in a subsequent passage, (p. 270.) he says—"Bailiffs are neither appointed by the king nor the court; a libel upon them terminates only in the defamation of a private individual; it is telling the people that a person employed to execute process has abused his authority. But a libel upon a court is a reflection upon the king," (by whom the court was appointed) "and telling the people that the administration of justice is in weak and corrupt hands; that the fountain of justice itself is tainted, and consequently that judgments, which stream out of that fountain, must be impure and contaminated."

Thus, again, his argument is that the king by his oath at coronation binds himself "to administer justice to his people;" if he acts corruptly and administers to them *injustice*, whether he does it by himself or his agents, he violates that oath: it is in this sense, that he says (p. 270) that libelling the justice of a court, imputes to the king a breach of that oath which he takes at his coronation "to administer justice to his people." Is there any thing ridiculous in this? Is it not plain common sense? Sir, if the honorable manager had attended to the terms of the king's coronation oath, and permitted himself to observe *the*

connecting links in Lord Wilmot's argument, he could have avoided the recoil of his own arrows. Bring the principle to our own country. Does not the appointment of corrupt, profligate and incompetent officers reflect disgrace on the appointing power? If such a thing may be imagined as a President's displacing virtuous and competent officers, to make room for his own unprincipled and incompetent partizans, would it not be a breach of his official oath? I will not press the analogy, lest, in these suspicious times, an hypothesis stated argumentatively, should be suspected of being intended as matter of fact.

There is another passage in Lord Wilmot's opinion, which has startled the republican feelings of the honorable manager. The Chief Justice speaks of the importance of preserving the *authority* of courts; meaning, as he says, by their *authority*, not their coercive power, but that *homage* and *obedience* which are rendered to courts, from the opinion of the qualities of the judges who compose it. "It is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands; *that authority acts as the great auxiliary of their power*, and for that reason the constitution gives this compendious mode of proceeding against all who shall endeavor to impair and abate it." It is in this train of thought, and in this light, that he advances the proposition which has given so much offence to the honorable manager. Having spoken of the ground on which attachments issue for resistance to the officers of the court, he adds, "But the principle upon which attachments issue for libels upon courts is of a more enlarged and important nature—it is to keep a *blaze of glory* around them, and to deter people from attempting to render them contemptible in the eyes of the public." What kind of a blaze of glory is Lord Wilmot speaking of? Is it the external pomp and gorgeous trappings of office—wigs, and robes, and ermine, and maces? No, sir; he has told you his meaning. It is that blaze of *moral glory* which results from their virtues and intelligence, and the *public homage* with which these high qualities surround them. It is that *authority* and *veneration* which always encircle the good and the great. Cast your eyes on the ancient republics of Greece and Rome—will not your memory readily supply you with names around whom this *halo of glory* continually beamed? Solon, Lycurgus, Pericles, Phocion, Epaminondas, Aristides, Socrates, Numa, Justinian, Cincinnatus, Fabricius, the Catos, the Brutuses, and a magnificent constellation whose stars it were endless to count, that shed a *blaze of glory* on the age in which they respectively lived, and impart that blaze of glory even yet to the page of history which recounts their noble qualities and achievements. What was it that consecrated the Areopagus of Athens? What was it in the Senate of Rome that struck the ambassadors who entered it with awe, as if they had entered an assembly of gods? Nay, sir—let us come to our own country. Let the honorable manager cast his eyes on the declaration of our independence, and the names appended to it. Does the honorable manager see nothing of a *blaze of glory* there? Sir, have we no such assemblies, no such tribunals, no such individuals in our own day? Who does not know and feel that we have,—nor would it be necessary to go far to find them. But the ground is delicate, and I have no taste for the name of a parasite.

Sir, a contempt for this fine and just sentiment of Lord W. may be thought a proof of spirit and boldness and independence. But if peace, and order, and decency in society be of any value, that sentiment will find minds to admit and hearts to feel its truth. I hope there are yet such among us. If there be not—'chaos is come again!'

Having thus endeavored to clear the authority of Lord Wilmot of the vapors which gentlemen have labored to congregate around it, let us come directly to the question before the Court.

The power to punish for contempts being admitted to exist necessarily to some extent, to what extent did it exist when these proceedings took place? The question is not how far this honorable court may think the power *ought* to extend;

but how far it did *in fact* extend, upon the authorities which are received in all courts of justice.

The honorable managers insist that it extended no further than to the removal of actual obstructions to the Court's jurisdiction; and that it did not extend to writings reflecting on the past proceedings of a court.

Let us divide the proposition; and inquire *first*, whether it extended to writings reflecting on the proceedings of a court.

The first case to which I shall call the attention of the Court is that before Lord Hardwicke, in 1742. 2 Atk. 469. This case has been so repeatedly animadverted on by the documents and arguments before you that a minute dissection of it is unnecessary. It was a motion against the printer of the *Champion* and the printer of the St. James's Evening Post, for a contempt of the court *by writing*. Lord Hardwicke says—"Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; now is there any thing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard?"

"But to be sure Mr. Solicitor has put it upon the right footing that notwithstanding this should be a libel, yet unless it is a *contempt of the court*, I have no cognizance of it; for whether it is a libel against the public, or private persons, the only method is to proceed at law."

He then proceeds to consider whether the printed paper in that case was a contempt of the court, and announces the various objections which had been made to affixing that character upon it. One of these objections, it seems, was just the objection which is made here, to wit, that the paper contained no contemptuous expressions towards the court, but the court was spoken of with great respect: to which Lord Hardwicke answers—"and indeed it is very true, *but then this is colorable only, and such colors shall never impose on the court.*"

Lord Hardwicke then lays down the law of contempt in the following terms to which I invite the attention of the Court, and request them to observe that he is thus laying it down in a case where the alleged contempt was by a printed libel.

"There are three sorts of contempt:

1. "One kind of contempt is by scandalizing the court itself.
2. "There may be likewise a contempt of the court in abusing parties who are concerned in causes here.
3. "There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard." He adds, that "there cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their character."

He adjudges the libel before him a contempt, and commits the printers. Be pleased to observe that Lord Hardwicke here recognizes three *separate and distinct species of libel*, which have no connexion, but may exist independently of each other, and which stand upon a different foundation of reason. Thus the first is *scandalizing the court itself*. The reason for this is that it impairs the authority of the tribunal and tends to bring it into public contempt: and this injury is equally done whether the cause to which the scandal relates be still pending or have been finally decided. The scandal may be levelled at the final decree itself; and it must be manifest that the indignity to the tribunal is just the same as if that scandal had related to an interlocutory order. The tribunal is a permanent one. Though the particular cause may be at an end, the tribunal still subsists, and the same necessity exists of drawing to it the respect and confidence of the public. It is the *third species of contempt* enumerated by Lord Hardwicke which requires for its consummation that the cause should still be pending: to wit, "*prejudicing mankind against persons before the cause is heard.*" The Court cannot but be struck with the distinction and the marked difference of the reason on which these two species of contempt respectively rest.

Yet the honorable managers insist that this power is confined to contempts

committed in the course of causes pending in court, and that if the cause has been decided and has left the court, there is no such power.

Now it is manifest that this objection limits the power to one species of contempt *only*, while Lord Hardwicke expressly declares that there are three; and it is equally manifest that this objection confounds the very different reasons on which these several and distinct species of contempt rest.

Now, sir, I deny the proposition that the power to punish for contempts is thus confined to causes pending in court; and as the gentlemen hold the affirmative of the proposition, we call for their authority, elementary or practical, which thus restricts it. None such has been or can be adduced; for there is none such. The restriction would destroy the whole policy of the law as it respects scandal on the court itself. We affirm that there is no elementary book, and no adjudged case, which imposes or even countenances this restriction, but that the reverse is the fact.

In the absence of all authority for this restriction, gentlemen cite books to show that the power has been applied to contempts committed in the progress of pending causes, and that *when so applied* the rule is necessarily *entitled* as of the cause in which the contempt arose. There is no doubt of this. The power does extend to the punishment of contempts committed in the course of causes pending in court. This is one of Lord Hardwicke's classes of contempts. But the question is not whether it extends to these contempts, which was never denied; but whether it extends no further, which is the very point in question. The proof that it applies to causes in court is proving only what is admitted on every hand; but is surely no proof that it extends no further. Gentlemen may cite books to show that an action of debt will lie on a bond with a penalty; but would this prove that it could not equally lie on a single bill?

Sir, it was never denied that an attachment would lie for a contempt committed in the progress of a cause. Nay, it is true that such are the cases which most frequently occur; and for this obvious reason that it is during the progress of a cause that those excitements and irritations, which lead to acts of contempt, most naturally and frequently arise. Hence it is that the cases on this class of contempts are most abundant. But it does not follow that these are the only kinds of contempts that are punishable. There are few more cases for verbal than for written slander: but does it follow that an action for written slander will not lie? Now, if the books which the learned managers have cited had not only affirmed the power to punish for contempts committed in a cause pending in court, but had gone further and disaffirmed its existence in any other case, this would have proved something material to the point in debate.

But the learned counsel seek to make out their proposition in another way. They say that in an attachment for a contempt, the notice and motion must be *entitled* with the names of the parties in the cause; and such being the fixed rule of procedure in all cases of attachment for contempt, it follows that it must have occurred with regard to a pending cause, since otherwise it could not be *entitled* with the names of the parties. Let us see to what extent these authorities maintain this position. They cite, first, Tidd's Practice, 450; and I expected to find the author treating directly and exclusively of *attachments for contempt* at large, and marking the boundaries of the power. But on turning to him and the authorities by which he illustrates his positions, I find that he is speaking of motions and affidavits for attachments generally *in civil suits*, and is confining himself to such as occur in *such suits*. His words are, "Motions and affidavits for attachments *in civil suits* are proceedings on the *civil side of the court* until the attachment is granted, and are to be entitled with the names of the parties: but as soon as the attachments are granted the proceedings are on the crown side, and from that time the king is to be named as the prosecutor." Now, of what kind of attachments is the author speaking? The authorities cited by him will answer the question. He cites, first, 3 T. R. 253, which was a motion for an attachment against a sheriff, for not bringing in the body of the

defendant. 2 T. R. 643—motion for an attachment against a defendant for not obeying an award. There had been no rule of court, and the motion was discharged. 7 T. R. 439—527,—case of attachment against the *Sheriff of Middlesex, for not bringing in the body of the defendant*. These are all the cases cited by Tidd, and what bearing they have on this question it passes my faculties to discern.

The gentlemen have also cited the case of the United States v. Wayne, from the Port-folio—where an attachment *having issued in a pending cause*, it was held that it should be entitled of that cause. The decision was wrong, because it is admitted by all the authorities that when the attachment issues, it takes the name of the king in England; of the government here. But if right, it proves only that *when the attachment relates to a pending cause*, it must be entitled of that cause; which proves nothing on the extent of the power, when the attachment does not proceed upon Lord Hardwicke's third class of contempts, but arises upon the first.

The Annual Register for 1765, p. 179, cited for the purpose of showing that the rule must be entitled of a pending cause, seems to me to prove precisely the reverse. The rule there was entitled of the case of the king against John Wilkes, which was (perhaps) a pending cause, and in relation to which the supposed contemptuous publication of Mr. Almon had taken place. There was certainly no previous cause against Mr. Almon, pending in court, of which the rule against him for a contempt, *could have been entitled*. If, then, the principle of practice contended for on the other side be right, the rule in Almon's case was rightly entitled, and could not have been properly changed: but what says the passage which has been cited.

“About the middle of June (Trinity term) the judges called for the defendant's counsel, and, in the course of much altercation, repeatedly desired their consent to the amendment in the rule; *where, instead of “the king against John Almon,” it was put “the king against John Wilkes;”* but to this, the defendant's counsel very firmly refused to consent. *The rule was, therefore, discharged;* and all prosecution was thought to be at an end. But next day a very considerable quantity of fresh matter of accusation was brought by Mr. Webb, then solicitor to the treasury, and supported by new affidavits; on which (in consequence of a motion made by Mr. Wallace) a new rule was made against Mr. Almon, to show cause why a writ of attachment should not go against him, for his contempt upon this new accusation.”

We rely upon this authority, therefore, to prove the reverse of the position for which the honorable managers have cited it; to prove that the rule need not be entitled of a pending cause, and that so far as the argument of the managers is bottomed on the supposed necessity of such entitling, it fails entirely.

There is, therefore, nothing in these authorities, which ties up the power as it is laid down by Lord Hardwicke, or lends the slightest countenance to the restriction proposed to be laid upon it by the honorable managers. There is nothing that limits it to causes pending in court; and the *reason* of the power so far as it forbids contempts in scandal of a court, forbids such a limitation.

But the learned counsel ask if there are any cases which show an exercise of this power when there has been no cause pending in court? Yes, sir; there are many. John of Southampton's case in the time of Edward III. 3 Institute, 174, S. C. 8 State Trials, 49.—Gentlemen smile at this case; but it has, as you perceive, the sanction of Lord Coke, and of a committee of the house of commons. Williams' case, 8 State Trials, 49. Colebathch's case, *ib.* John Barber's case, *ib.* (S. C. 1 Strange, 444. This is a strong case.) Wyatt's case, *ib.* Lady Lawley's case, *ib.* Mark Halpen's case, *ib.* and Almon's case, already cited. I shall call the attention of the Court presently to several cases in our own court.

But suppose there was not a single case. This was just the predicament of

the General Court of Virginia in the case of the Commonwealth v. Dankridge 2 Virginia cases—408. The objection of the total absence of any case to warrant the punishment of the alleged contempt had been taken, in that case, by Mr. Leigh, the counsel for the defendant. Permit me to read the answer of Judge Dade to this objection. “We are told that no reported case can be found in the books which sustains the idea of this being an offence punishable by attachment. My own researches have, indeed, been as fruitless as those of the counsel. Whilst this power has been freely and frequently exercised by the courts in defence of their extreme limits, we have no case on record where it has been drawn out to repel an attack on the citadel itself. I cannot even find more than a single reported case. (*Harrison’s case* reported in *Cro. Car.*) in which it has been exercised for the punishment of a gross insult *in facie curiæ sedentis*. It was obvious to the most superficial observer of judicial proceedings: it was a postulate which his feelings suggested, without reference to his judgment; that in this latter case such a power must belong to the court; and accordingly in the argument that power has not been questioned. And yet, I repeat, that it is not supported by more than a single reported case, but depends upon the same principles from which is deduced the power claimed by the Superior Court of James city, in the case before us, and is, according to my construction of Blackstone, to be found in the same elementary writer who has drawn together in the most condensed and perspicuous manner, the scattered authorities upon this head. At most, this is a negative argument, from the general force of which, where the principle is doubtful, it is not my purpose to detract. But where the principle is clear,—and the cases are numerous in which that principle has been sustained and enforced, even by inference and deduction, and has been made operative by mere relation,—it seems illogical to deny its direct and immediate application, because no case in point is to be found. When I find the courts protecting their authority by punishing those who treat with disrespect their process, rules, and orders, although that disrespect shall consist in merely using light and contemptuous expressions of them; when I see them committing those who undertake to publish accounts of or strictures on cases depending before them, as in the case of *Atkins*; when I see them punishing one who has questioned a juror for his verdict, or a witness for his testimony; I inquire why this has been done? I find in the case of the process, &c. that it was as effectual for its end and purpose, though spoken of contemptuously as if received in silence, or treated with professed respect. In the case of the jurymen and witnesses, I do not find that the verdict had been influenced or the judgment delayed. As, therefore, the actual authority of the court (meaning always the persons who compose it,) was not *obstructed*, I perceive no other reason in the above cases for its animadversion, than that its general authority and efficacy was impaired, and its dignity lessened; and that too by an inference, in some of the cases very remote and far-fetched. When Lord *Hardwicke* punished a printer for his publications respecting a case before his court, in which publications there was not one word disrespectful of the chancellor, I perceive that the object was to check a practice by which, in the end, the opinions of the court might come to be influenced. And when I see the juror and witness protected from insult for what they may have said or done in court, I ask whether it is more necessary to defend these characters, who may perhaps never be again called into a court of justice, than the judge, who must be so often exposed to similar trials. When in all these cases, I find the great object to be the preservation of the authority, dignity, impartiality and independence of the judiciary, without which it has been said it could not exist, or, if existing, would be a curse rather than a blessing, I cannot feel justified in excepting a case, which is, in all its particulars, in direct hostility to this principle, because I cannot back my opinion by a reported case.” Thus the argument of the judge is that when the principle is clear, and the object of the power manifest, he will not wait to ask if there be a case in point, but follow out the

principle in fulfilment of the object. Judge Dade and Judge White give us the precedent of relying on elementary writers, as well as reported cases, in ascertaining the principle and purpose of this power. Judge Haywood does the same in the case of Darby, which has been read to this honorable Court. So do the judges in Pennsylvania. Let us follow the example, and see if Lord Hardwicke is at all singular in considering a libel *in scandal of a court* as a contempt punishable by attachment, and whether there is a shadow of an intimation that to make it so punishable the libel must relate to a *pending cause*. Let us see whether, on the contrary, the power be not laid down in the broadest terms, without any such qualification as the honorable managers have intimated. Hawkins' Pleas of the Crown, B. II. C. 22. §. 33, reduces to distinct heads the most remarkable instances of contempts, some of which from their nature necessarily relate to pending causes, others not: they are then, 1. Contempts of the king's writ, which must be in the case of a pending cause. 2. Contempts in the face of the court, which have no necessary reference to any particular cause. 3. *Contemptuous words or writings concerning the court*: he does not add *in relation to a pending cause*, nor does the reason of the case call for such an addition, but manifestly repudiates it. 4. Contempts of the rules or awards of the court. 5. Abuses of the process of the court. 6. Forgeries of writs and other deceits of the like kind, tending to impose on the court. It is observable that the other specifications of contempt exclusive of the third, embrace and exhaust every species of contempt that can be committed in a pending cause; for what contempt can be committed in a pending cause which will not be comprehended under some one or other of the heads of, 1. Contempts of the king's writ, or 2. Contempts in the face of the court, or 4. Contempts of the rules or awards of the court, or 5. Abuses of the process, or 6. Forgeries of writs, or other deceits? If this be so, the third head "*contemptuous words or writings concerning the court*," is a distinct and separate head having no necessary connexion with a pending cause, but standing on the same ground of reason with Lord Hardwicke's first class, *of scandalizing the court*, and deriving its offensive character from its tendency to impair the dignity, authority and usefulness of the public tribunal. Hawkins, then, proceeds to take up these separate heads for illustration; and when he comes to the third head, he says (section 36) "as to the third particular, viz. where persons are punishable in the manner above mentioned, for *contemptuous words or writings concerning the court*, it seems needless to put any instances of this kind, which are generally so obvious to common understanding." He was speaking, no doubt, of *common understanding* as it existed in England, to which he was addressing himself; and not to the uncommon understanding which might exist in other regions of the globe. Blackstone III. 285, is still more explicit. "Some of these contempts may arise *in the face of the court*; as by rude and contumelious behavior, by obstinacy, perverseness, or prevarication; by breach of the peace or any wilful disturbance whatever: others *in the absence of the party*; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion or injustice; *by speaking or writing contemptuously of the court, or judges acting in their judicial capacity*; by printing false accounts (or even true ones without proper permission) *of causes then depending in judgment*; and *by any thing in fact which demonstrates a gross want of that regard and respect, which whenever courts of justice are deprived of, their authority (so necessary for the good of the kingdom) is entirely lost among the people.*"

Here you have, again, *speaking or writing contemptuously of the court, or judges acting in their judicial capacity*, presented as a distinct and substantive kind of contempt punishable by attachment: you have no such qualification as that contended for by the honorable managers, that this *contemptuous speaking or writing must relate to a cause pending in court*, though the author annexes that qualification *expressly to another species of contempt*, "printing false accounts

(or even true ones without permission) of *causes then depending in judgment.*" The reason which he assigns is worthy of observation: it is the tendency of these contempts to deprive courts of justice of their *authority*; of that authority which grows out of the respect and regard of the people. Now I, again, beg the honorable Court to consider whether this public respect and regard be not as effectually impaired by contemptuous speeches or writings of a court, or of the judge, acting in their judicial capacity, whether the cause to which they relate be still pending or shall have been finally decided? How is it possible that the pendency or non-pendency of the cause can affect the operation of such a libel on the respectability of the tribunal? If its integrity and intelligence be arraigned before the people by such a libel on a cause just decided, is not the effect of undermining the public confidence and destroying the authority of the tribunal as completely produced as if the cause were still pending? If the case has been decided, the libel will not, indeed, have the effect of prejudicing the public mind with regard to the cause: but this consideration belongs to an entirely different kind of contempt, a distinct class, and ought not to be confounded with that which we are considering. Whether the cause be pending or not, such a libel is a direct assault on the character of the tribunal, and its tendency is to overcast and eclipse and destroy all its respectability and usefulness, as a judicial tribunal. The honorable managers have, somehow, taken up the idea that nothing is a contempt which does not *obstruct the action of the court in a pending cause*: as if a *general and universal obstruction of its action by destroying its character* were not equally criminal! This is one of the objections which Lord Chief Justice Wilmot was called to consider in Almon's case, and he takes it up thus (page 255), "Indeed it is admitted that attachments are very properly granted for *resistance to process, or a contumelious treatment of it, or any violence or abuse of the ministers or others employed to execute it.* But it is said that the *course of justice* in these cases is *obstructed*, and the *obstruction must be instantly removed*; that *there is no such necessity in the case of libels upon courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatever.* But when the nature of the offence of libelling judges, *in court or out of court*, comes to be considered, it does in my opinion become more proper for an attachment than any other case whatsoever." "The arraignment of the justice of the judges is arraigning the king's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them: and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatever; not for the sake of the judges, as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary to the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

"In the moral estimation of the offence, and in any public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves."

If the physical obstruction of a court's action be the test of this power, gentlemen will have to recall much that they have conceded; for how, let me ask, does a libel on a court *in a pending cause*, present any physical obstruction to their action? It does not prevent their giving judgment nor issuing execution. Or how do contemptuous words spoken of a court or its process, interfere with the court's action in the cause? As Judge Dade remarks, "the process,

though it has been spoken of contemptuously, is just as effectual for its end and purpose as if had been received in silence or treated with professed respect." *Actual obstruction* therefore cannot, in these instances, be the test of the power which is clearly admitted to exist. On what then does it proceed? Let us see Judge Dade's answer to this question: "As therefore the actual authority of the court is not obstructed, I see no other reason in the above cases for its animadversion than that its general authority and efficacy was impaired and its dignity lessened." Here is the opinion of Lord Wilmot expressed by a Virginia judge without any privity between them: I say, without any privity, because it does not appear by the report of the case in Virginia that the opinion of Lord Chief Justice Wilmot, in Almon's case, was before them: had it been, it would certainly have attracted their attention most powerfully, and been the subject of specific comment.—But we know that the work is a comparatively rare one in this country. This coincidence in opinion was the result of the same strong sense acting on the objects and character of this power as explained by the other authorities; for it is obvious to common understanding that the cases just mentioned present no actual obstruction to the jurisdiction of the court; and it is not less manifest that if they did, obstruction in a particular cause is of far less consequence than a general and universal obstruction, by the entire prostration and ruin of the court's respectability and authority.

It seems that the restriction upon the power, here contended for, "that the contempt must have occurred in a *pending cause*, and could not be punished by attachment if it related to a past cause," was brought into view in the argument in the case of Dandridge before the general court of Virginia, though introduced in a somewhat different light. Let us see the view taken by Judge Dade of this restriction. "Upon this part of the subject, and in reference to the cases which have an indirect bearing on the present question, a distinction is attempted, for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the *prospective* conduct of the judge, but not for such as touch his *past* conduct. In reason I see but one pretence for this distinction: threats and menaces of insult or injury to a judge in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that, for which he could not be attached, when actually done. One says of a judge, "If he render a certain judgment against me, I will insult or beat him:" for this he may be attached. But, if (the judgment having been rendered) the insult be actually offered, an attachment no longer lies; because the contempt is in relation to the *past conduct of the judge, and to a case no longer pending. A recurrence to original principles, the only true test, by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal.*"

Thus it is very clear that Judge Dade did not consider the objection that there was no longer a *pending cause*, as any objection to this power, when the contempt was levelled at the court itself, and its tendency was to degrade and destroy the general authority of the tribunal.

Judge White, the presiding judge of the general court of Virginia, and one of the most learned and efficient members of the judiciary of that state, takes the same broad and just view both of the mischief and the general power of redress, and by his distinct mention of *disappointed suitors who had lost their causes*, shows that he was contemplating, among others, contempts provoked by a final adjudication, and occurring consequently when there was no longer a cause in court. His words are these: "We cannot prostrate the courts of the country at the feet of every disappointed suitor, *who may happen to lose his cause*, or whose conduct may necessarily elicit from a judge, observations unpleasant to his feelings, without producing the most fatal consequences. No! destroy the

protection which the law now gives to your courts, unloose the hands and tongues of such persons, expose your magistrates to their abuse, contumely, and vituperation, for their *judicial* conduct, without any immediate and efficacious means of restraint, and instead of that happy dignified and peaceable state of society which we now enjoy, we shall soon find that we have neither laws nor magistrates: and let it be remembered that in this country we ought not to have, we have not, any privileged order of men. If one man is restrained from such conduct, every other man must be subject to a like restraint. If one man is at liberty to pursue it, every other man must enjoy the same liberty."

In the case of P. H. Darby, there was no longer a cause pending before the court. The Supreme Court of Tennessee had pronounced its opinion, and the cause had gone out of that court. In this state of things, Darby published a libel upon the court for the opinion which they had given; and for this offence he was stricken from the rolls of the court, the effect of which was to disqualify him for practising in any court of record in the state of Tennessee.—See the opinion, pages 4-5. It is true, the case in which this learned opinion of the Supreme Court had been given, was still pending *before another tribunal*, the Circuit Court of Tennessee: so, also, was the case of Soulard, which was the subject of the libel before us,—of which I shall speak presently: but if the restriction has any meaning at all it would bind up the power of any tribunal before which there was not a case depending at the time of the alleged contempt, and would consequently have extinguished the power of the Supreme Court of Tennessee to have acted upon Darby. But the Supreme Court thought differently, and we hear of no dissatisfaction having been produced by their decision. It is in perfect unison both with the principle and practice of the power, as laid down both in England and the United States, and carries it quite as far as Judge Peck carried it in the case before us; and yet no farther than was necessary to accomplish the purpose for which the power was conferred.

The objection made here, that the Judge ought to have proceeded by *action* or *indictment* for the libel, and the accused ought to have had the benefit of a trial by jury, which is the great constitutional privilege of freemen, is repelled with the most convincing energy both by Judge Haywood, and Lord Chief Justice Wilmut. In the first place, neither the personal action nor the indictment apply to the injury which the attachment punishes. The *personal action* claims damages for the *personal injury*; but the attachment for contempt has nothing *personal* in its character; it is for the vindication of *the authority of the tribunal, as a court of justice*. The indictment for a libel is founded on its tendency to provoke a breach of the peace. The attachment for a contempt of court is entirely with a different aspect,—to preserve unimpaired the public confidence and respect for the judicial institutions of the country. An indictment is part of the *criminal law* of the land; the attachment for contempt is not: and so different are they in their derivation and purpose, that the two proceedings may be going on at one and the same time, for the same act, without any legal dependence or connexion with each other. This is Judge Haywood's view of the subject: "The power to punish for contempts is no part of the criminal law; if it were, courts which have no criminal jurisdiction, could not punish for contempts, as the Houses of the Legislature, the Court of Chancery, and this court. Where the contempt amounts to an indictable offence as well as contempt of the court, punishment inflicted by the latter is no bar to a prosecution of the former, and *vice versa*. And neither the contemned court, nor the court of criminal jurisdiction, is obliged to suspend proceedings till the other has acted. 9 Johns. 413, 417; Cowper, 829. This power itself, from its very nature, must necessarily be independent of all other tribunals. For if it depends upon another, whether punishment shall be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal, with every one whom his decision offends. He must quit his

business in court, and leave the bench, and travel to inferior courts, and give his attendance upon them, neglecting in the mean time the official duties which belong to his office.

“The inferior judge may not be disposed to discourage the contempt; the proceedings may not be regular, or legal; they may be in the end set aside and quashed, by arresting or reversing the judgment, and must be commenced again, and the same difficulties again encountered. No one would be afraid to offend: the delay of punishment, and the numerous chances of escaping it, would disarm the expected punishment of all its terrors, nor would the insulted court ever think of the attempt to cause the infliction of punishment under so many discouragements. No sooner does he get through one set of controversies, than some other dissatisfied suitor assails him with equal outrage, and involves him in others.

“He must go again and forever through the same *routine* of vexation and trouble. With such embarrassments to contend with, will he remain upon the bench? He must either quit it, or submit to be directed by men who resort to such means for the attainment of their ends, and become an instrument in their hands for the sake of rest, abandoning his duties and resigning the rights of the people. Without power to repress the efforts of designing men, that shall be directed against him because of an unyielding temper, how will the Judge be able to uphold his integrity, when interests of the highest magnitude are to be settled by his decisions? When it shall be observed that the most submissive pass unmolested; will not submission at least plead in recommendation of itself? Will it not set before him the perpetual conflicts which he has to maintain in vindication of opinions in which he has no individual interest, and the unceasing calumnies to which he is exposed for the protection of others, who hardly know the cause why he is so worried? If in so many difficulties the judge is not furnished with the means of immediate defence and repression, his authority must fall, and the rights of the people must fall with it. For what rights have they but those which the law gives by means of the courts it has instituted? And if these cannot support them, the rights themselves are *nominal*.”

With regard to the supposed invasion of the rights of the defendant in depriving him of a trial by jury, Judge Haywood says, “This power so far from being repugnant to the words or spirit of our constitution, is, on the contrary, a part of that law of the land in which it is recognised. The 29th article of Magna Charta, which says, as our Bill of Rights does, art. 11, sec. 8, ‘that no freeman shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,’ has been interpreted, under the term law of the land, to include the power in courts of judicature and in both branches of the legislature to punish for contempts, 4 Inst. 23; Sullivan’s Lectures, 494; 1 Dallas, Oswald’s case, 15; East, 85.

“That it is a part of the law of the land is proved by its constant exercise by all our courts of judicature, and by both houses of the legislature when necessary.

“This power the house of commons of North Carolina exercised in the year 1777, a few months only after the formation of the constitution, in the case of William Blount, who made an assault on Mr. Nash, the speaker of that house.”

With a view to the same objection, I beg leave to read two passages from the opinion of Lord Chief Justice Wilmut so often mentioned; the first is in page 268.—“See the consequence: If a bailiff’s follower, at the time of executing a process to arrest a man, should be called a rogue, and abused, the court is to grant an attachment; but if the four persons whom the king appointed to execute one of the noblest branches of the regal function, which the usage says may be done out of court as well as in it, are represented to the people as acting

in their judicial capacities out of court corruptly, illegally or oppressively, they are not to be under the same protection as a bailiff's follower, but the chief justices and judges of this court must wait at the door of the grand jury chamber, with their indictments in their hands, and afterwards attend the trial, which must still be before one of themselves, in order to get at that justice which the meanest person in the kingdom, acting under their authority, has a right to, in the first instance, by an attachment."

The other passage is in page 258: "As to leaving such libels to be prosecuted by indictment or information, that juries may judge '*quo animo,*' they were written or published. I am as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did or now does sit in Westminster Hall; but if to deter men from offering any indignities to courts of justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the court should call upon the delinquents to answer for such indignities, in a summary manner, by attachment, we are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all laws, the safety and security of the people.

"The trial by jury is one part of that system; the punishing contempts of the court by attachment is another; we must not confound the modes of proceeding, and try contempts by juries, and murders by attachment—we must give that energy to each, which the constitution prescribes. In many cases we may not see the correspondence and dependence which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it; *and I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the courts who are to preside over them.*"

This last is the sentiment, sir, which Chief Justice Kent echoes, with so much energy, in the case of Yates and Lansing; and there is no considerate man who can deny its truth: nay, who does not feel it.

It is not my purpose to go through all the authorities which have been so impressively presented by my associate. I leave them in their full array to produce their proper effect. My design has been to select only a few of them; to clear away the objections which have been made to them, and to present, with all possible simplicity, the doctrines with regard to this power as laid down by those authors; and I hold it clear that they establish these propositions:—

1. That the power to punish for contempts is a power as old as courts themselves.

2. That this power does not flow *from the common law*, nor *from the judiciary act of 1785*; but that it is a power *necessarily inherent in all courts* and *grows out of the very purpose of their institution, to which purpose it is an indispensable auxiliary.*

3. That the power is not confined to contempts in the face of the court, or to pending causes, nor to obstructions to its action in particular cases; but that it extends to the maintenance of the court's *authority*, in Lord Chief Justice Wilmot's larger sense of that term: and consequently that it extends to the punishment of all contemptuous publications, misrepresenting and calumniating its judicial opinions and proceedings *as a court*, and tending to impair the respect and confidence of the public in the purity and intelligence of the tribunal.

I have a few remarks to make on the counter authorities, before I proceed to apply the principles of law established by the authorities to the facts of the case now under consideration; and this I will proceed to do, either this evening or to-morrow morning, at the pleasure of this honorable Court.

[The Court adjourned to to-morrow.]

Tuesday, January 25, 1831.

HIGH COURT OF IMPEACHMENT.

THE UNITED STATES vs. JAMES H. PECK.

The Managers, accompanied by the House of Representatives, attended. James H. Peck, the Respondent, and his Counsel, also attended.

Mr. WIRT, one of the Respondent's counsel, resumed and concluded his Address to the Court, in behalf of the Respondent.

I will not consume your time, sir, by a vain expression of regret for that which has been already consumed. The case is one which cannot be dispatched *per saltum*. It demands, pre-eminently, a calm and patient investigation; and it will not do for us to flinch from the discussion of any topic, or the examination of any authority on which the honorable and learned managers have thought proper to rely! though candor obliges me to admit that my mind has been frequently at fault in attempting to divine the use intended to be made of many of the books to which we have been referred. To some of them the course of the argument obliges me to invite your attention this morning.

Among a host of other references, whose application I have not been able to discern, an honorable manager gave us one to an opinion of Roger North, on which he seemed to rely with very marked confidence. The reference was to the 8th vol. of Cobbett's State Trials, p. 163; and I have read the passage with the most anxious solicitude to discern its bearing on the questions before this honorable Court, but my efforts have been in vain. The passage is headed thus: "Proceedings against Lord Chief Justice Scroggs, before the Privy Council; and against the said Lord Chief Justice and other judges in Parliament. 32 Charles II. A. D. 1680."

The following extract is from a note appended to the account of these proceedings:—

"Roger North, whose representations, however, are always to be received with caution, has interwoven his character of Scroggs, Jones, and Weston, into the account which he gives of these proceedings against them."

The passage then proceeds with a character of Mr. Justice Jones, in these words: "Mr. Justice Jones was a very reverend and learned judge, a gentleman, and impartial; but, being of Welsh extraction, was apt to warm, and, when much offended, often showed his heats in a rubor of his countenance, set off by his grey hairs, but appeared in no other disorder; for he refrained himself in due bounds and temper, and seldom or never broke the laws of his gravity."

Did the honorable manager suppose that this was an apt picture of the respondent? There is so much of fancy in this matter of resemblances, that it ought not to be a matter of surprise if this *petulance*, *rubor*, and *grey hairs* should be supposed, by some of those who surround us, quite as applicable to some of the prolocutors in this debate, as to the respondent. The passage proceeds: "There are, in the report of the committee, certain relations tending to accuse divers of the judges; and we know how such matters come, ready cooked and dressed up by the party-men, to serve turns, and are presented with the worst sides forwards, to an assembly then willing to take every thing in the worst sense, and who, from superficial colors, conclude deep in substances; which matters, passing without hearing, but of one side only, are not much to be regarded."

The honorable manager, I presume, sees no resemblance between the proceeding here described, and the report of any committee which has occurred in this case.

This note of Roger North then proceeds to specify sundry frivolous and unfounded charges, which were made against Mr. Justice Jones, in common with the other judges, which it seems superfluous to notice; but there is one, marked in pencil, on which, for this reason alone, I conjecture that the hon-

orable manager may intend to rely. I say for this reason alone, because I confess my own utter inability to discern the application. The Court will observe that the whole passage relates to a rule which had been made by the court of King's Bench, *not for a contempt*, but that a certain book, *non ulterius imprimatur*; and the whole question involved in the passage relates to the power of the court to pass *such a rule as that*; without touching, in the most distant manner, their power to punish *a contempt of court*.

“The next matter, which was highly aggravated against the judges of the King's Bench, as such an illegal invasion of property as had not been heard of since William the Conqueror, was a rule, made by that court, that a certain book, *Liber intitulatus*, ‘The Weekly Pacquet of Advice from Rome’—“*non ulterius imprimatur*.” The case of that book was this:—the whole labor of the faction, at that time, was bent to make popery as odious and dreadful in the eyes of the common people as was possible; for, then, the inference of course was,—all this you are to expect from the Duke of York; and that the King and the Duke of York are all one—ergo, &c. Upon this design, a weekly libel came forth, entitled as above; which, under the mask of telling all the extravagant legends of popery in a buffoon style, continually reflected on the government of that time: and so that collection went on, and was published in pieces, which the zealous gathered together, most religiously, and would now exchange for any softer sort of paper,—for nothing grows so insipid as old state libels. The printer, I think, was one Langley Curtis, or one Janeway, and had been informed against, and, I think, convicted and punished for some of them. But it was an abuse not easily corrected; for the outward pretence being against popery, to be accused for that, was to be accused for taking the protestant side against popery; and every week they varied, so that a conviction of one did not extend to the next, and no ordinary judicial act could reach it. Thus it was very hard to meet with this inconvenience, which may happen at any time, when popularity runs very hard against any government. At length the experiment of this rule was made, but I think it went no further, nor was the printer taken up for any contempt of it: but it was enough; the rule itself was showed, and, as I said, made a great noise. I do not remember much agitation about the reason upon which the court of King's Bench took this authority of making a provisional order upon them; but it seems grounded upon that law which takes away the Star Chamber; for it is therein declared, or the judges have resolved, that all jurisdiction which the Star Chamber might lawfully exercise, rested by law in the court of King's Bench; and it is well known that the Star Chamber made provisionary orders, as well as decrees to obviate great offences; and that some, as Hale's, (in a posthumous piece) allows, though the originals are not extant, may be engrafted into the usage of the common law; especially in matters of public nuisances. Without doubt, the point was controvertible; for it might be said on the other side,—true—but then each court must follow the nature of their proceedings, viz.—the King's Bench, by indictment or information—having no ground, by law or precedent, to proceed, for offences *extra* the court, otherwise. And, when a book is convicted of crime, it may be part of the judgment “*quod non ulterius imprimatur*,” which will bind the person defendant. But how this method is to stop such a Protean mischief, after a little time, may become sensible. But admit it not to be a clear case upon the court side, there was ground enough for the court, as they say good judges do, to resolve it for their own jurisdiction: *and errors in judgment in courts of justice, are not criminal*—but corrigible by superior authorities. Therefore, in quiet times, the question had been carried into the House of Lords by a petition of the printer, if he had thought himself grieved; and then there had been a due consideration of the law, and the king's counsel had been heard upon it, and the determination authentic as upon a writ of error. Or occasion might have been taken by a short clause in an act of parliament, to have declared the law, one way or other. *There should be al-*

ways a distinction between corruption and error! The latter, if Westminster Hall may be heard in the case, is no crime, nor is it, with any aggravation, to be actionable at law; and upon the reason of these instances it seems, that to proceed by impeachment, for error in judgment, as for crime, is contrary to the policy of the English constitution; in which the authority of the courts of justice is sacred, and the exorbitances of them, when they happen, should be set right, without exposing to contempt, either the persons of the judges, or the reverence due to their station, lest what is got in the shire is lost in the hundred. *But it is seldom found that when persons are fallen upon in a heat, as upon the vindictive terms of parties, any decorum is observed, or due steps taken: for they will always be too long or too short.*—Thus far concerning the King's Bench as a court, and its legal jurisdiction: which, in this instance also, (but in nothing more,) touched Mr. Justice Jones."

I must, of necessity, leave it to the honorable manager to explain the application of this passage to the points in debate. It treats, indeed, of a rule—but a rule of so different a character from that under consideration, that it is utterly impossible to reason from one to the other, without a total confusion of ideas. The Star Chamber had exercised a power *over the press* by its *license* or *veto*. Upon the dissolution of that tribunal, it might have been supposed, says North, that all its powers were transferred to the court of King's Bench; and among them the power then in question, that of making a rule that a book "*non ulterius imprimatur*." I shall be excused, however, for the momentary digression of remarking that Roger North, in this passage, assumes it as a principle of established law *that no impeachment will lie for an error of judgment*.

In the same paper, Roger North next proceeds to a character of Mr. Baron Weston, in the course of which I find another passage pencil marked. It is this: "The case of Mr. Baron Weston was very extraordinary indeed; he was a learned man, not only in the common law, wherein he had a refined and speculative skill, but in the civil and imperial law, as, also, in history and humanity in general. *But being insupportably tortured with the gout, became of so touchy a temper, and susceptible of anger and passion, that any affected or unreasonable opposition to his opinion would inflame him so as to make him appear as if he were mad; but, when treated reasonably, no man was ever more a gentleman, obliging, condescensive, and communicative than he was.*" So far the passage is pencil marked. But what application has it to the case at bar? would the learned manager insinuate, by this reference and pencil mark, that this touchy and susceptible temper of Mr. Baron Weston belongs to the respondent? These must be a sad deficiency of evidence in the cause to drive the honorable manager to the expedient of borrowing from Roger North's testimony of Weston, a character for Judge Peck. Having first borrowed for him the *rouge* of Mr. Justice Jones, he now visits him with the *gout* of Mr. Baron Weston. It seems to have been held by the honorable manager a sufficient reason for multiplying his references and burthening us with the labor of following them, that the passages referred to, depicted a passionate man. Judge Peck has been proven by every witness to be just the reverse of this; but the evidence seems to be considered a slight obstacle against the predetermination of the honorable manager to fasten this offensive character on the respondent. It must be obvious to the honorable court that it was for no relation that they have to any question of law in this case, that these references were made; and it has, at least, the advantage of novelty to make such references for the purpose of incorporating foreign facts into a cause. The design would seem to be to create against the respondent a species of succedaneous guilt for the infirmities and sins of other judges, who have been, for centuries, mouldering in their tombs in another hemisphere. But against this vicarious responsibility we repeat our protest, and respectfully insist on being *tried* for our own demerits only.

Equally unfortunate, I think, was the reference to Mr. Erskine's opinion,

which the honorable manager insists is *flat against us*. This, be it observed, is the opinion, not of an English judge engaged in the trial and decision of a cause ; but the opinion of a professional gentleman (a very eminent one, I admit) on a private consultation ; so that if it really were *flat against us*, it would weigh but little against the multitude of *judicial decisions* which we have quoted. But whether it be of much or of little weight, the opinion of Mr. Erskine is not against us ; but, on the contrary, so far as the subject called upon him to go, the opinion, we insist, is in our favor. The reference is to 6 State Trials (Cobbett's collection) page 83 ; and it is important for the Court to understand the case on which Mr. Erskine was consulted, in order to perceive the just import and bearing of his remarks, in answer. There is no statement of the case prefixed to the letter ; but we collect from the heading and the incidental statements of the letter itself, that the court of King's Bench in Ireland had issued an *attachment for a contempt of that court* against the magistrates of Leitrim, for calling a meeting of the people to consult on measures touching a reform in the representation of that kingdom in Parliament.

How it could have entered into the imagination of any rational being to deem such a call, or such a meeting, a contempt of court, it is impossible to divine. But so it was : and that which gave occasion to the expression of Mr. Erskine's opinion was a letter from a professional gentleman in Ireland, enclosing an affidavit which states the case, and asking for the opinion. This letter of inquiry found Mr. Erskine at Bath, in England, away from his books, he says ; but the questions were such as did not require their aid: they were,

1. Whether, the facts charged by the affidavit, on which the court of King's Bench in Ireland was proceeding against the magistrates of Leitrim, were sufficient to warrant any criminal prosecution whatsoever for a misdemeanor.

2. Whether, supposing them to warrant a prosecution by information or indictment, the court had any jurisdiction to proceed by attachment.

As to the first question, he says it depends on the intention with which the meeting was called whether it would bear a criminal prosecution. If it was for the honest purpose of peaceably presenting a petition for a parliamentary reform, there was no crime in the case, and no prosecution could be sustained ; if, on the other hand, there was an intention of sedition and insurrection masked under the call for the meeting, it was a fit subject for an *information*, in which *the intention, the gist of the crime, must be charged and proved to the satisfaction of the jury*. But on the second question, he treats, with the contempt it deserves, the idea that such a *political meeting* could be considered a *contempt of any court*, and punishable by process of contempt.

"The rights of superior courts, (says he,) to proceed by attachment, and the limitation imposed upon that right, are established upon principles too plain to be misunderstood.

"Every court must have power to enforce its own process, and to vindicate contempts of its authority ; otherwise the laws would be despised, and this obvious necessity at once produces and limits the process of attachment.

"Whenever any act is done by a court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding. Upon this principle, attachments issue against officers for contempts in not obeying the process of courts directed to them, as the ministerial servants of the law ; and the parties on whom such process is served, may, in like manner, be attached for disobedience.

"Many other cases might be put, in which it is a legal proceeding, since every act which goes directly to frustrate the mandates of a court of justice, is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, viz. that it can only issue in cases where the court, which issues it, has awarded some process, *given some judgment*, made some legal order, or done some act which, the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused

to submit to; excited others to defeat by artifice or force, or treated with terms of contumely and disrespect." This is the opinion which is said to be flat against us. For my own part, it seems to me to cover the whole ground for which we contend: for one of the cases put as a case in which an attachment for contempt will lie, is where a court has given a judgment which has been treated with contumely and disrespect, which was exactly the case before Judge Peck.

In further support of the same position, (that attachments will lie only for contempts committed in a pending cause,) we have been referred to certain answers given by Mr. Fox, to a set of queries addressed to him in 1798 by a Mr. Perry, in relation to the power of parliament to punish contempts. The queries are found in page 87,—the answers in page 88, of the 8th volume of Cobbett's State Trials. According to our reading of these queries and answers, they again discountenance the proposition which they were cited to establish. I am sorry to be so often obliged to repeat this remark; but discourteous as it is, it is forced upon me by the infelicity of the references on the other side. There is very little of the passage before me, that has any application to the question now under consideration. It is almost wholly employed on the peculiar powers of the House of Lords, and House of Commons, and on the special provisions of Mr. Fox's celebrated bill on the subject of libel; but all that does apply to our subject, manifestly bears against the doctrine advanced on the other side. Thus, the first query is in these words: "Though the House of Lords, as well as every court of justice, has the power of protecting their proceedings from unlawful obstruction, can this right extend to commitment for the misdemeanor of libel?" The Court will be pleased to observe, that the question assumes the whole extent of power which alone is admitted to exist on the other side, to wit, the power of a court of justice to protect its proceedings from unlawful obstructions and puts the doubt expressly on the further power to commit for the misdemeanor of a libel on their proceedings. Mr. Fox's answer is, "There can be no right of committing but for contempt; but an act which comes properly under the description of a contempt, is not the less a contempt for being a misdemeanor: indeed it is difficult to conceive a contempt which would not be a misdemeanor." Having then answered the other queries which are irrelevant to the question before this honorable Court, he adverts to the letter of Mr. Erskine in the following words:—"Mr. Erskine's whole letter seems to relate more to ordinary courts of justice, than to the Houses of Parliament. But even in the case of such courts, if a man were to write contumaciously of the manner in which a judge gave judgment, I suspect he would certainly be attached for a contempt; though this case is not mentioned by Mr. Erskine, nor does it come perhaps strictly within the line of his argument." Now be it observed, that the case put by Mr. Fox, as one in which he conceives the offender "would certainly be attached for a contempt," is exactly the case which occurred before Judge Peck. The offence was the having written contumaciously of the manner in which the judge gave judgment. Mr. Fox puts the case, not with regard to a pending cause, but with regard to the judgment which puts the cause out of court. And lest the word contumaciously should be seized on, as meaning something more than contemptuously, and involving a purpose of resistance or obstruction, Mr. Fox immediately repeats the word in a connexion, which excludes the possibility of such a meaning; for he immediately adds, "Now if this be so, it is clearly a contempt of the House of Lords to animadvert contumaciously on the speeches of its members, and perhaps more clearly than in any other case, inasmuch as to print the speeches at all is a breach of privilege." If our learned adversaries can extract from this correspondence any thing favorable to their position, that there can be no attachment for an alleged contempt, unless it be committed in a pending cause, their ingenuity will certainly give them a full claim to all its benefits.

But suppose the power were in law limited to contempts committed in pending cases, we say with confidence that this was a pending case. Soulard's case was still pending. It was pending in the range of the federal tribunals. It was in the supreme court of the United States, and subject, moreover, to be remanded to the district court of Missouri for ulterior proceedings. If gentlemen mean that the cause must be still pending before the identical tribunal whose judgment has been libelled, they are met directly by Darby's case in Tennessee; for the case there had left the supreme court whose judgment was the subject of Darby's libel, and was, at the time of the libel, pending before a different tribunal; yet this was not considered as protecting him against the attachment of the supreme court for the contempt. And besides, there were *other cases* than Soulard's, pending at the time of the libel before the same tribunal, resting precisely on the same principles with Soulard's, and calling for a repetition of the very same judgment which in Soulard's case had been exposed by this libel to the ridicule and contempt of the public. All the pernicious consequences, therefore, of such a libel, in overawing the court, and poisoning the public mind with regard to pending cases, applied to the instance of this libel, in its relation to those other cases.

But we are asked, shall a man be punished for censuring an opinion in a decided cause, because there may be some other cause pending which involves the same principle? Certainly not, unless he knows of the pendency of such other cause, and designs to produce an effect on it. But here it was not because there *might be* other causes pending in court; but because *there were such causes*, and *Lawless knew there were*, and *designed to produce an effect upon them by this libel*; and all this he has distinctly admitted in his evidence; for he has admitted the identity of the pending causes, and has admitted that his design was to re-assure the hopes of the suitors in those causes. How? By showing them the justice of their claims, and that the decision against them had been founded on a tissue of the most contemptibly ridiculous absurdities on the part of the Judge. And this he chooses to do, not by a private communication to his clients, but through the medium of the public press; to be seen, therefore, and intended to be seen not only by his clients but by the whole community. It was a publication intended to produce a sentiment, and to raise a bias in the public mind, in favor of the justice of those other claims before they were heard; and to effect this by throwing odium and contempt on the court. It embraces therefore two of Lord Hardwicke's heads of contempt: 1st, of scandalizing the court;—2d, of prejudging the public mind with regard to pending causes. So that if gentlemen succeed in establishing their proposition, that the libel must have relation to a pending cause, and be designed to produce an effect upon its decision, even this *postulate* is met by the evidence in the cause; for though Soulard's case was the text, the sermon was levelled at the other remaining cases, and this fact, I repeat it, is admitted by Lawless himself.

So much with regard to the authorities in support of the novel proposition advanced on the other side, that in order to found an attachment for a contempt, the alleged contempt must have relation to a *pending cause*; and that in legal contemplation there can be no contempt of a court in regard to a cause in which final judgment has been rendered.

The gentleman's next legal proposition is, that, in a land of liberty it is the right of every citizen to question, in decent terms, through the medium of the press, the conduct of all public officers in all the departments of government, legislative, executive and judiciary. This principle is not questioned; but it is denied that it has any application to the case, or furnishes any defence for the libel published by Lawless. Let us first fix the true limits of the legal principle on the subject; we will afterwards compare that principle with the circumstances of this case.

I beg leave to call the attention of the Court to the two authorities chiefly relied on by the honorable managers under this head. The first is Holt on

libels 170. "It is undoubtedly within the natural compass of the liberty of the press, to *discuss*, in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error, and, provided it be done in the language and with the views of fair criticism, to censure what is apparently wrong; but with this limitation, that no false or dishonest motives be assigned to any party." This is a principle which no man has ever controverted in this case. The respondent never questioned it. But let it be observed what the principle is. It is the right of *discussion* in a *decent and temperate* manner, in the language, and with the *vicus of fair criticism*. Observe the integral parts of the proposition, and see what they require. *Fair criticism* requires that the opinion about to be discussed should, in the first place, be correctly stated, in order that the reader may estimate the fairness of the criticism about to be applied to it; and having been correctly stated, then that it should be *discussed*; that is, brought to the standard of law and reason for the purpose of testing its accuracy: that this process should be performed in a *decent and temperate manner*; and with a sincere and candid view to *fair criticism*, and with no other view. But does it follow that because the decision of a court may be *thus discussed*, and *with this fair and proper view*, it may be therefore vilely misrepresented, hideously caricatured and impaled, for the purpose of exposing both the opinion and the court to the contempt and ridicule of the world; thus prostrating and annihilating all the salutary authority and respectability of the tribunal, destroying all the public confidence in its opinions, disquieting the suitors before it, and poisoning the whole community with regard to pending causes? The law is good as Holt lays it down; the fallacy consists in applying it to such a case as this. That the author did not intend by this proposition, to give any such warrant for the boundless libertinism of the press as is sought to be extracted from the passage when it is applied to a case like this, is manifest, from the reference by which he supports his proposition. The reference is to note (C) at the foot of the page, which is in these words—"See 1 Camp. N. P. R. 359, in which the above proposition seems to be ratified in its full extent by Grose, justice, in the *King v. White* and another, of which case we shall speak in a following page."—This promise the author keeps in page 173, note (g), in which the case of the *King v. Hart* and *White*, 1 Camp. N. P. 359, is set out, and the remarks of Grose, justice, which it was his purpose to embody in the proposition just read.

We are told in note (g) this was an information filed by the attorney general against the defendants for certain libels published by them in a newspaper, 17th of January, 1808, and two others on the 21st of the same month, "with the intent to bring the administration of justice, and the trial by jury, as by law established, into hatred and contempt, and to insinuate that one William Chapman and one Thomas Bennett had been improperly acquitted, and found not guilty at their respective trials for murder, with which they had been charged; and to traduce, defame, and vilify Sir Simon Le Blanc, the judge, and the jurors of the respective juries by whom the said Thomas Bennett and William Chapman had been found not guilty." Permit me to observe in passing, that there seems to have been *no case pending* here; *the trial was over*; *the men had been acquitted*. The *gravamen* of the libel, as alleged in the information, was, that it was an *attempt to traduce the administration of justice in a passed case*.—Now for Grose's remarks, as explanatory of the text cited from Holt in 170. In this case, Sir N. Grose observed upon the trial, "It certainly was lawful, with *decency* and *candor*, to *discuss* the *propriety* of the verdict of the jury, or the *decisions of the judge*; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but on the contrary they (the defendants) had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained *no reasoning or discussion*, but only *declamation and invective*" (which is precisely the case with Lawless's libel) "and was written *not with a view to*

elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country." The defendants were found guilty, we are told in that case, and sentenced (not to *twenty-four hours*) but to *three years* imprisonment. Holt tells you that he meant nothing more than to transfer into his text the spirit of these remarks of Mr. Justice Grose, and we are perfectly willing to take them as the law of the land; but before the honorable managers can turn them to account in behalf of Lawless, they must be able to satisfy you that *decency, candor, and misrepresentation* are convertible terms; and that a pure intention to *elucidate the truth*, and a *mischievous and malignant intention to bring the public administration of justice into hatred and contempt, are one and the same intention.*

In the same page of Holt first quoted (170) and in the next sentence to that which has been read, he says, "*Any reflection on the administration of justice is unquestionably libellous;*" and in support of the proposition, he quotes some remarks of Mr. Justice Buller (in the case of the *King v. Watson*, 2 T. R. 199) which are so marked with strong and sound sense on the law of the case, that I beg leave to read them. Mr. Justice Buller observed—"Nothing can be of greater consequence to the welfare of the public, than to put a stop to the animadversions and censures, which are so frequently made upon courts of justice in this country; they can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method which the law allows, to correct the mistake. But when a person has recourse, either by writing like the present, by publications in print, or by any other means to *calumniate the proceedings of a court of justice*, the obvious tendency of it is to weaken the administration of justice, and, in consequence, to sap the very foundation of the constitution itself." And I should be glad to know, sir, what use there is either for constitution or laws or tribunals of justice, if the whole of them, and the peace and order of society, which depend on them, shall lie at the mercy of every desperate anarchist who may come among us, and can wield a pen? and if such an adventurer, because he has been slightly chastised for his offences (far, very far below his demerits) is to be everywhere taken by the hand and greeted and embraced as a martyr in the cause of liberty, and the freedom of the press? Alas for our country when such a temper, such principles and such actions receive countenance and encouragement among us.

Another learned manager, has quoted, in support of the right of discussion, 4 Chitty's Blackstone, 105, note (18)—"*But it has been laid down that the imputation of a mere error in judgment, even to the sovereign himself, if done with perfect decency and respect, without any imputation of bad motives, is not libellous.*" The author cites 2 Campbell, 402, which was a prosecution for a paragraph on the political administration of George III. Sir, it was never doubted, even in England, much less in this country, that every freeman had the right to question in *decent terms, and from fair, honest, and proper motives*, the political measures of the government. But suppose such a writer to impute to the king, falsely, a series of measures which had never taken place, and these measures of such a description as, if they had taken place, would stamp the character of the sovereign instantly with the character either of a knave or a fool: and suppose all this had been done with the view, and for the purpose of bringing the sovereign and his government into public and universal contempt and execration, how would the law have stood then? Does Chitty or Blackstone, or any other author say, that such a culprit would have escaped condign punishment? Be it observed, however, in taking leave of this authority, that the passage is confined to the right of *fair political discussion*; and does not touch the question now before us, which is a question of the libellous misrepresentation of an opinion of court, with a view to bring the tribunal into contempt, and to give a bias to the public mind with regard to the causes which remained to be heard.

Mr. President, I have now finished my review of the law of the case; and I think it must be apparent to every candid inquirer, that there is a power necessarily inherent in all courts to protect themselves, and to maintain, and enforce their authority; that although their decisions are open to *fair and candid* discussion and criticism, with a sober and honest view to the elucidation of truth, yet that their proceedings cannot be disgracefully misrepresented, with a view to bring them into public odium and contempt, and for the further insidious and dishonest purpose of prejudicing the public mind with regard to causes still pending, and undetermined. But that on the contrary all publications marked with the latter characters are proper subjects for an attachment for contempt; and if made by an attorney practising at the bar of the court which he has traduced, such an attorney may be struck from the rolls of the court, as well as fined, and imprisoned for the contempt.

Such appeared to the respondent, and such appears to his counsel to be the law as it stands. That the power to punish for contempts exists to some extent is admitted. The whole controversy is as to the extent of the power; and whatever this honorable Court may think the law *should be*, yet if *the law as it stands*, warranted the proceeding complained of, it is impossible that this impeachment should be sustained. The discussion of the law is now fully before this honorable Court upon all the authorities; and we hold it clear that Judge Peck did not go one hair's breadth beyond the principles recognized by all the elementary writers of authority, and the cases adjudged both in the English and American courts. And though some of the members of the honorable Court may differ with us in the construction of the books with regard to the power, it cannot, we think, be denied by any fair mind, that an honest, and conscientious man might well understand the books as Judge Peck understood them, and as it is manifest they were understood by Judge Wilmot in England, and by the courts of New York, Virginia, and Tennessee; and if they might have borne such a construction to an honest and conscientious inquirer, it is impossible to convert that construction into guilt, though you may deem it a mistake.

Having thus examined the law with regard to the abstract power of courts to punish for contempts, let us turn, now, to the case in which the power was exercised. Was the case a proper one for the application of the power, or was Judge Peck guilty of a high misdemeanor in punishing this publication as a contempt? Was it a contempt of court? Was Judge Peck actuated by the guilty intention charged in the impeachment in punishing it as a contempt, or was he governed by a conscientious sense of his judicial duty?

And here I must be permitted to observe, that the case is not within the nut-shell, in which the honorable managers seem to suppose it to lie. It is a question of *intention*, both in regard to Mr. Lawless, and to Judge Peck. *Quo animo* was the publication of Mr. Lawless made? Was it for the purpose of *decent and respectful discussion of fair and candid criticism for the elucidation of truth?* or was it to revenge himself on the court for the disappointment which their opinion had inflicted on him. Was it for the wicked and malicious purpose of exposing the court to public contempt, and ridicule—to exasperate the suitors against the Judge—to ingratiate himself with those suitors by making a display of his superior learning, intelligence, and firmness in bearding the Judge upon his judicial seat, and proving that he was either a fool, or a knave, and this by the most foul and wicked misrepresentation of his opinion? Was it to make a lodgment on the public mind in favor of the claims, the great mass of which remained undecided; and against the blind and stupid Judge, who had so grossly wronged all these suitors? These are the questions which enter into the consideration of the *animus quo*, on the part of Mr. Lawless; and in order to answer them satisfactorily, we must understand the history of his connexion with these land claims; the extent to which he was interested in them; the manner in which he was affected by the decision in Soulard's case; and the

feelings, and motives likely to actuate him. So, with regard to Judge Peck, the question is *quo animo* did he issue this attachment; was it as has been alleged, to soothe his vanity, which had been wounded by the publication of Mr. Lawless; was it from personal revenge, and for the tyrannical and unlawful purpose of oppressing a man whose only offence was that he had exercised the rights of a freeman in questioning, in decent language, the correctness of one of Judge Peck's opinions? or was Judge Peck actuated by the just, and proper motive of vindicating, with promptness, the dignity and authority of his court against an impudent and defamatory libel? These are the considerations which relate to the *quo animo* of Judge Peck; and to enable us to make a proper estimate of his motives, we must look to his peculiar situation. Sir, I have heard it suggested, even by those who condemn the conduct of Mr. Lawless, that it would have been better for Judge Peck to have treated it with silent contempt; and as it is not impossible that a similar suggestion may have presented itself to some of the members of this honorable Court, I beg leave to observe, that many things may be passed over, and are continually connived at by a judge in one situation, which it would be not only excusable but proper for him to notice and punish in another; nay, which his duty to the tribunal, and the country to which that tribunal belonged, would make it his imperious duty to punish, in another situation. In an old and long settled country, for example, like England, or like the Atlantic states of our Union, where the respect for the laws and the tribunals which administer them, is established and habitual, a judge may well connive at an isolated case of contempt. But you may place a judge in circumstances in which such a connivance would be the extreme of folly, and would be universally condemned. Even in so old a country as England such a situation might occur. Suppose, for example, a judge sent down from London, under a commission of *oyer* and *terminer* into a part of the kingdom which had been recently in rebellion, and where the elements of discord and insurrection were yet at work around him. Does not every man see that it would be the duty of such a judge, so circumstanced, to observe with vigilance and punish with severity the first indication of insult to his authority, so as to crush the spirit of contumacy in the bud, and prevent it from becoming bold and audacious by impunity? Again, suppose a judge (I put it, for the present, hypothetically) in a distant and frontier territory, to have thrown upon him, by the legislature of his country, the judicial settlement of a vast mass of foreign land claims, held partly by the original claimants, chiefly by sharp-sighted and sharp-set speculators, of rapacious and insatiable appetite; among which claims, though there were, no doubt, some that were fair and honest, there were others of a false and fraudulent character, which their holders might attempt to force through his tribunal by their intrepidity and effrontery;—I appeal to every considerate man whether such a judge is not placed in a situation which calls upon him to hold the reins of authority with a strong and firm hand, and to rebuke, with promptitude and energy, the first attempt either to insult or to intimidate his tribunal? Would you deem it wise or dignified in a judge so situated to permit himself, in his judicial capacity, to be exposed, by the misrepresentations of one of the officers of his own court, to the resentment of this large body of suitors and to the general contempt and scorn of the community? Will not, must not every candid and honorable mind find, in the situation of a judge so circumstanced, a sufficient, a just and proper motive for a vigorous assertion of the self-defensive and protective powers with which the law has armed him, without resorting to the base and despicable motives of wounded vanity and personal pique? We insist that Judge Peck has done no more than every judge would have had the perfect right and power to do under a similar attack upon the authority of his tribunal; and if there are other judges who would have overlooked such an assault, and it be thought hard and vindictive in Judge Peck not to have imitated such an imaginary model of forbearance, we refer to the peculiar situation in which he was placed, and the characters with which he had to deal, as a com-

plete vindication of the propriety and wisdom of his course. With regard to *him*, therefore, and for the purpose of ascertaining the true motives of his conduct, it is fit and necessary to look at his situation, with all the circumstances that naturally pressed themselves upon his consideration, and governed his conduct.

So, on the other hand, in the case I have put of a judge called by legislative authority to the adjustment of a vast mass of law claims ; suppose the individual charged with the contempt to have been the leading council, the attorney general of these claims, the *dux gregis* of the whole flock, *with a princely fortune staked on the contingency of success*. Suppose that in the first decision that takes place, this adventurer sees the discomfiture of the whole phalanx of these claims, the disappointment of all his hopes, the vanishing of all the visions with which he had warmed his fancy : under the exacerbation of such a disappointment, what will probably be his course of conduct? If he be an irritable man, a man of turbulent and lawless propensities, a man accustomed to the wild uproar of insurrection and civil war, his first impulse will probably be revenge upon the tribunal which has inflicted the disappointment : *ruat cælum*, but not *fiat justitia*. He may not call the judge to "*see him so*," [taking the attitude of a duellist in the act of firing] as one of the witnesses described it : but he has it in his power to take another kind of revenge. He can publish a libel on the judge ; he can so dissever, misrepresent, distort and discolor his opinion, as to render it absurd and ridiculous, and thus fix upon the judge's head the ass's ears or the rogue's brand, so as to deprive him of all the confidence and respect of the community, and make him a mark for the finger of universal scorn. Or, if he looked deeper into the game, he might have concerted a plan of hostilities, of which this libel was to be the first stroke, to blow up the tribunal altogether, and to erect another upon its ruin, before which his shattered troop of claims might appear with renovated hopes. I do not say that these were Mr. Lawless' motives, for I pretend not to know the secrets of the heart. But I wish this honorable Court to review all the circumstances of the case as they have been offered in evidence, and then to ask them whether there was not sufficient color for suspecting that Lawless intended to insult and degrade the tribunal, to justify the Court in calling upon him to say whether such was his intention or not? This alone was the object of the rule upon him to show cause why an attachment should not issue? If on his appearance under that rule, he had *condescended* to disclaim the insult, and to give that explanation of his motives which he has not disdained to give here, there would have been an end of the case, and we should have heard no more of it. But of this hereafter. At present, I have presented this hypothesis only for the purpose of showing that the field of circumstances, from which the intention is to be gathered, is much broader than the mere proceedings on the attachment, to which the honorable managers have confined their views. The inquiry properly begins higher ; and if we would possess the whole ground and embrace all the circumstances which properly enter into the question of *intention*, we must look to the origin and progress both of Judge Peck's and Mr Lawless' connexion with these land claims. The Court is not menaced with a prolix inquiry on this subject. The ground has been already trodden, and my remarks will be brief. They are, however, necessary to the connexion and illustration of that course of reflection, which I deem it necessary to the justice of this cause to place before this honorable Court.

By the act of Congress of 1824, the district court of Missouri was authorized to take jurisdiction of all French and Spanish grants, &c. *which had been legally made by the proper authorities*. By the second section of the law, the court is required to *refer in their decree, to the treaty, law, or ordinance under which the claim shall be confirmed or decreed against*. Under these restrictions, the court was authorized to confirm all claims which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the country under which the claim originated, if the sovereignty had not been

transferred to the United States,—not all that *the sovereign might, in the plenitude of his power and as an act of grace have confirmed* ; but such only whose confirmation would have been demanded from that sovereign *ex debito justitiæ*. For the King of Spain might, in the fullness of his power, and as an act of free and sovereign grace, have confirmed claims proceeding from persons in his colonies who had no shadow of authority to originate them. We have an instance of this in White's collection of Spanish land laws, p. 42, where *the total want of authority in the originating officers is recited, and yet the claims are confirmed*. The court of Missouri, however, could not do this ; for one of the inquiries forced upon that tribunal, by the very terms of the act which confers the jurisdiction, was whether the grant, concession, warrant, or order of survey had been *legally made by the proper authorities*. Among other sources to which this law required the judge to look for the government of his judicial action, were the previous acts of Congress touching these claims. And on referring to these previous acts the Judge discovered that congress recognized the probable existence of false and antedated claims among the mass that would be brought forward, and gave directions that such claims should be specifically noted. These acts had also appointed law agents, at the public expense, with ample salaries, to superintend the claims brought before the boards of commissioners which preceded the court, and to take care that no claims should be palmed upon these boards but such as were founded on grants, &c. which had been *legally made by the proper authorities*. Thus every thing was calculated to awaken apprehension that his court would be invaded by false and fraudulent claims.

You will be pleased to observe also, sir, that in the act of 1824, the very act which confers its jurisdiction upon the court of Missouri, there is a claim of one Jaques Clamorgan, for 512,000 arpens of land, which is expressly excepted by name from the jurisdiction of the court. Yet on the first docket of the first court held by Judge Peck under this law, stood a claim of *this same Jaques Clamorgan for 536,000 arpens of land* ! This was rather a startling fact. For if the magnitude of the first claim was the cause of its exclusion from the jurisdiction of the court, why was not the second, which was larger, excluded also ? If the first was excluded because it had been fraudulently obtained by Clamorgan, this circumstance was calculated to throw a strong suspicion on the other more enormous claim before the court, held by the same claimant. Both these claims are now before this Court, being among the documents on your table. The concession for 536,000 arpens, the larger claim, and that which was docketed before Judge Peck, is the oldest in point of date. It was issued in 1795, by *Delassus, then commandant only at the post of Madrid*, the consideration declared on the face of the concession being for *public benefits, to accrue* ; to wit, *by the cultivation of hemp*. This *Delassus*, be it observed in passing, the humble commandant of the post of Madrid, who made this exorbitant concession, is the same *Delassus* who figures as the chief witness in the case of Soulard. And while *he*, the mere commandant of a post, was conceding more than half a million of arpens, for a future consideration, the *Livre Terrier*, the public land book of the province, exhibits no instance of a concession down to 1797, of more than *a league square*. The other concession, that for 512,000 arpens, which was abolished by the act of 1824, was issued in 1797, by *Delassus, also*, and imports as its consideration, *services rendered, in exploring the country and promoting trade with the Indians*. The matter of these two claims, held by the same Jaques Clamorgan, under circumstances so suspicious, amounting to more than a million of arpens, in two years, both of them standing on concessions *by the same Delassus, an inferior officer, for considerations so inadequate, and transcending, by such an inordinate excess, the grants exhibited by the livre terrier for the same period* ; *one of them, too, stigmatized by congress*, the other apparently saved from the same fate, only because its existence was unknown to that body.

This matter may be susceptible of explanation ; but unexplained, it certainly was and is an awakening circumstance.

It has been said elsewhere, and insinuated here, that Judge Peck entered upon the investigation of these claims with a mind black with prejudice and predetermined to reject them *en masse*. The assertion is gratuitous and utterly unfounded. To such an assertion, so entirely unsupported by proof, he has a right to oppose his own declaration, that so long as he had jurisdiction of these claims, he never did permit himself to anticipate the proof of fraud in any one case. He never did inspect the evidence in any case, until the cause came regularly before him; until this impeachment called him to explore the character and number of the cases, in which Lawless was concerned, that he might, if possible, discover the motive to the deadly hostility with which he found himself pursued by that man. But with regard to these causes, while they stood upon his docket for trial, he kept himself aloof from them, until they were regularly brought on for adjudication. He had no doubt that, if there were some fraudulent claims, there were others that were perfectly honest. He kept his mind, therefore, prepared to examine each one, impartially, on its merits, as it should be brought before him, and to judge it, fairly, by the proofs which should be adduced on the trial.

But in the course of the discharge of his judicial duties, the case of Macky Wherry's heirs came up, and it was in this case that the evidence of M. Le Duc, which has been offered by the managers, was taken. Why the honorable managers selected this case to be printed for the information of the Court, I cannot divine. It is certainly the very case which the respondent would have chosen, to give the Court the best view that can be exhibited of the general character of these claims; and the evidence of M. Le Duc, selected by the managers, is, of all others, precisely the evidence which the respondent would have selected for the purpose of this illustration. M. Le Duc, be it observed, filled an office under Lieutenant Governor Delassus: he was his private secretary. Filled *an office*, did I say? He filled more offices than Caleb Quotem; and, according to his own showing, had more titles than the hero of the *Diable Boiteaux*, himself.

Permit me to read you an extract from the evidence of this titular gentleman: "Witness says that Lieutenant Governor Delassus *continued to make concessions until the transfer of possession to the United States, in March, 1804*; that he *knows* of but *one* concession made since that time, and that was made to Adam House, for four hundred arpens, and was made to bear date before the transfer, and has been confirmed; that Mr. Delassus, after the change of government, continued in St. Louis for about eight months, during which time applications were made to him for concessions, and sums of money offered to obtain them, and the application rejected with indignation, within the knowledge of witness; that said Delassus, after the time mentioned, left this for New Orleans, and that place for Pensacola, and from that place for Baton Rouge, where he exercised the office of Governor, in which office he remained until that country was taken possession of by the Americans; that the said concession was made to Adam House on the recommendation of Zenon Trudeau, which recommendation and petition had been mislaid and not found till after the transfer; and is positive that none other was made after the said transfer: says that *the said Lieutenant Governor continued to issue concessions after the notice of the intendant of the death of the assessor, in the year 1802, and his order not to receive further petitions for lands down to the change of government; and down to this period, continued to issue them about in the same proportion that he had issued them before the said notice; cannot say what proportion of the concessions made after the said notice of the intendant, were made to bear date anterior to said notice, and in the years 1799, 1800, 1801, and 1802, but believes that about sixty were made to bear date during those years;*" and thus M. Le Duc goes on, with the most edifying *sang froid* and *naivete*, to speak of grants made by Delassus, after the treaty of cession, and of antedating concessions, as if they were mere matters of form and things of course, as there is but too much reason to fear that they were considered by all the subaltern

authorities in the Spanish colonies. Though there were many concessions by Delassus, *since the transfer of the territory by treaty to the United States*, yet M. Le Duc assures us that he knew of *but one concession by Delassus since the actual transfer of the possession, which however was antedated, so as to be made to bear date during the continuance of the Spanish authorities*. Now sir, notwithstanding the perfect composure with which M. Le Duc brings out this fact, *it was nothing less than forgery, downright forgery*. It belonged to the class of *antedated and fraudulent claims*, which had been *expressly abolished by the authority of congress*. Yet we learn from M. Le Duc that this false and forged claim was palmed on the board of commissioners, and was confirmed by them. But M. Le Duc offers a sort of apology for this transaction. This antedated concession, it seems, was made to Adam House, on the recommendation of Zenon Trudeau, which recommendation and petition had been mislaid, and not found until after the territory was transferred to the United States, which is much about such an apology as if a man who had forged a deed for land should attempt to excuse it by saying that it was only done in conformity with a verbal promise of the nominal grantor's ancestor; or as if a man who had been detected in forging a will should seek to justify himself by declaring that it was only intended to give effect to a parol promise of the deceased. Sir, I repeat, it was forgery, rank and inexcusable forgery.

But M. Le Duc assures us, that during the eight months that *Delassus* remained in St. Louis, after all his power and that of Spain had been terminated, by the actual transfer both of possession and title to the United States, *applications* were made to *Delassus* the ex-lieutenant governor, for concessions, and *sums of money offered to obtain them, and the applications were rejected with indignation*. Observe, sir, not *one application*, but *applications and bribes, in the plural*. Now, sir, what kind of character could this man have established to tempt men to come to him with such disgraceful overtures. *He rejected them with indignation*. Did he, indeed? But who heard of this indignation? Did he prosecute these scoundrels? Did he expose them to the American officers? Did he, in any way, proclaim the fact of these villanous attempts upon his integrity? His indignation seems to have vented itself very quietly. It passed off, I presume, by insensible perspiration. M. Le Duc, at least, seems to have been the only witness of the gentle exhalation. But let us follow the evidence a little further. *Morales*, the intendant, had apprized lieutenant governor *Delassus*, in 1802, that *the assessor* (whose co-operation in completing the grants of the crown lands was indispensable) was dead, and had expressly ordered *Delassus* (as he had full authority to do) not to receive any further petitions for land till the place of the deceased assessor should be supplied. What is the conduct of Mr. *Delassus* under this order of his superior officer? He continued, says Le Duc, to issue concessions, *after this notice and order, down to the change of government, and to issue them about in the same proportion as he had done before the order*. He does not know *how many* of these concessions were made to bear date prior to the order, but, *he believes, sixty*; that is, sixty more forgeries were committed by the same *Col. Delassus*, in order to avoid the charge of disobedience to the intendant. Will it be said, in excuse for this conduct of *Delassus*, that in his testimony in Soulard's case, he declared that he did not acknowledge the authority of the intendant? The excuse will not avail; for if this were true, why did he antedate these concessions, so as to give them the appearance of having been issued prior to the notice and order? This act was, itself, an admission of the authority of the intendant, and an attempt to evade it by the perpetration of a crime. Sir, it is observable by the schedules annexed to this record of Macky Wherry's heirs, and it is worthy of your attention, that after the Spanish authorities knew of the transfer of the province to the United States, and that the power of Spain over it was at an end, within the last four months immediately preceding the final surrender, and in the very depth of winter, there were more surveys made in Upper Louisiana,

in that difficult and dreadful season of the year with a view to grants, than had been made from the foundation of the colony till then. What a state of affairs was that, and what a mass of light does it throw on the character of Lieutenant Governor *Delassus*! This respectable gentleman, be it again remembered, was a witness in Soulard's case, and the principal witness in support of the claim. In that case, it will be remembered, that among other extraordinary things, he testified that on the receipt of Morales's regulations, he wrote back to Morales and, in his letter, declared to the intendant that he disapproved of his regulations, and would not execute them till further orders. This liberty with a superior officer struck me as strange, in a despotic government like that of Spain; and as *Delassus*, in his deposition in Soulard's case, refers to *exhibit M.* as being the copy of his communication to Morales, I looked through the record, with some solicitude, to find it, that I might see the language in which Col. *Delassus* had couched so bold a declaration to the intendant of the king of Spain: but *exhibit M.* was not in the record. Supposing it possible that the clerk of the district court of Missouri, in making up the transcript, might have accidentally omitted the *exhibit M.* the clerk's office was searched for it; but it was not to be found; it had, therefore, been improperly withdrawn. On his cross-examination, here also, Lawless admitted that he was in possession of the original document, and offered to produce it. He was required to do so, and, after some importunity, I received, *instead of the original, a French translation, with the English interlined.* This, however, was not the paper I wished, and I demanded the *Spanish original*, which has at length been furnished, and here it is. I desire to make this honorable Court better acquainted with this curious paper. That part of the translation which professes to make this bold and daring communication to Morales, reads thus: [here Mr. Wirt read the French and English translation which had been furnished, and then proceeded.] The Court will observe that in the translation, this passage reads glibly, and appears to incorporate very well with the text. But now let us turn to the original which I wish the Court to inspect, reminding them that it was sworn by *Delassus* to be a copy of his letter to Morales. A copy of that letter, made at the time, would all be in the same ink and in the same hand-writing: but you will observe that, here, the last paragraph, which contains this alleged defiance to Morales, has no resemblance, either in the age or color of the ink, or in the character of the hand-writing. It is, *manifestly, a modern addition* to the old draft, and obviously fabricated for the purpose of sustaining the deposition of *Delassus*. [The paper was here handed to the Court, and while they were examining it, Mr. Wirt proceeded.] The Court will be pleased to observe that the whole of the letter, from the beginning down to this factitious paragraph, is in the same uniform hand, and the same ink, with all the appearance of having been written at the same time. The letter, it seems, was written in 1799. The body of the writing, therefore, is upwards of 30 years of age, and it bears the appearance of being thus old. But the last clause is obviously a patch of recent date, and certainly not older than the deposition of *Delassus* in Soulard's case. In farther confirmation of this obvious truth, you will find the whole of the old part of the letter employed in a very respectful discussion of the policy of Morales's regulations. But this last paragraph is a sudden and abrupt departure from the whole purpose, scope, and tone of the genuine original letter, and is such a rough and unskilful graft upon the old stock, as to betray, at once, not only the subsequency, but the recency of the interpolation. And, in a moral point of view, what is there worse in such a spurious addition to a genuine letter, than in the antedating of grants for land? The paper speaks for itself, sir, and it is easy to tell what would be its fate before a jury of the country. The fact, and the reluctance with which this paper has been brought out, after having been very improperly removed from the files of the District Court of Missouri, may serve to show us what kind of characters we have to deal

with, and what kind of characters were concerned in the manufacture of these claims.

There is another circumstance with regard to this Mr. *Delassus* that I think it proper to bring to the knowledge of this honorable Court. *Delassus* is the *Ajax Telamonius* of all these claims; nay the *Agamemnon*, too, the great monarch of the manufactory. This man, conscious that the concessions which he was scattering among the people, with so prodigal a hand, would not bear the test of the regulations of the intendant *Morales*, but must fall as fast as they were brought up to that standard, makes a bold dash in his deposition in *Soulard's* case to protect his hopeful progeny from the fell swoop of those regulations; and declares that *he has no recollection of having ever published Morales's regulations*, he is very sure he never carried them into effect, and never did mean to act under them. And yet, in the face of this undaunted and reckless assertion, we have the evidence of *Le Duc*, his private secretary, who proves the publication expressly. There were, you are informed by the witnesses, two modes of promulgating a law or public document at *St. Louis*; one, by posting it up in a public place, where it might be read by all the inhabitants; the other, proclaiming it by beat of drum. Now *Le Duc* swears, that he, as the private secretary, did, in the month of February or March, 1800, post up a copy of these regulations opposite the Governor's house, where it remained till washed away by the rain. Here is the proof of publication, by an officer of the Government, at the Government house, and before his eyes: would *Le Duc* have dared to take this step in defiance of the authority of his superior? Would he have done it without such authority? No rational man can doubt upon this subject. So much for Mr. *Delassus's* recollection. But, however this may be, he is very sure he never did act under these regulations, and never meant to do it; then why did he cause them to be published? But this is not all; it is in express proof that he did act under them: for in November, 1800, this same *Delassus* made a concession to *Jarvis* (p. 50 of the record in *Soulard's* case) in which he refers expressly to these regulations, as showing the condition of the grant. "Yes," said *Lawless*, in his cross examination on this subject, "he does refer to the regulations; but he might have meant the regulations of *Gayoso*." The Court could not have but remarked the conscious confusion of the witness in offering this puerile and frivolous excuse, to screen his principal witness from detected perjury. He knew well that the regulations of *Gayoso* had been superseded by those of *Morales*, and that *Delassus* would not have dared to send a concession for confirmation to *Morales*, with a reference to the regulations of *Gayoso* as giving the conditions of the grant, when those regulations had been superseded by those of *Morales* himself. The general reference to the regulations, *Delassus* well knew, would be understood by *Morales* and every one else, as a reference to the existing regulations, not to those which had been repealed. Yes sir, he did act, and knowingly act in execution of *Morales's* regulations, though he has the hardihood to deny it on his oath. So did *Soulard* his surveyor. In his certificate of survey in *Lt. Vrain's* case (p. 53 of the record) we have his express recognition of the regulations of the Intendant; and in pages 53, 54, of the *Soulard* record, we have *Morales's* confirmation of that claim, on the condition of compliance with his regulations. Thus we have *Delassus*, his surveyor, and *Morales* himself all co-operating to give effect to these regulations in Upper Louisiana; and yet *Col. Delassus* swears that he is sure he never carried these regulations into effect, and never did mean to act under them! Such is the code of morals which presided over these concessions.

I understand that we are prohibited from examining the documents on the table, in detail, with reference to the special frauds which were attempted or committed. A short list, however, has been placed in my hands, of concessions for services, of so singular and interesting a character, that I beg leave to call your attention to two or three of the items. Here is a concession for services,

to two infant children of *Soulard*, the one 3 years, the other 1 year old—by way of cover, it is added for services of their father. Here is another concession of 15,000 *arpens*, to *Le Duc*, the private secretary of *Delassus*, for services. Here is another concession of a league square, to *Delassus*' cook, for private services; where were they rendered? In the kitchen, I presume: they are not public services, they are private. But, as if conscious that these concessions would not hold water, there is, in each of these cases, a separate concession to boot, of 800 *arpens*, under *Morales*' regulations; this is throwing an anchor to windward, by way of making sure work, that his favorite *protégés* should at least receive something.

Such is the general complexion thrown upon these claims by the documents. Yet, sir, I repeat it that it has never been doubted that there were among them some honest claims, notwithstanding the very suspicious company in which they were found; and among the very few which Judge Peck has been called upon to decide, he has already confirmed several. It is in proof by Judge Wash, that among these claimants were many very respectable men, and some of them the intimate associates and friends of Judge Peck. If, therefore, he could have been intimidated by the fear of giving displeasure on one hand, or swayed by feelings of personal friendship on the other, there existed every consideration to bend the erect and perpendicular integrity of his mind. But in the decision of those claims, as in the proceedings against Lawless, he has shown that he knows but one principle of action, the firm and fearless discharge of his duty, without permitting himself to calculate the personal consequences. Had he possessed a little more of that moral lubricity, which is sometimes veiled under the fashionable name of *tact*, he might have slipped out of all his difficulties, and, at the same time, slipped into the good graces of that very numerous class of the people of Missouri, called the land claimants, and been quite as popular as those who persecute him. He chose the onward path, however, and has been punished for his *singularity*, so far as a man, who is at peace with himself and Heaven, can be punished, by the persecution of the wicked. But to our subject.

Soulard's case (out of which the present impeachment has arisen) though not the first upon the docket of land claims, was the first submitted to the Judge for decision. It seems to have been singled out, by the counsel, as one of the fairest, and the most likely to propitiate the Court, in favor of its companions. The claim was for 10,000 *arpens* of land, and was founded on an alleged concession said to have been made by don Zenon Trudeau in 1796. But if it was issued at that time, *Soulard* had kept it in his pocket ever since, for it had never been seen by any other human being, save only the very honorable and accurate Col. *Delassus*. According to all the regulations of land titles in Louisiana, from the time that Spain took possession under O'Reilly, there was annexed to every concession, a condition of settlement, enclosure and cultivation, within a limited time; the title was to be consummated on a compliance with these conditions within three years, otherwise the title was forfeited and reverted to the crown. This concession to *Soulard*, be it remembered, is alleged to have been made in 1796. In 1799 *Morales* published his regulations, by which, among other things, he calls upon all the holders of incomplete titles to report their claims within 6 months; and declares that all not so reported should be forfeited. *Soulard* never reported his pretended claim under that call; it was, therefore, forfeited by the express declaration of the public laws of the intendant *Morales*. *Soulard* keeps this pretended concession to himself. Although himself the surveyor of the Upper Province, with the power of commanding whatever assistance he pleased, he does not even cause his concession to be surveyed. For eight years, there is not only no settlement, no enclosure, no cultivation, but not even a survey of the concession. His title, therefore, if he ever had any, was doubly forfeited, first by non-compliance with the fundamental conditions of the grant, and secondly, by his direct disobedience to

the mandatory call of Morales, the Intendant. No reason can be assigned for his refusal to obey this call, but one of two; either that there was no such concession at all then in existence; or if there was one, he was conscious that it would not bear the scrutiny of the intendant Morales. During the continuance of the Spanish authorities in full vigor, we hear nothing of the existence of this claim. It was not until it was known that the territory of Louisiana had been ceded to the United States, and "only one little month" before the actual surrender of the possession, to wit, in February, 1804, that this pretended claim, (which if it really existed in 1796, had since been annihilated by the seal of a double condemnation) was drawn forth into light, as it is alleged, only so long as to be surveyed, when it again vanished from mortal sight, and was never seen again, nor its past existence ever heard of, until this bill was filed by Mr. Lawless under the act of 1824.

The second disappearance of this concession, after the survey in 1804, is if possible still more mysterious than its original concealment from 1796 to 1804. Observe it was in 1804 that this claim is said to have been surveyed. The first board of commissioners for the settlement of these land claims, was organized under the act of congress of the next year, 1805. By this law, all holders of incomplete Spanish grants were required to produce them to the recorder of land titles, within twelve months, on pain of forfeiture. Soulard never produced this claim, but was as deaf to this call, as he had been to that of Morales. The several boards of commissioners, organized, in succession, for the examination of these claims, and sitting from year to year down to 1814, although every successive law contained a denunciation of forfeiture for the non-production of these claims—all these boards were suffered to pass away, and not a whisper was heard of this claim of Soulard's for 10,000 arpens of land.

To make the matter still more strange, *Soulard had other claims before the same boards of commissioners*, and, in a letter or memorial to the board in support of these claims, *he recites his services to the public, and alleges that he had no claim for them, except for about 4,000 arpens, then before the board, and he makes the smallness of these claims an argument for their confirmation.* How does this consist with the proposition of his then having a surveyed claim in reserve, *for 10,000 arpens, for these same services?* This evidence was not before the jury who tried the issue of fact in Soulard's case: it has been discovered since the trial. Thus it appears, that he not only failed altogether to give the board notice of this claim; but had in fact asserted that he had no such claim, by the direct assertion that he had *none except for the 4,000 acres.*

There is another singular piece of evidence, touching the reality of this claim, brought out by Soulard himself for a different purpose, and obviously without perceiving its effect on this pretended claim. It is the letter of Carlos Howard, page 43 of the Soulard record, being one of the exhibits annexed to the answer. This letter, you will be pleased to observe, bears date in 1797, only one year after this alleged concession of 10,000 arpens, for public services. Yet in this letter, which is one of recommendation of Soulard, found now in Soulard's possession, and consequently written with his knowledge and approbation, the writer, after setting out the merits of Soulard in his various offices of surveyor, adjutant major, engineer, &c. proceeds to state, "being to be observed that he rendered the services above mentioned, without having received or solicited any gratification therefor." Thus we have this pretended claim veiled in darkness from the term of its alleged birth; its existence, or the existence of any such claim expressly denied the very next year by Carlos Howard, the friend of Soulard, with his knowledge and approbation—its existence, also, *impliedly* denied by Soulard himself, in his refusal to produce it on the call of Morales, though under the penalty of forfeiture; its existence, again, *impliedly* denied by him, in his refusal to produce it before the recorder of land titles and boards of commissioners, under the various calls of congress, although under the like pain of forfeiture; and finally, we have its existence *expressly* denied by him,

in his memorial to the board of commissioners, wherein he affirms that he had no claim for services, except for the 4,000 arpens then before the board. Then follows the long sleep of ten years between the abolition, or rather expiration of the board, and the passage of the act of 1824, giving jurisdiction to the court of Missouri over these land claims, during which not a whisper is heard of the existence of this claim. If a real entity, why did it thus shun the light, and why was the existence of any such claim, so often both impliedly and expressly denied, both by Soulard and his friends? *Possibly* we may find a solution of it in a part of Le Duc's evidence in Macky Wherry's; I mean the commencement of his cross-examination, in which, after saying that he acted as translator to the board of commissioners for the adjustment of land titles, he states that *the greater part of the concessions brought before the board were in the hand-writing of An oine Soulard*. Mr. Soulard might possibly have been a little fastidious of exhibiting a concession to himself in his own hand-writing, and submitting the signature of *Trudeau* to general scrutiny. But whatever the cause, one thing is certain, that the concession, in the iron mask, lived and died, unseen, unknown, its existence *disclaimed and denied for thirty years, by its master and his friends*; and yet in 1825-6, under the magic touch of Col. Lawless' wand, the apparition of this claim arises, in company with those of Jaques Clamorgan for half a million of arpens, of Soulard's infant children, and Delassus' cook, and becomes a veritable entity for the consideration of a court of justice. I say its apparition, because the concession did not appear in its bodily form; that had perished—being a trifling paper, only a title to 10,000 arpens of land, the statement of the petition is that Soulard had, *by mistake, thrown it in o the fire, with some other papers of no value*. A very likely thing, to be sure, to happen to a man of business and system, in the habit of arranging and preserving papers in relation to land titles, as the surveyor of such an extensive district must necessarily have been. The Judge doubting, as he well might, the validity of this concession, referred the question to a jury as an issue of fact. But the petitioner called Col. Delassus, as his witness, *and all was light*: the jury found that the concession had really existed.

The Judge was now called to answer the questions propounded to him by the act of Congress, to wit.

1. Was the concession *legally made by the proper authority*?

2. Had any *treaty, laws, or ordinance* been shown, to which the Judge could refer in his decree, as *authorizing the confirmation*?

He heard the arguments of counsel on the demurrer to the petition. He received and read Mr. Lawless' printed argument in support of the claim. After the petition was amended, he heard another argument on the merits. He took the case under deliberate advisement; and found himself ultimately constrained to answer both the questions propounded to him by the act of Congress, against the petition. 1. That the claim was not legally issued by the proper authority. 2. That no treaty, law, or ordinance had been shown to which he could refer, in his decree to justify the confirmation; but, on the contrary, the Spanish ordinances, which alone bore upon the subject, demanded its rejection. To these ordinances he referred in his decree; and assigned, at length, from the Bench, the reasons of his Opinion, substantially as they were afterwards printed.

He was ready to enter his decree at the same term at which he gave his Opinion. But the leading counsel, Mr. Lawless, not being present, through respect to that gentleman and the interests of his clients, he suspended his decree till the next term, in order that Mr. Lawless might be present to prepare the case for an appeal to the Supreme Court, where the Judge was as anxious as Mr. Lawless, or his clients, that the case should go, for the final settlement of those principles which were to govern all these claims.

The Opinion which he had delivered being the first judicial Opinion on the subject of these claims under the act of 1824, and having gone at large into the

principles affecting all their claims, the counsel practising at his bar, and particularly the counsel for the land claimants, were desirous of having an opportunity of examining it more deliberately, with the view of making up their own opinions on the solidity of the decision, and the probability of its standing the test of an appeal, and of seeing how much ground it covered, how many of their claims it would settle, how many it would leave still to be contested. With this view, they requested the Judge to publish his Opinion; and deeming the request reasonable, as it certainly was, he yielded to their request, and published it. And with the same candor and judicious propriety which had marked all his conduct, and the same anxious desire to do justice and to correct in any future case any involuntary error into which he might have fallen, he appended a note to the Opinion, in which he stated—"that the title to more than a million, perhaps millions of acres of land was supposed to depend upon the decision of the questions which had been considered; and the Opinion having mainly proceeded upon a view which had not been taken at the bar, and having been extended to an inquiry into the source and nature of the Spanish titles to lands in Louisiana and to an inquiry concerning the laws under which these titles were derived; and the decision of most of the points, therefore, having proceeded chiefly upon grounds which had been little or not at all examined in the argument of the cause, it is deemed proper to remark that counsel will not be excluded from again stirring any of the points which have been here decided, when they may hereafter arise in another cause." And the return for all this candor, patience, tenderness and solicitude to do justice to all concerned, was a virulent attack upon the Opinion by Lawless, in the public newspapers, which has ultimately resulted in this impeachment.

In the predetermination to find fault with any act of the Judge, and to screen Lawless at his expense, it has been said that he had no business to publish his Opinion. That it was done from vanity. That the tendency of his own published Opinion was to create that very prejudice with regard to pending causes of which he complains against Lawless. That the Opinion, thus published, was by the Judge's own act made a proper subject for newspaper criticism; that Lawless was perfectly justifiable in exposing the errors of that Opinion; and that the attachment for contempt was a mere act of revenge on the part of Judge Peck to soothe his own disappointed and wounded vanity.

I do not know, Mr. President, in what light these reflections may strike this honorable Court; but I must confess that I expected a loftier as well as a juster tone of sentiment from the honorable managers. "Judge Peck published his Opinion from vanity!" what circumstance is there in the case that lends the slightest color to the suggestion? Not one. On the contrary, the proof is clear, full, most express, and perfectly uncontradicted, that the opinion was published *at the request of the bar, and for the natural and proper purposes which have been already enumerated*;—and yet, in direct contradiction to this proof, gentlemen undertake to say that the publication proceeded from vanity. What candor, what justice, what judicial decency is there in thus wantonly ascribing the act to so mean and despicable a motive, when the testimony in the case expressly proves a pure, correct, all-sufficient and manly one? Was it not right that the suitor should know the Court's Opinion on the law of these titles?

Did they not ask it through their counsel? Was not the publication made at their request, expressed through the counsel? Was it not a matter of general interest that the decision should be made known? Were not the whole people of the United States, to whom these lands belong, interested in knowing the opinion of the Court? Was not the subject under the control and the legislation of congress, and was it not important, as a guide to legislation for that body to know the construction placed by the courts on the law as it stood? Judge Peck's, let it be observed, was the first judicial decision that was made on the subject of these foreign land titles under the treaty of Louisiana. It was a perfectly new question in our courts; and it was a most interesting one.

I speak from my own experience and observation. Having, at that time, official duties to perform under the law which had committed this subject to the jurisdiction of the court of the United States, and the titles turning upon the laws, ordinances and usages of a foreign government of which the best general lawyer among us was wholly ignorant, I well remember the intense interest with which I looked to the lights that should arise from the decisions of the tribunals sitting in the country which had been the theatre of these laws. I hailed the publication of Judge Peck's Opinion, therefore, as a public benefit, and thought the country indebted to him not only for the labor which he had bestowed on the investigation, but for having thus made the fruits of that labor public property. Sir, is not this thing continually done and properly done? Do not your newspapers continually present you, with the decisions of the courts of *nisi prius* on new questions of law? and who before was ever heard to complain of this course until the purposes of this prosecution and the emergency of the argument made such a complaint a matter of policy? Are not the decisions of the first, second and third circuit of the United States regularly published on the rising of the court, even before the cause has been heard on appeal before the supreme court of the United States? Yet who ever before suggested that there was any thing improper in these publications, or that they were manifestations of vanity on the part of the judges who furnished their opinions for publication? Who before ever objected that the publication of the opinion of a court by their own authority, in a cause regularly before them, was liable to the charge of being a contempt committed by the court upon itself, inasmuch as it was calculated to prejudice the minds of the community with regard to other causes still pending in court? It calls for a practical confusion of ideas peculiar to the country, from a native of which this probably originated, to comprehend the proposition. At this rate, no court, not even the supreme court of the United States, can safely pronounce an opinion, or permit it to be published, because it may effect the decision of some other case which is waiting for trial, and so become a contempt of the court's own authority committed by itself. Hitherto, it has been supposed the peculiar province of courts to make *precedents* to bind other cases, and to make those precedents known for the settlement of other controversies and the instruction of the community: but now it seems it is a contempt of the court, by itself. If gentlemen mean to say that the publication by the press was a contempt of the supreme court, because it was calculated to influence the decision of that court before which the appeal was yet pending, the answer is, that the *publication* was no more calculated to produce this effect, than the communication to the supreme court of the same matter in a manuscript form; and this is a case of continual occurrence on appeals to that court. The reasoned opinion of the inferior court is frequently incorporated in the record—and the reports of the three first circuits frequently appear before the cause has been decided on appeal, and the reasoning of the judge below has been frequently read in argument by counsel before the supreme court. Yet no one has ever before been so astute as to see the objection to the course which we are here considering.

As to the Opinion's having become a *fair subject of criticism* by the publication, the right of *fair criticism* with an *honest view* to the truth has never been controverted. It is the *foul criticism* and the *dishonest view* to which we object. It is the gross misrepresentation, the lawless spirit, the contemptuous purpose, the scandalizing the court with the wicked intention of destroying its authority—it was this that was the subject, of punishment and the proper subject, according to every authority.

As to the idea that the Judge's vanity was wounded by the libel, that he looked for glory and not for ridicule, and that the attachment was a mere effusion of personal revenge for the mortification which Lawless had inflicted on him, it is one of those gratuitous aspersions in argument which was certainly not to have been expected here. Why is such an imputation to be made on Judge Peck sooner than on any other Judge who has punished, in the same

way, a libel on his judicial opinions; Judge Haywood, for example, in the case from Tennessee? In every case, in which contempt has been sought to be cast on the judgments and proceedings of courts, the proceeding by attachment is exposed to the same construction of motive; and yet this puerile cry of spite and hurt vanity has never hindered a firm judge from proceeding to vindicate, in this mode, the dignity and authority of his court, nor will such a course of conduct ever lower such a judge in the estimation of an enlightened and moral community, who know the importance of upholding the authority of the laws.

No, sir; there is but too much reason to believe that whatever spirit of revenge existed in this case was on the other side. It has been shown by the evidence that Mr. Lawless, whose dependence was on his profession, was deeply interested in the success of these land claims. The proof is that he was the leading counsel in claims amounting to six hundred thousand acres. If his commissions were only ten *per cent.*, as he admitted them to be in Macky Wherry's case, his receipts from the claims already on the docket, would, in case of success, have amounted to sixty thousand acres of land, to say nothing of the numerous claims which remained behind, and which would unquestionably have been brought forward, if Soulard's case had succeeded. But it was immediately perceived that if the decision in Soulard's case should be sustained, it would demolish, *en masse*, nearly the whole of these claims; and Mr. Lawless saw all his high and flattering prospects on the point of being blasted by this baleful decision. We are told by the evidence that he is exceedingly irascible, and that his deportment towards the courts of the country was too often very disreſpectful. We have seen that one of his habits was to vent his spleen through the medium of the press. This honorable Court cannot have forgotten those barbarous publications in which the temporary blindness of the judge from disease is made a matter of taunt and sneer. From such a man, in such a situation, the paper signed *A Citizen* ought not to have been matter of surprise. It would have been far more surprising, and even unnatural, in such a man, to have permitted the decision in Soulard's case to pass in silence. The Court will remember that he had himself previously written and published an argument for the edification of the Judge and of the people of the country, generally, in support of these Spanish claims, in which he affects to give the law, *ex cathedra*; and you must have observed, on his examination, the solicitude which he manifested to be considered pre-eminently at home on the whole subject. He had made the law of these claims a peculiar study. He knew something of the Spanish and French languages, and was obviously willing to be considered a master of them both, and to have not only superior, but exclusive advantages, over all the other judges, and lawyers of the country, in mastering all the science which was necessary to the decision of these claims. His printed argument is more in the tone of dictation than of discussion, and seems rather to exact submission than to invite consideration. But the Judge, *nullius in verba jurare in verbe magis'ri*, had scattered this labored pamphlet to the four winds, and, by the force of his logic, had destroyed not only Mr. Lawless' golden commissions, but his golden reputation as the great advocate or rather the great autocrat of these claims. Is it surprising that a gentleman who had been first tossed on the revolutionary sea of Ireland, and then on the revolutionary and counter revolutionary seas of France, until storms had become so habitual to him that he rather enjoyed the rocking of the battlements, should have been restless under such a derangement of all his ardent and sanguine expectations? Sir, *his* was the situation and *his* the temper for revenge; and not those of Judge Peck; and the character of the paper, combined with the whole tenor of Lawless' antecedent and subsequent conduct can leave no doubt of the spirit in which he wrote. That libel was the child of revenge. I refer you for the proof of it to his own evidence as to the effect of the decree on his professional hopes. It had swept over them like the fell simoom, and laid them in the dust. And to the concurrent testimony of all the witnesses as

to the combustibility of his temper, his habits of newspaper scribbling, and his rude and passionate deportment toward the courts by whose decisions he was disappointed. Sir, to such a man, in such a situation, the first impulse would be revenge : revenge upon the Judge who had inflicted this frenzying disappointment upon him. If there was another motive blended with this, it was that which he suggested to Foreman, the printer, as a motive for him to take on himself the authorship of the piece—the fine opportunity of immortalizing himself by a martyrdom in the great cause of the freedom of the press.

But the honorable managers insist that “there is nothing in the article at which offence could be taken by any reasonable man.” They insist that “it is perfectly decorous and respectful, throughout; that the language is not only *delicate* but most cautiously guarded and polite; that the object was merely to point out what Mr. Lawless thought *errors* in the Opinion; that he calls them *errors*, and nothing more; and that there is not a *single scurrilous word*, from the beginning to the end of the publication.”

Mr. President, the honorable managers seem to me to pay but a poor compliment to the good sense of this high and enlightened tribunal, when they suppose them capable of being deluded by such an argument. Sir, it is not the outside but the inside, not the shell but the kernel of the piece that we are called upon to examine. Sir, the malignity and mischief of a libel consist *not in the words* it employs, but *the thoughts it conveys*. The most poisonous serpent has a smooth and glossy exterior. The great bandit was sometimes seen in the courtier's robes. “No rude expressions!” Why, sir, what is this to the purpose? Suppose a man were to publish of his neighbor, by name, in a public newspaper, a paragraph to the following effect: “Many men of many minds—I may be wrong in the opinion; but it seems to me that my very respectable neighbor, Mr. A. B. committed an error, both in doctrine and practice, in entering my house after midnight, last night, and taking from my desk five thousand dollars in bank notes.” Would the affected delicacy of the language protect him from a prosecution for a libel? Sir, the humility of the tone in this essay is nothing more than the couching of the tiger before he makes his spring; and the passages are not few in which he shows both his teeth and his talons. Let us come to the piece itself, and see whether it be the innocent and legitimate thing it has been represented to be.

It is not my purpose to detain you long on this subject. The exposition made of this article in the Judge's answer to the articles of impeachment, and his defence before the House of Representatives, and the additional commentaries which have been offered here by my learned friend and associate, will render it superfluous for me to go into much detail. The remarks which I shall make on these *specifications of the Judge's errors* by Mr. Lawless, will be rather of a general character. These specifications are a perfect caricature of the Judge's reasoning and conclusions, from beginning to end, and, like all caricatures in painting or drawing, they have just resemblance enough to the original to point out the individual on whom the asses' ears are mounted, or the rogue's brand is fixed.

We are to read this paper and to understand it, just as it would be read and understood in Missouri, the place of publication. Such is the legal principle. Judges will understand a paper just as the readers for whom it is intended would understand it. The Court will bear in mind that neither the Opinion of Judge Peck, nor the particular circumstances of Soulard's case, are supposed to be before the reader of the article. The Judge's Opinion had, indeed, been published eight days before; but it had been published in a different newspaper, and had consequently fallen into the hands of a different set of readers; and besides it was a *long and grave opinion, on a law case*, in which there was no personal scandal to attract notice and gratify the mischievous, no graces of rhetoric, no beauty of composition to allure the general reader, but all was serious, argumentative, dry and laborious investigation. How many persons read such a paper? Lawyers only, sir, and not even all lawyers. Sir, it is

probable that of the hundreds and thousands of persons who had the curiosity to read the short and pungent article of Mr. Lawless, not one of a thousand had ever taken the trouble to wade through the opinion of Judge Peck, or knew any thing of the particular circumstances of Soulard's case, though they might know something of the general nature of the Spanish land claim, and of the laws or ordinances which affected them. To the general reader, therefore, there was no knowledge either of the Judge's Opinion or of Soulard's case to throw light upon Lawless' meaning. The reader was to depend entirely on Lawless' own representation both of the case and the Opinion, and he has taken care to make no statement of either which could possibly abate the surprise, contempt, and indignation which it was his purpose to excite in the reader's mind. This honorable Court must have observed that there is nothing in the Opinion itself, read by itself, to awaken any other than respectful feelings towards the Judge; and considered as having first broken ground in the *terra incognita* of the Spanish land claims, as being the first opinion of an American Judge on that new and difficult subject. I considered it, on its first appearance, and still consider it as entitled not only to the respect but the gratitude of the public. How has Mr. Lawless contrived to cast ridicule and contempt on this Opinion? By the most artful misrepresentations of its doctrines and tendencies. By suppression, by mutilation, by disjoining its parts, and making a new and ludicrous joinder of members having no connexion with each other in the original; by changing the language and ideas in which the Judge has expressed his propositions, and presenting the ridiculous results thus wrought out by his own ingenuity as the Judge's *assumptions*. I beg the honorable Court's particular attention to this artifice of the writer. The Judge, in every case, reaches his conclusion by a process of reasoning which leads fairly and logically to it; and the reader, following the chain of thought, perceives the justice and truth of the result in which it has terminated. It has been remarked by a sagacious observer (William Gerard Hamilton) that you may render almost any conclusion ridiculous, by dropping the connecting terms which led to it, and stating the conclusion as the result of some irrelevant or disjointed member in the process of argument. Mr. Lawless seems to be a master of this trick of misrepresentation. He has even improved upon it. Conclusions, which the Judge had gained by a laborious process of reasoning, and proved by that process to be just, are stated by Mr. Lawless as propositions *assumed* by the Judge, as self-evident truths. He calls them the Judge's *assumptions*, and instead of giving the Judge's own conclusions, in his own words, he changes the terms so as to render them ridiculous; and, thus metamorphosed, imputes them to the Judge as *assumptions*; by which no one could understand any thing else than that this blind and stupid Judge had assumed these absurdities, as postulates from which he was about to reason. "Judge Peck," says he, with all the affected gravity and solemnity of a man about to state only what was true, "in this Opinion, seems to me to have erred, in the following *assumptions*, as well of fact as of doctrine;"—and then begins the tissue of absurdities which we have called *specifications*, numbered from 1 to 13, which Mr. Lawless has been pleased to style the Judge's *assumptions*, but which, to borrow a title from Ovid, might be much more truly styled "the metamorphoses of Luke Lawless."

There is a suppression of one prominent point in the Judge's argument, which, as it is one of the master propositions of the opinion, so Mr. Lawless has contrived to give the suppression of it a pervading and most successful effect on the whole series of his fabrications. I beg leave to develop this stratagem. Mr. Lawless, in his celebrated printed argument, had told his clients and the whole reading community of Missouri, that the royal ordinance of 1754 was in force in Louisiana, at the time of the cession of that province to the United States. Judge Peck, on the contrary, was satisfied that that ordinance was not in force; and one of the primary objects of his argument was to demonstrate the correctness of that opinion. I humbly think that the demonstration is suc-

cessful, and it is certainly one of the main pillars of the edifice. No one disposed to treat that Opinion fairly could possibly have failed to bring forward that proposition, and to give the Judge all the advantage of it. But Mr. Lawless *suppresses it altogether*, and leaves his reader under the same impression under which his own printed argument had left him, to wit: that the royal order of 1754 was in force, and that the Judge, admitting it to be in force, had nevertheless *assumed* as concessions what would certainly have been perfectly absurd on that hypothesis. Observe the effect of this suppression on that specification against which the honorable managers have alleged that the Judge has been able to raise a cavil, only by the use of a most contemptible quibble. It is the second specification, which is in these words :

“2. That a *subdelegate*, in Louisiana, was not a subdelegate as contemplated by the ordinance of 1754.” What could the Missouri reader make of this article, on the supposition that the ordinance of 1754 was in force in Louisiana? As it is that ordinance which creates the office and prescribes the powers of the subdelegates, certainly wherever it was in force, the office of subdelegate must exist, and be clothed with all the powers which the ordinance confers. The course of reflection then forced upon the reader, by this alleged *assumption*, is this : “The ordinance of 1754 prescribes the powers of the subdelegate Judge. This ordinance is confessedly as much in force in Louisiana as elsewhere ; and yet this wise Judge *assumes*, as a self-evident proposition, that a subdelegate under that ordinance is not a subdelegate *here*, although he would be a subdelegate every where else where the ordinance is in force. What an absurdity ; and more especially what a flagrant absurdity, when considered as the *assumption of a self-evident truth*.” Whereas, in reality, all that the Judge had said was (not that a *subdelegate* in Louisiana was not a *subdelegate*, &c. for this would have been to admit that there were *subdelegates* in that province, under the ordinance of 1754) but that the *Lieutenant Governor of Upper Louisiana, was not a subdelegate*, within the contemplation of that ordinance, 1. *Because that ordinance was not in force in Louisiana* (which he did not assume, but prove.) 2. Even if the ordinance was there in force, that the *Lieut. Governor* had not been *appointed according to its provisions, nor in that character*, and, consequently, *could not be clothed with its powers*. Is this cavilling or quibbling? If it be, I could wish that there were a little more of it in the arguments we are answering. Does not the Court perceive that by suppressing the fact that the Judge held the ordinance not to be in force, and changing the terms of the proposition, (substituting *subdelegate* for the Judge's *Lieutenant Governor*) this adroit knight of the quill has converted a plain truth into a palpable absurdity. This policy runs throughout the whole article. The Judge's propositions are continually changed, and what was true as he stated it, is, by this species of legerdemain, made false, absurd, and frequently ridiculous.

For example, the question before the Judge was, whether the concession to Soulard was authorized by any treaty, law, or ordinance? The Judge asserts and proves that a *given ordinance does not authorize the concession*. Whereupon the very candid Mr. Lawless immediately charges him with *assuming* that the ordinance in question *prohibits it*. We are asked what is the difference between saying that the ordinance of 1754 *does not authorize* a concession, and saying that it *prohibits* it? Only this ; that the one is true, and the other false. The ordinance of 1754 does not authorize such a concession as that to Soulard, and yet it does not prohibit it. It is true, as the honorable managers have argued, that *if* that ordinance was the only source of the powers of the Lieutenant Governor, and did not authorize such a concession, the Lieutenant Governor could not make it. But still it would not be because the ordinance *prohibited* it, but *because no one could grant the crown lands but by the authority of the King*. It did not require a *prohibition* from his Catholic Majesty to prevent such an intrusion into his affairs on the part of his subjects. It was enough that there was *no authority* to exercise it. Nor let it be said, sir, that this is a mere

dispute about words. For Lawless himself has been constrained to admit, on his cross examination, the wide difference between a *positive written prohibition*, and the mere absence of a *written authority*: for a *positive prohibition* he admits would have silenced the argument of power founded on the long practice of the lieutenant Governor in making these concessions and the tacit acquiescence of the King in that practice: whereas the mere absence of authority would have left that practice in full force: after which it is idle to contend, as has been done, that the proposition of the Judge and that imputed to him by Lawless are one and the same.

An honorable manager has told us that Mr. Lawless is an Irishman, and when he said *prohibit* he meant *not authorize*. But if he meant to plead the privilege of his nation, he ought to have apprized his reader of it fairly by a postscript—“take notice, reader, that I am an Irishman; and if I have committed any bulls in my attempt to state the Judge’s propositions, you will please to remember that I was born under the constellation of Taurus.” The honorable manager has added, that if Lawless had been a *Scotch Irishman* he would probably have added another specification, and charged the Judge with assuming that the King of Spain had *no right* to confirm certain claims, when all that the Judge had said was that the King was *not bound* to confirm them. Sir, there would have been no objection to blunders of this sort, if Lawless had hoisted his *national flag* in the onset: but he had no right to fire under English colors and leave his adversary and the world to construe his assault on that hypothesis. An Englishman would not be apt to call *capers, anghovies*, and shoot a brother officer through the head for doubting his assertion that they grew on trees. Yet the honorable manager, I presume, would vindicate Mr. Lawless for such a course, though it might make wreck of the character, the peace, or even the life of an honorable man.

But to return to these specifications. Another trick which pervades them is this: a proposition advanced by the Judge is perfectly true within the limits he states it: but Lawless enlarges it till it becomes an absurdity, and imputes it, in this form, to the Judge, as one of his assumptions.

For example; O’Reilly’s regulations of February, 1770, had directed that all grants for land in Louisiana should be made by the *Governor General* of such an extent and on such conditions. In the following August, (1770) there had been a *royal order* on the subject, which had not been seen in Missouri, when the Judge pronounced his decree in Soulard’s case, and no one there knew the contents or exact effect of that order. The advocates of the claims had argued that this order had probably altered or repealed the regulations of O’Reilly, and justified the concessions which the Lieutenant Governor of Upper Louisiana had made in Soulard’s case. The Judge, however, observed that *after the date of the royal order of August, 1770, grants still continued to be made in conformity with O’Reilly’s regulations*, and, hence, *inferred that there could be nothing in the royal order of August, 1770, which had altered O’Reilly’s regulations in that particular*; and it is submitted that the inference is perfectly fair and legitimate. But observe what a dish Mr. Lawless has cooked out of the materials of this argument, and then imputed it to the Judge as one of his *assumptions*. It is the 3d specification, which is this:

“3. That O’Reilly’s regulations, made in February, 1770, can be considered as *demonstrative of the extent of the granting power, either of the Governor General or the subdelegate, under the royal order of August, 1770.*”

The Court will observe that here is a ridiculous anachronism imputed to the Judge, which Lawless has sought to make more emphatic, by italicising the dates. Whereas there is no anachronism whatever either in the form or substance of the Judge’s proposition. He never did assume that O’Reilly’s regulations of February, 1770, were to be considered as *demonstrative of the extent of the royal order of August, 1770*: he merely *inferred* their conformity, so far as concerned the mode, the terms and conditions of granting lands in Louisiana,

from the fact that after the date of August, 1770, the royal lands still continued to be granted in that province in conformity with those regulations. Sir, the two propositions are so utterly different that no man of common sagacity could have confounded them. The perversion must have been intentional and malicious.

The same remark is equally true of the 4th specification, which is another gross misrepresentation extracted from the same materials. It is,

"4. That the Royal order of August, 1770, (as recited or referred to in the preamble to the regulations of Morales of July, 1799) *related exclusively to the Governor General.*"

There is not a word in the Opinion that furnishes the slightest countenance for this monstrous absurdity. And precisely of the same character are the 10th, 13th, and 14th specifications.

Another of the tricks of this very ingenuous writer is to mix an assumption of his own with assumptions which he imputes to the Judge, and thus to form a compound of absurdity, the whole of which he places to the sole credit of the Judge, as one of his assumptions. Of this, the 5th specification furnishes an example—it is in these words:

"5. That the word "*mercedes*" in the ordinance of 1754, which in the Spanish language means "*gifts*," can be narrowed by any thing in that ordinance or in any other law, to the idea of a *grant to an Indian*, or a reward to an informer, and much less to a mere sale for money."

The Court will observe that the whole absurdity here charged upon the Judge arises from the *assumption* that the word *mercedes* means gifts. But Mr. Lawless, when asked on his cross examination whether Judge Peck either assumed or admitted in his Opinion that *mercedes* meant gifts, answered "O no—that was my own assumption." "Did the Judge say that the word *mercedes*, *in its sense of gifts*, could be narrowed down and transmuted first into *grants to an Indian*, then *rewards to an informer*, and finally, *into a sale for money?*" "O no—that was my own deduction." Now cast your eyes for a moment on what the Judge did say, and see how perfectly rational and logical it is, and how little it resembles this absurd caricature into which the genius of Mr. Lawless has transformed it. The word *mercedes* occurs only in the preamble to the ordinance of 1754, and there its true meaning was a controverted question at the bar. It was not admitted that its only meaning was "*gifts*." The translator of the government of the United States had rendered it "*grants*." Spanish lexicographers showed that it meant, also, rewards. The Judge adverting to *these different significations*, of which the word was capable, had remarked that, in either sense, it was applicable to the various regulations of the ordinance; that *in the sense of "grants"* affixed to it by the government translator, it found an application in these articles which regulated the grant of lands or sale and composition: that *in the sense of rewards*, it was satisfied by the seventh and eighth articles, which authorized rewards to those who gave information of intruders on the public lands; and that in its sense of "*gifts*," it had application to the 2d article which authorized "*gifts*" to the *inhabitants of towns for pasture and common*, and to the Indians for tillage and herding according to their wants. And yet from this plain and rational distribution of the term *mercedes*, according to the various senses given of it by works of authority, Mr. Lawless exhibits the Judge as *warping the word from its only and acknowledged sense*, and applying it, with the most grotesque absurdity, to objects entirely foreign to it; and this for the unholy purpose of defeating these claims.

Sometimes he presents the Judge as deciding that such and such was to be disregarded as proof of such and such a fact, when in truth the Judge had said nothing upon the subject, and there had not been, in reality, any such evidence before him. As illustrations of this, I refer you to the 14th, 15th and 16th specifications.

In the last specification he presents the Judge as in open rebellion against the authority of congress.

"18. That the laws of congress heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those claims of a precisely similar character which remain unconfirmed." That is to say, that the Judge disregarded the laws of congress which bore on the subject, and which he was bound by the act of 1824 that conferred this jurisdiction on him, to have respected and obeyed.

Mr. Lawless was asked whether the Judge said, in his Opinion, that acts of congress which bore on the decision of these incomplete titles, would furnish no argument or protecting principle, with him. "O no—that was my idea, not the Judge's." "But you have imputed it to the Judge?" "Ah, but I did 'nt mean it." Thus, the Judge is represented as so much in hostility to these claims that nothing in the form of law, evidence, or common sense could bind him: he was ready to swim rivers, leap mountains, and ride over congress, in the rage of devastation which he had conceived against these claims; and yet, on the subject of the 13th specification, all he had said was the calmly stated proposition, that no act of Congress had been shown, which, in his estimation, bore on these claims. And, even now, the only act which Mr. Lawless is able to cite relates to certain specific claims which had been reported to congress by the land commissioners, and inspected and decided on by congress. Soulard's claim was not on this list; had never been seen, either by land commissioners or by Congress; and yet that act, confirmatory of claims which had been partly disclosed and examined by congress is relied on as confirmatory of this clandestine and skulking claim, which *no latitat* of Congress could ferret from Soulard's possession, but which continued to lie hid until it was committed to the flames.

I will not detain you farther, sir, with the character of this paper. It cannot but be perceived that it is a *false report* of the proceedings of a court of justice, *intended to degrade and destroy its authority, and to poison the public mind with regard to pending claims*; and if there be any authority in the law, it was a clear case for the process of contempt.

But the honorable managers have said that this envenomed paper, thus cast among the people of Missouri, was a perfectly harmless one, and that in truth nobody in Missouri understood these specifications as the Judge affected to understand them. In answer to which, I beg leave to inquire why the honorable managers objected to our proving how they were understood by the people of Missouri. We offered the proof; on their objection it was excluded; and now they take advantage of that exclusion to affirm that no other man in Missouri thus understood this publication except Judge Peck. We must take leave to meet the gentlemen with a *contra* affirmation; and we again offer to prove that the most enlightened men in the state understood the article in the same offensive sense.

Another of the honorable managers has made an ingenious and amusing classification of readers, for the purpose of showing that the publication could have had no injurious effect on the Judge. He draws his classes from the 8th page of Judge Peck's answer; and one of these is composed of the people of Missouri, among whom the paper was put into circulation. This class of readers, says he, are described by the Judge as understanding the subject, and as capable, therefore, of appreciating the absurdities which Lawless had charged upon the decision. With this class of readers, said the honorable manager, the paper could have had no bad effect: "the reader seeing that there were absurdities, they could not possibly have injured the Judge." Pray, why? "Because the reader would not believe that the Judge had committed them." Sir, I should be glad if this respect for the judicial character were as universal as the honorable manager seems to suppose it. In this degenerate age, however, we are obliged to confess that an opinion seems to have gained ground that even

judges may reason absurdly. Mr. Lawless certainly did not publish the article in the expectation of being disbelieved. Did he expect to produce the effects which he confesses he aimed at by being disbelieved? He said, in his examination before the Judiciary Committee, (which the honorable managers have placed in evidence here) that he did produce the effects he aimed at. Then he *was* believed; and contrary to the theory of the honorable manager, the Judge *was* believed to have been guilty of the charges imputed to him; that is, to be either a stupid or an unprincipled judge.

It is objected by the honorable managers, that a writing to be a libel must be plain and intelligible to all; and not to be made out by the subtle inductions which have been employed by the Judge.

As this objection is manifestly borrowed from the report of Almon's case, I must beg leave to borrow, also, from the same report, Chief Justice Wilmot's answer to the objection, which was, that a court would understand such a paper just as those to whom it was addressed would understand it. This paper was addressed to the people of Missouri, and was there well understood; and though it may require an effort to exhibit its true character where the subject matter is not understood, it required no such effort where it was; and this, I repeat it, we were and still are prepared to prove. Sir, it is the case with all local slander; the circle to which it is addressed understand and feels its edge; the next state or even the next courts may require a key.

But the honorable managers are in a constant flame at the insolence of Judge Peck, in punishing such a paper as this as a contempt. "We have shown that the King of England, say they, may be charged with errors of judgment by his subjects; but *his majesty Judge Peck, it seems, is to be treated as infallible.*" *Can the King of England be, with impunity, charged with absurdities in his official conduct, which he never committed; and this with the very view of bringing him into contempt with his subjects? Can he, from such motives, be falsely accused of what he never did?* This is the question; and where is the authority to show that *this* can be done with impunity?

One of the honorable managers was exceedingly indignant at Lawless for the tone of *humility* in which he introduces the article. The honorable manager declares that he would have come out far more loftily, and told the Judge his own in unmeasured terms.

Sir, the honorable manager does not understand this business as well as Mr. Lawless. He is far too open—too frank. He cannot teach Lawless the art of libelling; he might as well undertake to teach Hannibal the art of war. This humility, sir, is the barb of the sting. It has long been known that

"True wit is keenest, by politeness set;"

and no one knows better than Luke E. Lawless, the exquisite edge given to a satire by the mock respect with which it treats its victim. I will do Mr. Lawless the justice to say, that I have hardly ever seen a composition better contrived to effect its purpose than the one under consideration. I am sorry that I cannot extend the compliment to the candor with which he has spoken here of his purpose.

He says, that his object was to prevent the claimants from being thrown into despair by the Judge's Opinion, and thus becoming a prey to sharpers and speculators. Had he heard of any such speculators *before*? No. After? No. But where was the alarm from an opinion of an inferior Judge, subject to appeal, and from which an appeal had been actually taken to the Supreme Court of the United States? Could he not have told his clients, by private letter, that he was confident of a reversal of the judgment? Would they not have confided more in a letter signed by their counsel than in an anonymous newspaper publication? But he says, that some of the persons were so situated, in point of residence, that he could not have reached them by letter. Then how could he have reached them by a newspaper? The same mail that carries newspapers

carries letters; and the private hand that would convey the one would convey the other. Or if a newspaper was necessary, why could he not have inserted a short and decent card, stating simply the judgment of the court as adverse to the claim, and his entire confidence that it would be revised, and put his name to it? Why was an anonymous and degrading misrepresentation necessary to so fair and proper an object? And if this statement of his purpose be sincere, why did he not make it before the Court of Missouri? If, too lofty to make it in his own case, why did he not let it slip in his argument on the rule against Foreman? Sir, I will not say, that this explanation of his purpose is an after thought. But I will say it is exceedingly strange that it occurred to the gentleman so late. It is exceedingly strange that nothing was heard of it in Missouri, while these attachments were going on, not even in the confidence of private and friendly communication. And it is strangest of all, that so lame and impotent a pretext for the publication should be offered at all by a man of ordinary understanding, when there were so many better, because more efficacious and innocent modes of effecting the same subject. No; sir, the mind must be greedily credulous, indeed, that can swallow and digest such an apology. No; sir, the true motive is visible, palpable in the face of the article itself. Revenge was to be gratified. The Judge was to be stung, mortified, degraded, rendered contemptible and ridiculous before the people of Missouri, and, if possible, worked out of his seat, that some one else might be worked into it more propitious towards these hollow and meretricious claims; and all this was to be accomplished by means which would at the same time build up a professional throne for Mr. Lawless on the ruins of the tribunal, and bring these claimants, one and all, to kneel at his footstool and kiss the hand of the conqueror. This was the object, and the evidence of it is found on the face of the article itself, and the conduct of its author throughout all the proceedings to which the article led.

Let us come now, sir, to these after transactions, the final scene—the *conduct of the Judge* under this rude assault on the court over which he presided. It is, *here*, that the honorable managers make *their great stand*. Indeed, they seem to think it the only part of the case that demands consideration. That *guilty in intention* which the impeachment charges, and which they know that they are bound to prove, before they can demand a conviction, is to be made out, they think, from *the conduct of the Judge himself*. His conduct, they allege, proves *personal malice* against Mr. Lawless, and establishes *that intention unlawfully to oppress and injure, by color of his office*, which constitutes the vital point of this impeachment. On this ground I meet the gentlemen, sir, with perfect composure; for *I know* that, with all their acknowledged abilities, it is *utterly impossible* for them to extract this proof of a *guilty in intention, from the conduct of the Judge*, except by the adoption of a process which every lofty and honorable mind will reject at once. Nay, it does not require loftiness or high honor; it requires only *common charity* to reject and spurn the process by which alone a guilty intention can be inferred from the conduct of the Judge—and that process is *by the gratuitous imputation of a base motive to an act equally referable to a pure one*. If the act be, in its own nature and character, *equally consistent with a fair motive*, what justice is there in imputing a *foul one*? Let it be observed, that there is *no pretence of direct proof of malice* (the *malus animus*) in the Judge. It is to be made out entirely *by inferences drawn from his conduct*. But in the process of inferring motive from conduct, the act under examination must not be equally referable to a good and a bad motive. In a criminal trial, particularly, where any man is presumed to be innocent till the contrary appears, there must be *no equivocality* in the act from which guilt is to be inferred; for that would be to *presume* guilt where innocence might, with equal fairness of reason, be presumed. The accused having, in the outset, the legal presumption of innocence on his side, must continue to be presumed innocent, until some act shall be adduced

which is entirely *inconsistent* with such presumption, and consistent only with the presumption of guilt. But an act which, upon its face, is equally compatible with an innocent, lawful and honorable motive, will never, on such a trial, and before such a tribunal as this, nor any other tribunal that knows its duty, be referred to a guilty and a base one. It does not require the inclination to err on the side of mercy rather than of justice, to acquit rather than to condemn, which distinguishes every enlightened criminal tribunal, to adopt the course of construction on which I insist: it requires only common reason, common right, a common sense of justice. For what innocence, what virtue, what nobleness of character can protect a man, if the purest, and wisest, and best acts of his life may be *tortured into guilt by the arbitrary imputation of a guilty motive*. Gentlemen may descant as long, and as loudly as they please on the imaginary tyranny of Judge Peck. But the tyranny of a government in which such a principle of criminal law prevailed as that which is applied to fasten guilt upon him—the wanton and gratuitous inference of guilt from an act consistent with the purest innocence—would be a tyranny that would not be borne by any man who knew what freedom was, and had the power of locomotion. As for myself, sooner than live under such tyranny, I would say with Brutus—*Longe à servientibus abero, mihi que esse iudicabo Romam, ubicumque liberum esse licebit.**

Sir, I have not thus examined the conduct of Mr. Lawless. I have compared the act with the motive he avows, and with that to which I assign it, for the purpose of seeing whether it be such an act as would *naturally spring from the motive he avows*; or whether, on the contrary, its very character does not obviously refer it to the worse motive? whether the motive he avows, had it been the true one, would not naturally have produced a different course of action; while the course he did pursue, must, from its very color, nature and tendency, force the fairest mind to the conclusion of a different motive? Thus in the case which I have just examined, Mr. Lawless says the only motive of his publication was to guard his clients from that despondency under the Judge's Opinion, which might have delivered them up a prey to speculators. To test the truth of this declaration of motive, I have compared the motive with the act. Such a motive was perfectly pure and proper, and perfectly consistent with a just respect for the court; and I have shown that if such had, *indeed*, been the motive, Mr. Lawless' course would have been to have written a private letter to his clients, or, at the most, a card in the newspapers, expressing, in respectful terms, and under his own hand, his confidence that the judgment would be reversed. Such a motive required not the cloak of a fictitious signature. It required no misrepresentation of the Judge's Opinion. It required no contempt to be cast upon the court. It required no ridiculous caricaturing and falsification of the Judge's reasoning. All these offensive features are out of keeping with the motive assumed. They go beyond it. They are inconsistent with it. They call for the assignment of other motives; and the most obvious motives, for a *libel of such a character, under such circumstances, in a court of justice*, are, I humbly conceive, those which have been assigned; contempt for the court; a desire to bring it into *general* hatred, contempt and ridicule, to destroy its authority with the people, and, by the same act, to enlist the public prejudices in favor of those Spanish land claims which were still before the court, waiting for decision.

I ask only for the respondent the same rule of construction as to motives, which I have applied to Mr. Lawless. Let the act be measured by the motive hypothetically assumed: if it fits the standard of innocence, let it be adjudged innocent. If it goes beyond that standard, and matches only with the standard of guilt, let it be judged guilty. In other words, let the act be deemed inno-

* "I will remove far from all who are disposed to be slaves, and fancy myself at Rome wherever I can live free."—*Brutus' Letters to Cicero*. Epist. XVI.

cent, if it be such a one, as *may* have sprung naturally from an innocent motive; and let it not be deemed guilty till it be shown to be such as *could have* sprung *only* from a guilty motive. This, I submit it, with confidence, is the true and only rule for the trial of *intention*, in a criminal case, where the *intention is to be inferred, merely, from the conduct*. And assuming this to be the true principle, let us apply it fairly to the conduct of Judge Peck, which is here in question.

The charge is that his *intention* was *unlawfully to oppress and injure Mr. Lawless, under color of law*. The Judge, on the contrary declares that he is not guilty of *this intention*; but that, on the contrary, *his sole intention was to discharge his official duty as a Judge, in punishing, in the common form, what he deemed a contempt of his court*.

We have shown that a libel on the proceedings of a court of justice is a contempt punishable by attachment. We have shown that this publication was a libel on the proceedings of a court of justice. If these propositions be true, it follows, with the certainty of syllogism, that the Judge had the right to punish this publication by attachment, as a contempt.

But suppose you think the Judge wrong as to the first proposition, to wit, that a libel on the judgment of a court may be punished as a contempt; still it is utterly impossible for you to withhold your assent from the proposition that the law in favor of the power is so strong, that an honest and enlightened judge might well believe that the power existed. We think we have *demonstrated* that it *does exist*. But it is sufficient for the acquittal of the Judge, if you should be of opinion, on a view of the authorities, that *he might* have innocently *believed* the power to exist: and if *he might not*, then has there been no innocence on the English bench from the first institution of courts to the present day, nor on the enlightened benches of the several states of this Union, whose decisions have all been read. Sir, I have no fear of this point.

Or, suppose you believe the Judge wrong in the minor proposition which has been stated—to wit, that the publication was a libellous contempt of his court, must it not be admitted that it is one which Judge Peck *might* have sincerely *thought so*? Will you say it was *impossible he could have thought so*? Then you affirm as *impossible* what we were and still are prepared to prove not only possible, but true—to wit, that other persons, and those enlightened and honorable persons, among those to whom the paper was addressed, did think and do still think it a libel. Nay, may I not, with respect, ask if you have not found in your own consultations, among yourselves, a difference of opinion on this subject as to the character of this publication? And if *any member* of this honorable Court believes this paper to be a libel, both in fact and intention, much more if a considerable number so regard it, must not *all* admit that *Judge Peck might have so regarded it*? I do not perceive that it is possible to come, with candor, to any other conclusion.

Now, let it be observed, that Judge Peck did not proceed, at once, to punish it as a libel: he thought that the question whether it was a libel or not, depended on the intention of the author: and all that he contemplated was to inquire into this intention: such was the nature and effect of *the rule to show cause*, with which this attachment, like all others, commenced. Now, sir, if Judge Peck thought this publication a *libellous contempt of the court*, whose object and tendency it was to bring *the court, and its authority*, into open contempt, and to give an unjust bias to the public mind in relation to the claims still pending for trial—and no cool and impartial man can deny that he *might have so thought it*—it was *his duty as a Judge* to call the author before him, by a rule, either to avow or disavow the contempt indicated by the paper. The Judge declared at the time, and has declared, ever since, in his defence before the House of Representatives and in his answer here, that in t king this step, *“he was actuated by the purest sense of official duty;”* and why shall we not believe him? The law says we *must* believe him *innocent*, till his *guilt* shall be

proved. In the act itself, of making this rule, there is no indication of guilt. *He did exactly what all other courts do, who consider it their duty to notice contempts of their authority; and there is no better reason for inferring a corrupt and guilty motive, in this case, than in the case of Judge Haywood, in the proceeding against Darby, or in the case of any other court, that has proceeded against a contempt of its authority. Why, then, suspect it here rather than in any other case; and convert this suspicion into proof?*

Gentlemen indeed have affirmed, that his vanity was stung at having his errors so exposed, and his beautiful Opinion so marred and disfigured; that Opinion by which he set so much store and from which he expected a *niche* in the temple of Fame. Now, where is *the proof* of all this personal vanity, of all this inflated estimate of his Opinion, and this expectation of a *niche* in the temple of Fame? There is not one tittle of proof, on any one point here assumed. No witness has imputed to the Judge this weak and unmanly vanity of character. No one has ever seen him otherwise than grave, temperate and sober, in his estimate either of himself, or others. No one has ever heard any effusion of vanity from the Judge, with regard to this Opinion. There is certainly no vanity on the face of it, but the reverse; for in the conclusion of it, admitting that he may have fallen into error in the first investigation of a subject so entirely new to him, he modestly and respectfully invites the discussion of these principles anew, whenever the question shall, again, arise. The only atom of fact on which the gentlemen rely for the proof of this vanity, is the *publication* of the Opinion; and that was distinctly shown to have proceeded from the united request of the bar, and particularly of the counsel for the land-claimants themselves; and this, for the best of reasons, as I have already explained. And, with the dissipation of this atom of fact, there is not, now, one vestige of proof remaining, to give the slightest color to this picture of irritated vanity which the honorable managers have drawn and painted for the Judge. Taking all the materials, form and coloring, from their own imaginations, they present the figure to you as that of Judge Peck, and having excited your indignation against this creature of fancy, which has no more resemblance to Judge Peck than it has to Judge Haywood, or any other modest and amiable man that ever lived, they expect you to transfer this gratuitous and unfounded excitement to the respondent, in the form of a sentence of guilty, on this impeachment. They say that Judge Peck was moved by wounded vanity and personal revenge. It is *possible* he was. It is *equally possible* that the same is true of every other court that has ever proceeded to punish a contempt *on itself*. But it is, also, *possible* that they were moved by a pure sense of official duty; and it is just as possible of Judge Peck. There is no more reason to suspect *him* than any other tribunal that has ever acted in this way. But suppose there was even room for suspicion—is *suspicion, proof*? The maxim is, that the accused is to be presumed innocent, till the contrary is *proved*, not until it is *suspected*. Here is a case in which a good motive may as well be imputed to this judge as to any other court proceeding in such a case. And will this honorable Court, on such a trial as this, in which the accused has every thing at stake that can make life valuable to a man of honor—will you, in such a case, *gratuitously* impute to him a *base motive—a criminal intention*? I say, *gratuitously*; for, I repeat it, there is not one atom of proof to that effect, which will not equally serve to convict every other court of the same guilt!

But let us follow the honorable managers through the whole tissue of circumstances on which they rely, as proving this guilty intention.

They say the Judge was so *infuriated* that he would not listen to the remonstrance of his best friends who tried to stay him, but pressed on, in spite of them, to the gratification of his revenge: and in proof of this they cite the deposition of Mr. Bates. This gentleman, they say, advised the Judge that this was no libel, no case of contempt, no subject for punishment; and begged him not to think of proceeding against Lawless—but, in spite of this friendly warning and advice,

this tyrannical and oppressive Judge rushed forward to seize and immolate his victim on the altar of his revenge. Now, sir, look at the deposition of Mr. Bates, and see how little it supports the poetic paraphrase that has been made of it. Does Mr. Bates say *that this publication was no libel*; does he say it was *no case of contempt*; does he say it was *no proper subject for punishment*? Not one word of it. Sir, that part of the deposition in which Mr. Bates did express his opinion upon this subject has been expunged, under the decision of this honorable Court; on the objection of the honorable managers. We regret that it is so. But we must request that this paper may be referred to; and it will be seen that the opinions ascribed to Mr. Bates were never expressed by him. It is true he did advise the Judge to take no notice of the publication: *but why*? He assigns the reasons himself. It was not that he doubted the power. It was not that he thought the paper no libel. It was not that he thought Lawless did not deserve to be punished. No such thing. No, sir. The motives that he urged upon the Judge were *his own peace and quiet*. "*The proceeding will bring on a personal quarrel with Lawless—you will embroil yourself with him and with all his friends, and all whom he can influence.*" The question thus propounded to the Judge was, Shall I yield to this selfish policy, or shall I consult my duty? What was the answer? "*Mr. Bates, I have taken my course. I see the line of my duty, and I shall follow it. I cannot, in a case of official duty, permit myself to look to personal consequences;*"—and this answer, pronounced as calmly as firmly. When Lord Mansfield, in Westminster Hall, exclaimed, *fiat justitia, ruat cælum,*" it was thought a fine instance of the moral sublime. When Judge Peck modestly utters the same sentiment, in private to a friend, it is charged to a malignant and tyrannical disposition. Sir, the deposition comes in direct support of the motive which Judge Peck has always avowed, and refutes *that* which the honorable managers seek to extract from it. But the honorable managers, with their transforming eloquence, can turn whatever they touch into proof of guilt:—be it my office to endeavor to take off the spell of enchantment, and restore things to their proper shapes and colors.

Then come the proceedings in court; and *there* was nothing that the Judge could do or say which the honorable managers have not seized upon as evidence of guilt, even though forced in the next breath to admit that the act was a thing of course.

For instance, the honorable manager who spoke last introduces his narration of the Judge's conduct thus:—"After having gone through a little morning business, the Judge takes out a newspaper called 'The Missouri Advocate and St. Louis Enquirer,'—which contained the offensive article; and although, (says the honorable manager,) he knew the editor of that paper as well as any one in court, *he affects not to know it*, and addressing the bar and audience asks if any one knows who is the editor of that paper?"—And yet, the honorable manager (than whom no one is better acquainted with the duties of a judge) admits, *in the next breath*, that Judge Peck could not proceed *judicially* on his *private knowledge of the fact*, but *must have an affidavit* to found his proceedings. Then, why this remark *in odium* against the Judge? Why impute to a disgusting *affectation* what the honorable manager himself admits was a necessary act of duty? Trifling as it is, the circumstance shows the jaundiced medium through which every act of the respondent has been surveyed, and how little reliance can be placed on the eloquent reports of it from the other side.

In answer to the Judge's question, Col. Lawless, it seems, gallantly volunteered the answer which the Judge required, and gave the name of Foreman as the editor of the paper. But the affidavit and rule having been made, his courage seems to have exhausted itself in the effort, or to have oozed like that of Acres out of the palms of his hands; for we find him next, very strenuously exhorting Foreman, *in private*, not to give up *his* name as the author, and urging upon him, among other motives, that it was a *fine occasion to raise his name, under the cry of persecution*, and thus, to increase the number of his subscri-

bers. Foreman, however, not feeling, like Erasmus, any peculiar call to martyrdom, declined both the honor and the profit held out to him by Mr. Lawless, and gave up his name.

The next step was necessarily a rule upon Lawless; and now, to show how

"Trilles, light as air,
Are to the jealous confirmations strong
As proofs of holy writ,"

the honorable managers seize upon the different wording of the order against Foreman, and that against Lawless, to prove the Judge's malice against the latter. Now, to test this difference fairly, let us see whether there was not a difference in the two cases. Foreman was the editor of the paper merely, and had published an article written by another, without knowing any thing of the facts of the case or intending to make himself responsible for the truth of the publication. The rule against Foreman, therefore, calls the publication *false*, and nothing more. But when Foreman gave up, as the author, Luke E. Lawless, who, having been counsel in Soulard's case, must have understood the Judge's Opinion, must have known, therefore, that he was misrepresenting it, and could have had none but a wicked motive for so doing, the rule against him calls the article *false* and *malicious*—and *malice*, as this honorable Court knows, means in law language, only a *lawless* or *wicked mind*—the *mal a mens*. Thus the different language of the two rules is found in the very different circumstances in which the two parties stood before the court. And, at least, the rule is a mere call upon the party to answer to the charge; and to answer it upon his own evidence merely, if he thinks proper to do so.

But it is objected that the rule itself proves that the Judge had *prejudged the case*, and predetermined the species of punishment which should be inflicted; for it calls upon Lawless not only to show cause why an attachment should not be issued against him for the contempt, but also *why he should not be suspended from practising in that court as an attorney and counsellor therein, for the said contempt and evil intent.*"

Now we should be glad to learn how the same form of rule escaped censure from the honorable House of Representatives, in the case of Judge Conkling? for such exactly was the rule which he issued against Mr. Tillinghast; and yet those of the honorable managers, who belonged to the committee of the House in that case, saw nothing to censure in the same rule as issued by Judge Conkling. The truth is, that there is no impropriety in either case. It is true the rule calls it a *contempt*, but is this a pre-judgment of the case; if so, every rule is such a pre-judgment. With regard to the punishment, the rule is only notice of what the punishment would be, *if the contempt should not be purged*. Lawless was a member of the bar, an officer of the court: if *guilty of the evil intent and contempt*, indicated, *prima facie*, by the published article, he was no longer worthy of a place at the bar of the court which he had treated with so much indignity, from so vile a motive; and the rule informed him, just as Judge Conkling's rule informed Mr. Tillinghast, that such would be the consequence, unless he should clear himself of the contempt: Sir, it was fair and proper that the rule should thus apprize him fully of the danger in which he had placed himself, and direct his attention to every point material to his vindication. The rule is merely an initiatory process to lead to inquiry; and, like all other initiatory process, it was proper that it should apprize the defendant fully of the character of the offence imputed to him, and the consequences with which it would affect him; but it is no more the pre-judgment of the case than any presentment, indictment or information whatsoever.

Another use has been attempted to be made of this rule by an honorable manager. He says it proves that the Judge had not, at the time this rule was drawn, considered the publication as *having any effect on the claims still pending before the court*; and that *this obnoxious feature of the article, is an after-*

thought of the Judge's, growing out of the pressing emergency of his case. Sir, look at the language of the rule. What is it? It calls upon Lawless to show cause why an attachment should not issue against him for the false and malicious statements in said publication contained, in relation to a judicial decision of this court in the case of Julia Soulard, widow, &c. &c.; "with intent to impair the public confidence in the upright intentions of the said court, and to bring odium upon the court; and, especially, to impress the public mind, and particularly many litigants in this court, that they are not to expect justice in the cases now pending therein; and with intent farther to awaken hostile and angry feelings on the part of the said court, in contempt of the court." Here you have the very reference to the effect of the publication on the pending causes, and on the public mind in relation to those causes, which the honorable manager has charged as an after thought. And thus does every criticism on the conduct of the Judge, vanish at the first touch of sober and candid inquiry.

But we are told that the oppressive intention of the Judge was further evidenced by the repeated interruptions of Mr. Lawless in the argument. Now the same witnesses who speak of these interruptions, say that this conversation was invited by the colloquial manner of Mr. Lawless himself. Why, sir, such interruptions are very common. Judges frequently ask questions of the counsel in the course of argument, but they have never before been considered as proofs of malice. I have been interrupted and disconcerted, too, again, and again, by such questions; called off from the chain of argument I was pursuing, to some distant point, far a-head, to which I intended to speak by and by. Every lawyer knows how common this is. We generally bear with it. But when I have found it oppressive, and likely to impair the force of my argument, I have begged the court to permit me to proceed in my own way, with a promise that the question would be answered in the course of the investigation;—and no court has ever failed to yield to the request. Sir, I repeat it, the occurrence is common; and it is done precisely as it was done here. It leads to a short dialogue between the advocate and the judge, and no one thinks any more of it. If Mr. Lawless was embarrassed by these interruptions, why did he not complain at the time? He did not complain. On the contrary, *he himself invited the colloquies that occurred*; and, though proved to be irritable in the extreme, he was perfectly calm under these conversations, as well he might be, since he invited them. One of the witnesses, indeed, says that Lawless seemed to be *subdued*: and yet he was so far from being subdued by this ferocious tyrant of a judge, that when respectfully asked whether he chose to answer interrogatories, he bearded this Rhadamanthus upon his throne, and gave him a rude and flat denial. Sir, you cannot but perceive that these interruptions, the daily and hourly occurrences of every bar, are miserable circumstances to offer in proof of such an impeachment as this—and I shall dismiss them to the obscurity of their own insignificance.

But we are told that the Judge further displayed his *intention to oppress* by the language which he applied to the libel. He called it, frequently, "false," "malicious," "defamatory;" and gentlemen press this language into the service as clear and full proof of the *guilty intention to oppress* set forth in the impeachment. Sir, there is not a judge that ever tried either a civil action, or a criminal prosecution *for a libel*, who has not given the same evidence of an arbitrary and oppressive disposition. Nay, there is not an indictment, information, or declaration, in such a case, that may not be impeached on the same ground; for these epithets are nothing more than the common language of the law in all matters of libel. And the witnesses all concur in telling you that the Judge applied these epithets *to the libel*, not to *Lawless himself*. He did not call Lawless a *false, scandalous, malicious and defamatory libeller*. This would be going out of the way. But, in speaking of the libel, *he used the common and constant language of the law*; and out of these materials have the eloquent managers wrought the picture of this very modest, very sensitive, and very delicate gen-

tleman, an American citizen, having been doomed to sit two hours to hear a torrent of the vilest abuse poured out upon his innocent and patriot head—a torrent of abuse which every clerk pours out who reads an indictment to a jury for a libel; which every judge pours out who charges a jury in such a case; which every author pours out who treats of the law of libel. If the eloquent gentlemen are to be permitted to transform the common language of the law into proof of the guilty intention charged in the libel, it is but of little consequence what is proved, or what is not. Any thing—or nothing—will suffice for a conviction. But I have no fear of any such consequence before this just and honorable Court.

But the Judge would not suffer Mr. Maginnis to *argue over again, the truth of the specification, which he had already heard argued for two days in the rule against Foreman, and which he had solemnly decided in that case.* This, to be sure, is a stupendous piece of oppression. How often, I would fain learn, is a judge bound to hear over again, a point which he has already decided on solemn argument? What lawyer has not been stopped, in the same way, again and again? Sir, it was time, when the brains were out, the man should die. The Judge had heard, for two days, every thing that could be said upon that subject—had deliberately and solemnly decided it; and we do not learn from Mr. Maginnis that he had any new lights to unfold. Pray, sir, what would you think, after having heard *this argument* once, and decided *this cause*, of being requested, either by Judge Peck or Mr. Lawless, to hear the argument over again? I submit the objection upon the answer which I am sure you must give to this question: you know that a judge has something else to do than to be hearing over, and over, and over again, a point which has been once before fully heard and solemnly decided. *Interest Republicæ ut sit finis litium.* Mr. Maginnis was not stopped on the other parts of the cause: it was only on the single point of the truth of the specifications, which had been fully discussed and decided on the previous rule.

But the Judge, we are told, pressed on Lawless *so furiously*, that although engaged in another court, he would not permit him to absent himself. How *can* the honorable managers persist in this charge, when every member of this honorable Court knows that it is not only entirely without proof but has been directly disproved. The proof is that Lawless, being called for, was said to be in another court, then sitting in St. Louis: he was sent for; came in, and said that he was actually engaged in the trial of another cause in the other court, in which his presence was important to his clients; when the Judge at once yielded to his request, *and gave him all the time he asked.* Yet, in the face of this proof, gentlemen still repeat the charge.

But it is said, again, that such was the impatience of his tyranny and such his haste to do evil, that he did not take time to consider the arguments of counsel; "he had not the *decency*, even, say the gentlemen, to consult his pillow."

Sir, he had consulted it three times already, (for the argument had lasted four days) and if his pillow had not yielded the proper response in all that time, *on such a question*, it was not more likely to be found pregnant of wisdom on the fourth night. Pray, sir, did Judge Conkling consult *his pillow even once?* He consulted only the dinner-table. He came straight back from the banquet, and struck Mr. Tillinghast's name from the rolls. Yet Judge Conkling, it seems, was innocent, though he consulted his pillow not at all; while Judge Peck is guilty, though he consulted *his*, thrice.

But we are told that the Judge "was in a perfect frenzy—Bring in the man!" and the honorable manager gave us what appeared to be intended as a *fac simile* of Judge Peck's manner in calling for the man—"Bring in the man!"—to which there is only this small objection, that it is a *fac simile*, without an original—a charge without the slightest *scintilla* of proof. What witness has said that Judge Peck was in a *perfect frenzy*, or a frenzy of any kind? What wit-

ness has imputed to him the exclamation "Bring in the man?" Not one—not one. It is a mere drama of the gentleman's own creation; and not even an historical drama. I confess my surprise at an exhibition so dramatic from a gentleman accustomed to fill, with honor, a character far more grave and dignified, and accustomed, also, to judicial accuracy and severity in the scanning of evidence. I repeat it, sir, there is not a man who says that the Judge was *in a frenzy*. The strongest expressions in describing the scene are naturally to be expected from Mr. Maginnis, a blood relation of Mr. Lawless, his counsel, also, in the cause, and the counsel who had been stopped by the Judge, in the attempt to discuss, a second time, the truth of the specifications which had been discussed and decided on the previous rule. It would not have been surprising, it would have been excusable, if that gentleman had colored the scene, in his description, beyond the truth of the case. Yet what says Mr. Maginnis? I advert to his evidence with respect, for it was given in a manner which commands it. He says—"the Judge was *more excited than usual*—that *his usual manner was very mild*—that if he is delivering a short opinion, his manner continues to be mild—but if he is delivering an opinion which keeps him a long time in speaking, it is the fault of his manner that he becomes warmer and warmer." He spoke of it as *the fault of his manner*. Judge Wash gave the same description of his manner, even in private conversation. The mildness of a single remark or two; and the earnestness and ardor which his manner assumed when the conversation took the turn of discussion, and he was drawn into protracted debate—and *this, although conversing, in private, with a single friend*. Now, in the case to which the evidence points, he was urged by the extent and variety of argument, to which he was replying, into a long opinion; and this defect of manner betrayed itself. *And is defect of manner an impeachable offence? Is this defect of manner, in particular, a crime?* Sir, there is nothing more common. The axle-tree glows by its own friction, until it takes fire. On this particular occasion, Judge Wash, also, saw the Judge, and concurs in the very language of Mr. Maginnis, in representing him, as *more excited than he ever saw him before*. I asked Judge Wash if he had ever seen him engaged before in such a case as that—in punishing a contempt upon the court by a libellous publication? Never. Had any other witness ever before seen him so engaged? Never. Now, sir, I am willing to part with the explanation of his excitement, arising from defect of manner as described by these witnesses. I am willing to admit, what I do not doubt was the fact, that he had been warmed by the scene which had just been passing, and felt and expressed strong indignation at the outrage which had been committed on the dignity and authority of the court, and the style in which it had been defended. Let the *scene* be remembered, sir, which *had* just passed. The discussion on this subject had been going on for four days. The scene of debate had been changed from one place to another. The affair had become one of *general excitement* among the people. Mr. Lawless was seeking that crown of martyrdom which Mr. Foreman had declined. It was necessary that he should be exhibited to the public as a victim about to be sacrificed on the altar of liberty. In the course of this animated and protracted discussion, the Judge had been told, again and again, *that he was violating the liberty of the press and trampling on the right of trial by jury*, and the changes had been rung upon these topics, before the assembled multitude, until the whole scene had become one of feverish excitement. The Judge had been doomed to abide the pelting of this pitiless storm for four successive days, while he felt the injustice of the imputations thus *publicly* cast upon him, and was conscious that he was in the discharge of a sacred though unpopular duty. Was it not natural, nay, was it not virtuous, that he should feel indignant at the insult which had been offered to the court by the publication, and which had been aggravated by the attempt thus openly made, in the face of the public, to fasten upon the court the charge of tyranny and usurpation? Was it strange that in the course of a long argumentative

opinion, repelling these charges and vindicating the authority and dignity of the court, he should have felt and exhibited more warmth than in the ordinary routine of the business of the court? Pray, in what tone of voice does the presiding judge of any court keep order, and rebuke the disturbers of his proceedings in open court? How often has the honorable manager, in his character of judge, had occasion to maintain the order of his tribunal: how often has he had occasion to call upon the sheriff or tip-staff to "bring in the man," whose noisy turbulence was interrupting the administration of justice? and did *he*, on such occasions, deem it necessary to keep a pitch-pipe by him to govern the note of voice in which he should give the order? Is it expected of a judge to be more or less than man? Are contempts of court to be rebuked with a gentleness and imbecility that may invite repetition? Is there not even dignity and virtue in warmth and energy, when honestly engaged in vindicating the authority of those laws on which the peace, order and happiness of society depend? And what witness is there, however prejudiced, who imputes to Judge Peck any great degree of warmth? Nay, so much as we have all seen displayed on the bench, on far inferior provocations.

But *the Chinese custom, that dreadful Chinese custom!* It was really curious and amusing to see the effort made to blow into consequence that poor figure of *the Chinese custom*, whose only fault was its want of taste. There was not a single witness who was permitted to escape the question, "Did you hear the Judge say any thing about a Chinese custom?" If, by any chance, the question had been omitted to be put to a witness in the first instance, he was called back again, to have this most important question solemnly repeated to him; and it was repeated and reiterated so often, that in spite of all my respect for the honorable gentlemen, and the solemnity of the occasion, I could not help smiling at the association this awakened in my memory, with the *Chinese Bridge* of the steward, in Kotzebue's play of the Stranger. Now, sir, what is this mighty affair of the Chinese custom, which gentlemen think so fraught with proof of personal malice on the part of the Judge? The witnesses have explained it, and in a manner which so completely annihilates the inference founded upon it, that I did suppose it would have been abandoned in the argument. What was the case as thus explained? The counsel for the defendant had argued that if the article published by Lawless was false, it could do no mischief; because the Opinion of the Judge, which had, also, been published, would prove the falsehood and prevent the mischief. "True," says the Judge, "if all who read the article would also read the Opinion, and make the comparison. But this was not to be expected from the great mass of newspaper readers. The Opinion had been published in a different newspaper, supported by a different political party, and had fallen, therefore, among a different class of readers from those among whom Mr. Lawless' article would circulate. The poison of the falsehood, therefore, would work, without the salutary antidote, and people could not know, instinctively, that the article was false. If falsehood always proved itself, there would be no occasion for laws against slander and libel; no sense in that custom of China, by which the houses of slanderers were blacked, to put people on their guard against the inhabitant." Such was the *train of argument* in which this poor Chinese custom was introduced—associated with the laws against slander and libel, and used merely to answer and repel an argument which had been urged from the bar. Sir, we are on a criminal trial—we are not here on a trial of rhetoric. The powers embattled against us may make mountains of mole-hills, and convert even this obsolete Chinese custom, though introduced thus argumentatively and by way of illustration, into a bursting volcano, from which the lava of the Judge's malice was poured out on the head of Lawless. But we trust that this cause will be tried by the evidence, and not by the fancies of gentlemen. If the Judge's *conduct, manners and language* are to be relied on as furnishing proof of a malignant and wicked intention,

let us take his conduct, manners and language, *as the witnesses have stated them*, not as the honorable managers may please to dramatise them.

But it has been said that the Judge was engaged for two or three hours in pouring out a *torrent of abuse* on Lawless. The *torrent of abuse* remains to be proved. We protest against its being assumed. Not only has no *torrent of abuse* been proved; but *no abuse at all*. For we have examined, specifically, the language relied upon as abusive, and have proved that it was not so—not so, as proved by the witnesses, unless the language of the law as applied to libels be abusive. Now, sir,—look at the language of Judge McKean in the case of Oswald: “*With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than his who commits a midnight arson,*” &c. Find any language from Judge Peck that matches this! Yet it fell from chief justice McKean, in passing sentence on Oswald, and was spoken in direct reference to his case—and yet there was not a single member of the legislature of Pennsylvania that thought judge McKean impeachable. Even Mr. Findlay, though he thought the court wrong in their judgment, yet admitted that “*the only true causes for an impeachment were bribery and corruption, or a wilful and arbitrary infraction of the law*”—the very ground which we take in this defence. If it had been supposed that warmth and even vehemence of language could supply the proof of guilty purpose, that court had not escaped impeachment. The attempt is here made for the first time; and the attempt is made to infer such guilty purpose from a tone and manner and language as mild and subdued as ever fell from any judge, engaged in a similar office. As to the two or three hours employed by the Judge in delivering his Opinion, let it be remembered that he was answering arguments which had consumed *four days*, and that he was employed in disabusing the public mind of the popular fallacy, that the power of attaching for a contempt was an invasion either of the liberty of the press or the right of trial by jury. Here permit me to turn aside for a moment to advert to a remark of an honorable manager. He tells us, loftily enough for the occasion, that he does not consider the liberty of the press and the right of trial by jury, as *popular topics*; he considers them *important ones*. And where is the contradiction? They certainly are important; and is it any denial of their importance, to say that they are popular; or does the gentleman mean to say that nothing really important can be popular? He cannot, I presume, intend so poor a compliment to the people. The gentleman’s real intention, no doubt, was to impute to us an impious irreverence of those two great rights, by speaking of them as *merely popular—trifles fit only to catch the populace*. But we disclaim a construction which we believe that no man can really think was our’s. The liberty of the press and the right of trial by jury are *deservedly popular*; nor is it matter of wonder that the people are jealous of them, and are so easily excited to resent the most distant approach to them in a spirit of hostility. These were the topics which had been handled against Judge Peck, and this the accusation preferred against the course he was pursuing, *in the presence of the people and to the people*. These arguments and declarations were calculated to inflame the people. I do not say they were so intended; but Mr. Bates, in his deposition, tells us, with a significance that cannot be mistaken, that he never heard these expressions *so often iterated and reiterated in his life*. The Judge could not but have known the effect which such arguments (if arguments they must be called) were calculated to have on the people. It was his duty to remove from their minds all such unfounded suspicions and prejudices against the courts of the country and the laws which they administered, by showing that in England, where these rights were as sacredly guarded by *magna charta* as they were in Missouri or any other state of the Union, by their respective constitutions, and in all these states, themselves, where, in the language of Edmund Burke on another occasion, “*ten thousand swords would leap from their scabbards to avenge the slightest insult,*” either to the liberty of the press or the trial by jury, the right, nay the duty of the courts to vindicate

their authority by attachment was held properly consistent with those great and inestimable rights. The field of argument on these awakening and agitating topics had been occupied for *four days* by the gentlemen of the bar. Is it matter of surprise that the Judge should have required *two or three hours* to refute their arguments, and place the matter fully and fairly before the people?

Let me briefly pursue this attempt to infer personal malice and wilful oppression from the conduct of the Judge, through the few specific charges that yet remain.

The Judge, we are told, sentenced Lawless to prison among common felons "*an adopted citizen of the United States, an Irish gentleman, doomed to the society of common felons.*" I ask, again, for evidence. Give us evidence; and not assertion. Sir, this is part of the poetry of this case. The Judge passed no such sentence. He ordered him to be imprisoned for the contempt for *twenty-four hours*. Oswald was imprisoned for a month. But there was no designation of the room in which he should be confined: that was left to the ministerial officer. *Nor is it true that Lawless was carried to the felons' room at all.* So far as there was any distribution of rooms, at all, in the prison, we are told that the felons' room was below. Lawless was in the debtors' room. And *how long* was he even there? *Fifteen minutes*; and he was then transferred to the sheriff's office. "*He was sent to prison!*" And is not every man sent to prison, who commits a contempt of a court? was not Oswald sent to prison? was not Passmore? "*A freeman sent to prison!*" was not Oswald a freeman? Is not every freeman, who does not know how to use his liberty, sent to prison, and rightfully sent there?

But the Judge deprived the man of the profession by which he earned his living! Here is another topic, which, any where else, I should suspect was merely *ad captandum*. Pray, sir, is not every lawyer deprived of his profession, who is struck from the rolls? and yet the honorable managers well know that this is done continually, from one end of the country to the other. Both here and in England, it is continually done. Tillinghast was struck from the rolls, not for eighteen months, but forever. So was Darby, in Tennessee, not suspended for eighteen months, to learn better manners, as Lawless was; but *struck from the rolls of the court, forever*. Yet Judge Conkling, who passed the sentence on Tillinghast, has been thought perfectly innocent by the House of Representatives; and Judge Haywood has never been drawn even into question, for Darby's case.

But the honorable managers think that they have discovered an unequivocal proof of *personal malice*, and *intentional oppression*, in the circumstance of the duration of the sentence. The Judge, they say, took care to measure the time of the suspension by the exact time which the law had to run: thus demonstrating, as they insist, the intention of the Judge to cut him off from all participation in these profitable land claims. This is another striking instance of prepossession working on the evidence, to discolor and distort it. The punishment was not so meted. The law was passed in May, 1824. It allowed two years to file the claims, which brings us to May, 1826; and allowed one year to the court for the decision of the claims, which brings us to May, 1827; so that, at the time of this sentence, the law had *thirteen* months only to run, whereas the sentence was for *eighteen* months. This exact co-extension of the law and the sentence, is, like many other comments that we have heard, mere matter of imagination. If the severity of the punishment be thought to argue malice, what becomes of the other cases that have been held perfectly innocent; those which were decided by Judges Conkling, Haywood, and Livermore?

Asto the suggestion that this was done to cut off Lawless from these claims, in which he made so high a figure, how does the fact appear on his own evidence? He says that as soon as Souldard's case was decided, he dismissed all his causes, and meant to bring no more. He did not wait, then, for his sentence of suspension. He placed himself out of court at once, by his own voluntary

act. He states, as a grievance, that they had to pay three or four thousand dollars costs, on these dismissals. He is not accurate:—he says that he had eighty claims in the District Court. The truth is, that he had but eight at St. Louis, and a few more at St. Genevieve;—but why did he dismiss his suits? he says that there was no hope for any of them after the principle settled in Soulard's case; but, in truth, other suits were brought by him *after that decision*, and *the docket proves it*. His course was inconsistent with itself; it was manifestly the effect of resentment and caprice. The costs, of which he speaks, and which he chooses to lay at the door of Judge Peck, are costs incurred in the causes brought by Lawless, *after Judge Peck's Opinion was given*.

Had it even been, sir, as the honorable managers have alleged, that the continuance of the suspension was measured by the continuance of the law, and the design had been to exclude him from any farther appearance in these causes, there would have been a peculiar propriety in the proceeding, since it was in relation to these causes that he had cast this wanton and unprovoked contempt upon the court, and sought to control their future destiny, by infusing the poison of prejudice into the public mind. But it was not so.

Mr. President, we have now gone through the several parts of the Judge's conduct on which the honorable managers rely to prove that *malicious purpose* and *guilty intention to oppress*, which constitutes *the soul* of this impeachment. I have examined them, specifically, in order that this honorable Court might pause over each one; compare it calmly and deliberately with the case under trial, stripped of the rhetorical colors which the honorable managers have thrown upon them, in order that they might judge whether there was any thing in any one of these circumstances separately, or in the whole combined, to justify that inference of guilt which has been attempted to be drawn from them. And I submit it, with confidence, to the Court, that if it be once conceded that the Judge *might* have believed himself authorized to punish for the contempt in this case, there is nothing in his manner, language, or sentence more than is common on every such occasion.

If there be any one who still thinks that the sentence was marked with severity, (which, however, seems impossible to us when we compare the sentence in this case to those which have been placed before this Court in analogous cases,) let us turn from the conduct of the Judge to the conduct of Mr. Lawless himself, on this occasion, and see whether we do not find in that conduct such an aggravation of his original offence, as to justify this supposed severity. It is manifest, from the rule made by the Judge in this case, that he contemplated, at first, no other punishment than a suspension from practice: he finally added to this punishment 24 hours' imprisonment. Let us see whether the conduct of the accused on the trial was of a character to mitigate or to inflame his punishment.

The Judge having decided that this was *prima facie* a contempt, turned to Mr. Lawless, and offered him the privilege of clearing himself by his own evidence, according to the provisions of the law, in such a case. He said to him, according to the testimony, "You have a right, sir, to have interrogatories filed, and to purge yourself of this contempt on your own oath. Do you wish to have them filed? Will you answer them, if they shall be filed?" What was his reply? The witness, Judge Carr, described the lofty and insulting defiance of his manner. "I do not wish them filed, and if they are filed I shall not answer them." This too, in the face of the court and of the public, and in answer to a proposal thus kindly made, and for his own benefit! Not satisfied with this first insult, he offered a paper which he read aloud, and to which he demanded the signature of the Judge. The witness, Maginnis, says that he does not know *why* the paper was offered, unless it was as a *bill of exceptions* to the Opinion of the court. But a *bill of exceptions* always concludes with the words "to which Opinion the defendant, by his counsel, *excepts*, and prays that these, his exceptions, may be sealed and enrolled"—which is done accordingly. Now, sir, to

see whether this paper could have been possibly offered as a *bill of exceptions*, let me read it, with the addition of the final clause which I have mentioned, and which is necessary to give to it the *form and effect* of a *bill of exceptions*. "Be it remembered, that on the day and year aforesaid, the said court called upon the said defendant to know whether if there were interrogatories filed in this cause he would answer them, which the said defendant declined for the following reasons, which he assigned to said court in the words following: First, I refuse to answer the above interrogatories, because this court has no jurisdiction of the offence charged upon me, in manner and form as the court has proceeded against me. Second, because the positions ascribed, in the article signed "A Citizen," are true, and fairly inferred, and extracted from the Opinion of this court, in the case of Soulard's widow and heirs *vs.* the United States, as published," to which *Opinion of the court the defendant, by his counsel, excepts, &c.* To what *Opinion?* There is none stated. You perceive that the conclusion, necessary to make it a *bill of exceptions*, would make it *nonsense*; a *bill of exceptions* could not be formed out of these materials.

And again, would a *bill of exceptions* lie in the case, if one could be drawn? A bill of exceptions in a case of contempt! the thing, I believe, would be a perfect novelty. What ground does the paper present for a *bill of exceptions*? It states no opinion of the court which could be matter of error in law. It states merely that the court called upon the defendant to know whether if there were interrogatories filed he would answer them. This is all the paper states the court to have done; and this, you perceive, affirms no legal proposition; it merely propounds the question from the bench to the defendant. The rest of the paper is wholly employed in stating the refusal of the defendant to answer such interrogatories, if they should be put, and assigning the reason of such refusal. Now what is there here to which a *writ of error* could apply? The function of such a writ is to correct *error in law*; but there can be no error in law where no legal proposition is affirmed; and here it is manifest that none is affirmed.

Could he have intended the paper to ground a motion for a *mandamus*? That writ, we know, is always granted on affidavits. It could have been of no use, therefore, either for a *writ of error* or a *mandamus*. It could not have been licked into the form of a *bill of exceptions*; and for a *mandamus*, this isolated question of the bench could not have served as the ground-work. The *mandamus* must have had a broader foundation; it must have embraced the whole transaction, and the relief prayed must have pointed, not to this question, but to the restoration of the defendant to his professional privileges. The paper, therefore, could have been intended for the purpose of no legal relief in a higher tribunal. It could have been pressed upon the court, therefore, for no other purpose, and with no other view than to insult the tribunal. It re-affirms the two propositions against which the court had expressly decided; and it is inconceivable to what *proper end* the Judge could have been required to fix his signature to such a paper. To have done so, would have been to sign the death-warrant of his own respectability. Yet the witnesses have told us with what indecent importunity this paper was pressed upon the bench. Nor did the matter end here; for after the Judge had very properly refused to sign it, Mr. Lawless again demanded whether he would admit the paper to be placed upon record, if he, Lawless, could get the bystanders to sign it. I pray you, sir, and I pray of this honorable Court, to consider the insolence of this proposal. It was an attempt to involve the court in controversy with the bystanders, to enlist those bystanders on the side of Lawless against the court, and thus to bully and browbeat the court, by force of terror, into this lawless measure. But he mistook his man. The Judge understood what was due to the dignity of the bench, and repelled this contumacy with the firmness that became him.

Here let us pause, sir, and ask why Mr. Lawless refused to answer interrogatories. What objection could he have had? On his examination here he has had no difficulty in telling us that if he had answered the interrogatories proposed by Judge Peck, he could safely have affirmed that he had not intended his publication as a contempt of the court. Why could he not have said this to Judge Peck? If he had, there would have been an end to the prosecution. Would it have degraded him to have given this answer? Would any man, of well-regulated mind and morals, who should find that he had had the misfortune to fall under the censure of a respectable court, hesitate for one instant to disavow the intention of contempt, if he could do so with a clear conscience? Nay, would he not be pleased with an opportunity of declaring his innocence? Does a brave man consider his courage as tarnished by disavowing an affront which he never intended? Does a generous man hesitate to atone for a wound which he has unintentionally inflicted on another? or do these sentiments, which are so decent and dignified in private life, lose *any thing* of their *decorum* and dignity by being extended to a court of justice? Supposing Mr. Lawless, then, to be worthy of a residence in a land of laws, what reason can be assigned for a refusal, and more especially for a contumacious refusal to avail himself of the common privilege of all persons who have fallen under a suspicion of contempt, of clearing himself from the charge on interrogatories? What reason does he himself assign? He says, that he considered Judge Peck as having prejudged his case, and usurped an authority which the law did not give him, and, therefore, he would not condescend to answer interrogatories. But Judge Peck, so far from having *prejudged* the case, had not even *judged* the main question that belonged to it. That question was the *intention* of Lawless, with regard to the alleged contempt. What had the Judge decided? He had passed his opinion on the effect of the paper, considered in itself, but he had not pretended to have looked into Lawless' heart. He says, by his decision, I have examined this paper, and, judging by the indications presented on its face, I should conclude that a contempt was intended; but you best know your own intentions, and it is *your right and privilege to demand interrogatories*, that you may have an opportunity of disclaiming the contempt. Will you have interrogatories exhibited; or will you answer them if they shall be exhibited? Instead of meeting the proposition, as every temperate and well-ordered mind and heart would have met it, with cheerfulness and respect, he answers, *haughtily and contemptuously*, "No, I will not." What inference could be drawn by the Judge from this refusal, except that Lawless was ashamed to deny what he felt to be true, and what all the public who knew him must have known to be true, and sought to cover his refusal under this ill-timed arrogance and haughtiness of exterior? Blackstone says, as you have seen, that the refusal to answer interrogatories in such a case, is, itself, a new and substantive contempt, deserving a separate punishment. It surely could have been considered by Judge Peck in no other light than as persisting in the contempt, and in fact repeating it. Now, how was he to act under such circumstances? Lawless had brought the case to the very issue to which Judge McKean told Oswald *he* had brought it, in the case in Pennsylvania; "Either you must bend to the law, or the law to you." Judge McKean thought it most proper that the defendant should bend to the law, and so did Judge Peck. Judge McKean was held innocent. You are called upon to pronounce Judge Peck guilty, and thus to make the law bend to the culprit, instead of the culprit's bending to the law.

But an honorable manager has said that Lawless was perfectly correct in refusing to answer, *the proposal being against right and liberty*; and yet, sir, it is the standing form and course of practice on all such occasions. Gentlemen treat that as an offensive innovation which has been the course of practice ever since the law of contempt was introduced. You cannot open a book, elementary or practical, which does not give you these interrogatories as the standing

order upon the coming in of every defendant on the rule to show cause ; and it is universally considered, not as an injury, but as a benefit to the accused ; as his right and privilege ; because it puts it in his power to clear himself of the contempt on his own evidence. And yet, sir, because Judge Peck tendered to Mr. Lawless this opportunity, and tendered it to him, expressly, as a right and privilege given to him by law, in strict conformity with the immemorial and uniform practice of all courts on like occasions, an honorable manager has permitted his imagination to take fire at it, as a most unprecedented insult, and, from this small spark, he broke out into that magnificent conflagration at which this honorable Court, as well as ourselves, were so much amazed ; declaring, with all the vehemence of voice, and look, and action, that if he had been in Lawless' place, and such an overture had been made to him, he " would have dragged the tyrant from his throne, as Virginius did, and finished him on the spot." And another honorable manager, who has since spoken, adverting to the same scene, and apparently desirous of supporting his colleague in the sentiment, but despairing of rising to his altitude of indignation, exclaimed, that if he had been in Lawless' place—he *would not have been so submissive* ; attempting to supply by the significance of his look the inadequacy of his language to match his emotions. Mr. President, on what times have we fallen ? The time has been that the virtuous and enlightened portions of society considered it as among their most solemn and imperious duties, to inculcate a reverence for the laws, and for the tribunals that administered them. In a republic, pre-eminently, where we have no sovereign but the laws, and the peace, the order, and happiness of society depend on a prompt and cheerful submission to them, this deference has been considered as a religious duty. But the times, it seems, are changed, and our distinguished men expect applause by teaching, from high places, violence, tumult, disorder in our courts of justice, and even the assassination of judges, for no other offence than the performance of their common duties. I will not press the topic, for there is far more of pain than of pleasure in the prospect it offers of coming events. If ruffian force is to be invited into our halls of justice, what is to protect our halls of legislation ? Why are we to suppose that the persons of those who make the laws will be held more sacred than those who administer them ? And is our government to become one of violence on the one hand, and terror on the other ? Are anarchy and uproar to take the place of peace and order ; and are the leading men of the nation to advise and to exhort to this baleful change ? Sir, there may be occasions that may call for a Brutus : but is the misconduct of " a petty, provincial judge," as the gentlemen have been pleased to call Judge Peck, such an occasion ? Is the Bench to be made to crouch, with abject fear, before the Bar ; and are judges to be dragged from their seats and slaughtered whenever they may cross the wishes of a ferocious advocate ? Is this the conception which gentlemen have formed of the *decorum* and dignity of a court of justice ? We trust, sir, that better views will be inculcated by the decision in this case ; that Mr. Lawless, and all other men in his predicament, will be taught, that we are, here, in a state of peace, and not of revolution ; that burning of houses and insulting judges is not our fashion ; that this is a land of order, as well as of liberty, and that, among us, men are respected according to the respect which they themselves show to the institutions of our country.

The gentlemen have offered another apology for Lawless' refusal to answer interrogatories, which is, that no interrogatories were, in fact, filed, and that until they were filed, he was not bound to answer. And why, sir, should they have been filed, after he had thus insolently declared that he did not wish them filed, and that, if filed, he would not answer them ? They had been offered as a privilege belonging to himself : the affair rested entirely within his own option : after he had made that option, and haughtily repelled the offer, what dignity, what propriety would there have been in the Judge's proceeding to reduce the

interrogatories to writing, and put them anew? What could have been expected from such a course but a repetition of the insult which he had already received?

The gentlemen say, again, that Lawless did not know what the interrogatories would be, and, therefore, could not say, in advance, whether he would answer them, or no. Then why did he say that he would not answer them, at all? If he were candidly in doubt from not knowing what the interrogatories would be, his answer ought to have corresponded with that state of mind, and he should have asked to see the interrogatories before he should be put to his decision. But there was no such doubt. He knew well what the interrogatories would be. He knew what they must be, according to the standing practice in such cases. He knew that they would point to his intention; to that intention of which he alone could speak with certainty; and with this knowledge he gave the abrupt and contumacious answer which has been so often stated.

Now, sir, if Blackstone be correct that the refusal to answer in such a case is in itself a new and substantive contempt, what smaller punishment could have been awarded for a refusal so aggravated by the contumacy of its manner, than that which was awarded? Compare it with the punishment which has been inflicted, without censure, in the other cases that have been brought before you; and you will see how little reason there is to infer from it, personal malice, or a design to oppress, on the part of the respondent.

Mr. President, I have now finished the review of Judge Peck's conduct on which the honorable managers rely to prove the guilty intention charged in the impeachment; and I submit it, with deference, but with the firmest confidence in the result, that there was nothing in the transaction, considered upon the evidence as it stands, which was not perfectly in the character of a judge; nothing in the sentence, unsuited to the occasion. I say *upon the evidence as it stands*, in contradistinction to those eloquent exaggerations of it, of which we have already heard so much, and are destined, I take it for granted, to hear still more. Our consolation is that the case is not to be decided by the advocates on either side, nor by an estimate of *their* comparative merits, but by this enlightened and impartial Court, who have too much experience and too strong a sense of justice to permit themselves to be drawn away from the simple and naked testimony as stated by the witnesses, to those horror-stricken exhibitions of it which *have been made*, and, we have therefore a right to expect, *will continue to be made*, by the eminent gentlemen who conduct the prosecution.

Mr. President, a few more remarks and I have done. We are looking, sir, at intentions on both sides, and have been endeavoring to extract the proof of them from the conduct of the parties. Mr. Lawless has been held up to us as an Irish gentleman of high talents and honorable feelings, who has been the victim of oppression from this brutal Judge. Let us mark the deportment of Mr. Lawless subsequent to the transaction, and see how far he deserves the eulogy by which he has been commended to our sympathies. Shortly after the sentence, he was, we are told by the witnesses, in a porter cellar at St. Louis, in company with Mr. Maginnis. Mr. West was also there, with the witness Melloyday. Lawless, speaking of the sentence to Maginnis, but *at them*, (to use the language of the witness,) declared that "every man in Missouri should consider the case as his own, and unite in the resentment which he felt to Judge Peck." Thus, we see, he was enlisting volunteers, raising recruits to make war upon the Judge. Finding, however, that the witness and his companion West, were not so ignitable as he had hoped, he proceeded, "Well, I don't care, *I have got Peck exactly where I wanted to have him.*" Where had he got him? What did he mean? and how long had he wanted to have the Judge there? Was *his want*, coeval with his disappointment in Soulard's case? Was it part of the object of his publication, to draw the Judge into this predicament? If so, it cannot but be perceived that this was a cold-blooded and most malicious stratagem, and whether it was so or not, let his memorial to the House of Representatives answer. "*Just where he wanted to have him.*" Where was that?

he had dragged him before the nation, and exhibited him under the humiliation of an impeachment. Sir, there was a double plot. At the very time that this impeachment was put in motion we are told that there was a proposition inserted in the public papers at St. Louis, for the appointment of a board of commissioners to try these land claims, in lieu of Judge Peck, of which board Mr. Le Duc was to be a member, as recorder. Mr. Le Duc, with regard to whom this Court knows that he was a large proprietor in those same land claims, and therefore just in the condition which rendered it unfit to propose him as a member of this board. This article was from the pen of Mr. Lawless; and from the sample of Mr. Le Duc, it is easy to see what the complexion of the whole board was designed to be. The condition, therefore, in which Lawless exulted that he had placed Judge Peck was this; that he would either break him, on the impeachment; or, if he failed in this, that he would so destroy his credit as a judge, as to facilitate his plan of the adoption of a board, and thus open again that door to fortune which the integrity and sagacity of the Judge had closed. Such is the meaning of the general soliloquy with which this gentleman and soldier consoled himself in the porter cellar. "Well, I do 'nt care, I have got Peck just where I wanted to have him."

The honorable managers, from the incident thus brought out by Melloday, (Lawless' own witness,) have, with an expression of the utmost scorn, accused Judge Peck of raking the porter cellars of St. Louis for evidence. Sir, where was such a subterranean remark to be expected but from under ground; from such a spirit, in such a place. But the Judge did not rake the porter cellars for evidence. Melloday was not *his* witness,—he was brought from St. Louis to this place by Lawless himself, and he has told you, on his cross examination, that he had no conversation with Judge Peck until after he had been *here* discharged as a witness by the managers. It was *then*, for the first time, that on inquiring "*why* he had been summoned and dismissed without examination," the incident that has been mentioned was brought to our knowledge; and *we* thought proper to detain him as a witness, on the *quo animo* of Lawless.

Nor was this incident the only evolution of Lawless' character and spirit towards the Judge. For after his first effort to get up an impeachment had failed; two years after, when he had had full time to cool, we are told by the Sheriff, Walker, that in a conversation which he had with Lawless in his garden, Lawless, in reference to this past affair with Judge Peck, exclaimed, that "if the Judge would *see him so* (putting himself into the attitude of a duellist,) he would forgive him." And upon Walker's attempting to soothe him, with the remark that it would not do for a Judge to fight a duel, he cried out, "Then by G— I will have him before the Senate:" and he has kept his threat. Whether he shall succeed in the sacrifice of his intended victim, will depend upon your justice, of which *we*, at least, entertain no doubt.

Nor was it by these occasional ebullitions, only, that the temper of this man towards Judge Peck was betrayed. There is evidence far more deliberate of the deep and deadly war of extermination on which he had resolved. The libel in the case of Soulard was not the last act of hostility of that character. He may be truly said to have watched, and waylaid, and beset the official path of Judge Peck, and to have sprung upon him whenever he thought he could strike an effectual blow, either at his peace or reputation. Permit me to call your attention to two documents which the honorable managers have caused to be printed, no doubt for the purpose of casting censure on Judge Peck, and vindicating the course of Mr. Lawless. I shall be much surprised if they do not produce consequences exactly the reverse, and illustrate the malignant spirit which we have imputed to Lawless. The first of them is the record of the Judge's decision in Chouteau's case, which you will observe was decided after that of Soulard. The avowed purpose for which the honorable managers have caused this document to be printed, is to show that Judge Peck in the last case, confessed that he had committed an error in the former, and thereby

had acknowledged the justice of that very criticism of Lawless which he had nevertheless punished so severely as a contempt of court. Now, sir, there is just truth enough in this statement to furnish a pretext for the charge, while it is manifest to every reader of common candour and ordinary sagacity that the error which the Judge does confess, redounds to his honor as a Judge, while it has not the slightest connection with those errors that form the subject of Lawless' libellous publication. Permit me, sir, to explain this point for the honor of the Judge and the confusion of his accuser—if indeed there be sufficient grace left in that quarter to feel confusion under any exposure. You will observe that when Judge Peck decided Soulard's case, he had never seen the royal order of August, 1770, and knew nothing of the character or provisions of that order. The counsel in the cause had never seen it, and were as ignorant of its contents as the Judge upon the bench. All that any of them had seen, in the way of Spanish law, touching these land claims, were the successive Regulations of the Governors O'Reilly and Gayoso, and of the intendant Morales. But among the claims offered in evidence in the case of Soulard, there were several which did not conform to the Regulations, and the question was, how they came to be confirmed? The Judge, having observed that the two governors and the intendant had, all in succession, exercised the power of making laws for the government of these grants, supposed all their regulations to stand on an equal footing, in point of authority, and referred all these anomalous confirmations to a general dispensing power with their own laws, which these officers were supposed to possess. Such was the state of information, and such the opinion which he entertained, at the time of the decision of Soulard's case. But after that decision, and before the case of Chouteau came on, the Royal order of August 1770 had been procured from Spain, and threw an entirely new light upon the whole subject of these Regulations. That order was found to be an express confirmation *by the King* of the Regulations of O'Reilly, and a declaration that *those regulations* should remain in force until they should be altered by the authority of his majesty himself. Hence it was apparent that the provincial regulations did not rest, as the Judge had supposed, on the mere authority of the Provincial officers; but that O'Reilly's Regulations, at least, stood on the authority of the King himself, and were to remain unalterable except by his Catholic Majesty. Hence it was apparent that the governors of the province possessed no such power to *dispense* with these Regulations, which the Judge had attributed to them in the case of Soulard, and he had the magnanimity to confess the error; whereupon, Mr. Lawless springs upon him, through the columns of the newspaper, and, in the article which has been read to you in evidence, reproaches him with having punished him for charging error in his opinion in the case of Soulard, and then coming out in Chouteau's case, and confessing the error himself, as if the Judge had admitted the very errors which Lawless had ascribed to him, or any error which affected the validity of the opinion in the case of Soulard, whereas, in truth, the error which had been shown to the Judge, by the new light cast upon the subject; had no manner of relation or resemblance to the misrepresentations for which Lawless had been punished; and left the opinion in Soulard's case just as invulnerable as it was before. So that this publication of Lawless in Chouteau's case is only another specimen of his aptitude and propensity for misrepresentation, and of the settled hostility with which he hung upon the steps of the Judge.

Next came the case of Mackey Wherry for decision. This has, also, been here printed by the honorable managers. In the previous cases, there had been too much reason to *suspect* collusion, between the applicants and the granting officers of the crown; but as long as the matter continued to be the subject of *suspicion, merely*, it had drawn no animadversion from the Bench. But, in the case of Wherry, the fraud was so palpable that the Judge could shut his eyes to it no longer. He saw *Delassus, Soulard*, and others concerned in what he thought a gross fraud, and, in the judicial opinion which he ex-

pressed on the occasion, he puts the decree, as it was his duty to do, distinctly and expressly on the ground of fraud. Whereupon out comes Lawless with another publication, inciting, irritating, and exhorting the claimants, the witnesses and their relatives to assail the Judge, for the conscientious opinion thus expressed in the discharge of his judicial duties, in the shape either of an action of slander, or in any other form more congenial with their exasperated feelings. Permit me, sir, to read this incendiary paper to the Court. It is found in the "St. Louis Beacon" of 17th June, 1829. [Here Mr. Wirt read the article, as follows:—]

"Our readers will perhaps recollect that, some time in February last, Judge Peck published in the Missouri Republican an article purporting to be an argument against the claim of Joseph Wherry and others, to the confirmation of their title to a tract of 1600 arpens, granted to the father of the petitioners by the Lt. Governor of Upper Louisiana. Amongst other positions taken in that argument by Mr. Judge Peck, were the following, to wit: That the *claim was fraudulent in its inception*" and *"was an intentional fraud not confined to the original claimant, but extending to the officer making the concession, and implicating Soulard, the surveyor, in whose hand-writing the concession is proved to be."* Again, Mr. Judge Peck informs the public, *"that, on the hearing of the case of the heirs of Mackay, deceased, some days since, the Court (meaning himself, Mr. Judge Peck) believed, and now has no doubt but that three of the officers of the former Governor were concerned in antedating the concession upon which that claim was founded, viz. the Lt. Governor, (Col. Charles Dehault Delassus,) the surveyor, (Antoine Soulard) and the commandant of the Post of St. Andre, (James Mackay) in whose favor the concession was made."* Besides the above charges of fraud and antedate against the officers mentioned, Mr. Judge Peck pretty plainly gives the public to understand, that the testimony of M. Marie P. Leduc (formerly private Secretary of the Lt. Governor of Upper Louisiana, and now presiding Judge of the County Court of the County of St. Louis) goes not only to establish the charge of fraud and malpractice against those officers, but furnishes conclusions by no means advantageous to the moral character of the witness himself.

"It may be recollected, that the errors of this argument have been already pointed out, in an article signed '*a Citizen*,' published in the Missouri Republican of the 9th of March last, and written, as we are informed, by Mr. Lawless, who was counsel for the petitioners, and that Mr. Leduc, in order to enable the public to appreciate Judge Peck's insinuations against him, has published in the same journal, his testimony as actually given. We were much gratified that, thus far, Mr. Judge Peck's attack upon the reputation of his fellow-citizens was treated as it deserved; and we now have the satisfaction to state, on authority, that Col. Delassus (now at New Orleans) has declared it his intention to appeal to the law of the land for protection from Mr. Judge Peck's denunciations. He feels, as was anticipated, indignant that his well-earned reputation should be withered by the "breath from the nostrils" of a District Judge of the United States for the District of Missouri !!! Col. Delassus has consulted eminent counsel, who have informed him that a libel is not less a libel for appearing in the garb of a judicial argument, *gratuitously inserted by the author in a public newspaper*, and that Judge Peck, if he has libelled Col. Delassus, is responsible criminally and civilly to the same extent that any other citizen would be.

"We for our part, hope, that the question of judicial impunity and power may be tested in this way. If the law be, that a judge can, in the shape of a newspaper essay, fling his unwarranted slanders on the best men in society—can blast the fair fame of the living and the dead—we say, that the sooner the law is altered the better. We however cannot believe, that, in the United States, such can be the law. Such a doctrine is repelled by all our institutions. We wish not to

be understood to contend that a judge, acting in the regular course of judicial proceedings, and within the limits of his function, should be liable to be sued for slander or libel; but we do believe that when a judge, wantonly and without any legal or official obligation upon him to do so, deliberately composes a labored essay, containing charges of fraud, perjury and prevarication, against respectable individuals, and causes that essay to be printed and published, he loses all title to judicial impunity; and upon this ground we repeat, that, if the charges made by Judge Peck against Col. Delassus are false, he, Judge Peck, ought to be considered and dealt with as a malicious libeller."

And this, sir, for no other offence, than the conscientious discharge of a public and painful duty!

One would have thought, sir, that Lawless might have been satisfied with these attacks on the Judge's *official conduct*. One would have supposed at least, that the Judge's personal misfortunes would have disarmed him. Coming from a nation distinguished for its generosity, and trained, as we are told, to the profession of arms, with which we have always been accustomed to associate only the best and noblest feelings of our nature, it was certainly not to have been anticipated that he would prove such a recreant to the land of his birth, and to his chosen profession, as to make these very misfortunes the subject of reproach in the public newspapers. Yet, hear the manner in which he taunts the Judge on the temporary blindness with which it had been the pleasure of Providence to visit him. That blindness, be it observed, had never interrupted the discharge of his official duties. No session of a court had been prevented, and no suitor had ever complained of neglect or delay. [Here Mr. Wirt read the article, as follows:—]

"Lord Mansfield, in the full vigor of his mental faculties, resigned his seat as Chief Justice of England, because his eye-sight had become defective. Here we see one of the greatest judges that ever sat in a court of justice exhibit, by an act which admits of no doubt, his sense of judicial obligation. It does not appear that any objection had ever been taken by client or counsel to Lord Mansfield on account of his declining vision, or that any popular murmur was ever heard against him on that subject. His own conscience—his accurate knowledge of the nature and extent of the functions of a judge—his conviction of the impossibility of a blind man's administering justice or expounding or applying the law to the satisfaction of the parties, or with due precision and accuracy, impelled him to the honorable act of resigning his high and lucrative office. We cannot help contrasting this noble proceeding of Lord Mansfield with conduct of a totally opposite character on this side the Atlantic and the Mississippi. We have seen, to our utter indignation, we confess, and ineffable disgust, a judge *with a bandage over his eyes*, year after year, presuming to sit in judgment on the rights and titles of his fellow-citizens. We have seen this man using other men's eyes for the purpose of judicial inspection—we have seen him taking the law upon trust,—signing records upon trust, and, in fact, exhibiting, as a mere automaton judge, in every instance where physical vision was necessary to the execution of a judicial duty. It is difficult to conceive a greater abandonment than this amounts to, of every delicate sentiment,—thus to cling to office and emolument, while utterly unfit and undeserving of either, shows a callousness of soul—an indifference to public opinion, and to the interests of justice, that must shock every man of sense and honor. Yet this offender has persevered for years in this course, and might, for aught we see to the contrary, have continued it to the end of his life, utterly irresponsible to the nation, and untangible by any code or court of criminal justice that we know of. It is the general opinion that impeachment does not reach his case; if not, what other mode exists of ridding the nation of such a nuisance? We know of but one, to wit: that of subjecting the judges, like all other public servants, to a depen-

dence on the nation's will. The amendments to the constitution of Missouri will effect this as far as respects our state judiciary, and it is to be hoped that the same principle will be brought, sooner or later, to bear on the Constitution of the Union. The arguments in favor of subjecting our state judiciary to the control of the people apply with increased force to the judiciary of the United States. The particular case to which we have alluded is that of a Federal judge; but it is an excellent illustration of the mischief with which our present state judicial tenure is pregnant, and of the wise policy of the proposed Constitutional amendment. The following extract of a letter of Mr. Jefferson, will show that if he were now alive he would sanction those amendments. They are in fact suggested by him.

“ To W. T. Barry, July 2, 1822.

“ Let the future appointments of judges be for four or six years, and renewable by the President and Senate. This will bring their conduct, at regular periods, under revision and probation; and may keep them in equipoise between the General and special Governments.”

And this, sir, is the liberty of the press! And if this impeachment shall find favor here, such is to be the condition of the judges of our country. I make no farther comments, sir, on this inhuman article; I leave it to make its own, and to find such favor as it may, among the good and the wise.

Mr. President, I have now, under the pressure of ill health, and deep affliction of spirit, discharged the painful duty which rested upon me. I have spoken *professionally*, and trust that I may not be so misunderstood, as to be supposed capable of finding enjoyment in the wounds I may have inflicted. They are as painful to me as to others. But our duties, sir, whether pleasant or painful, must be done; and I should be unworthy of a place at your bar, if I could permit any ill-timed delicacy to interfere with their firm and faithful discharge.

The question before you, sir, is not that of Judge Peck alone. It is the question of the independence of the American judiciary. It is in his person that that independence is sought to be violated. Is this Court prepared to suspend the sword by a hair over the heads of our judges, and constrain them to the performance of their duties amidst fear and trembling from the terrors of an impeachment? Or will you not rather, by your decision, maintain them in that firm, enlightened, and honest discharge of their duties, which has heretofore so pre-eminently distinguished them? Can you sacrifice such a man as Judge Peck to such a man as Lawless? Can you, by such a precedent strike a panic throughout the American bench, and fill the bosoms of all the reflecting, the wise and good, with dismay and despair? Sir, there is not a considerate man who has not long regarded a pure, firm, enlightened judiciary as the great sheet-anchor of our national constitution. Snap the cable that binds us to that, and farewell to our Union and the yet dawning glories of our Republic. I commit the subject to you, sir, without any apprehension of so dreadful a catastrophe from a tribunal like this.

A P P E N D I X .

(NO. II.)

(A.)

SPANISH REGULATIONS OF GRANTS.

EXTRACTS FROM THE CODE OF SPANISH LAWS, ENTITLED "RECOPIACION DE LAS LEYES DE INDIAS."

Of the sale, composition and grant of lands, grounds, and waters.

LIBER 4.—TITLE 12.

LAW 1. *Lands and grounds may be granted to new settlers. They may have authority over the Indians. What is Peonia and Cavalleria.*

That our subjects may apply themselves to the exploration and settlement of the Indies, and that they may live with comfort and convenience, which we desire, it is therefore, our will, that houses, grounds, lands, cavallerias, and peonias, be granted to all those who shall settle new lands in the villages and places that the Governor of the new settlement shall mark out for them. There shall be a distinction made between gentlemen and laborers (peones) and those who shall be of less grade and merit, and, in proportion to their services, the lands shall be increased and ameliorated, for prosecuting agriculture and the tending of cattle. After a residence in those settlements for four years, and labor therein, we grant them power thereafter, to sell their possessions, or dispose of them at pleasure, as their own property. The Governor, or whoever shall exercise our power, shall allot the Indians to them, according to their character, when the grant shall have been made, so that they may enjoy their lands and improvements, in conformity with established laws and regulations. And, because it might happen in the partition of the lands, that some doubts might arise as to the quantities, we declare that a *peonia* is a lot of ground fifty feet broad and one hundred long, one hundred fanegas of arable land for wheat or barley, ten of maize, two huebras of land for vegetables, and eight of unarable ground for planting of trees, and pasturage for ten breeding sows, twenty cows, five mares, one hundred sheep, and twenty goats. A *cavalleria* is a lot of ground one hundred feet broad and two hundred long, and equal in other respects to five peonias, which would be five hundred fanegas of arable land for wheat or barley, fifty for maize, ten huebras for vegetables, forty for trees, and pasturage for fifty breeding sows, one hundred cows, twenty mares, five hundred sheep, and one hundred goats. And we command that the division shall be so made that there may be an equal share to all of the good, bad, and indifferent land.

LAW 2. *Condition of making the grants in the new settlements.*

To those who shall have lands and lots in the new settlement of any province, there shall not be granted or distributed any lands in another province, unless they shall have left their first residence, and proceeded to reside in the new settlement, except they shall have continued the four years necessary to acquire property in the lands, or shall have forsaken them, or failed to reap the advantage of the term of their residence from its being incomplete. And we declare the allotment of lands made contrary to the provisions of this our law, to be null; and we condemn the violators thereof to the punishment of our displeasure, and the payment of 10,000 maravedis for our Camara.

LAW 3. *Within a certain time, and under penalty of this law, houses shall be erected, and the pasturage cattled.*

Those who shall accept lots of cavallerias and peonias, shall be obliged to have them built upon, the houses occupied, and the portions of arable land divided and cultivated, and the pasturage planted and cattled, within a limited time, specified by their orders. Those who shall fail to do so, shall be subjected to the loss of their lands and lots, besides a certain sum to be paid to the Republic, with a satisfactory bond.

LAW 4. *The Viceroy may grant lands and lots to those who will settle them.*

If, in the Indies already discovered, there be suitable situations and places for founding settlements, and any persons should apply to establish themselves therein, that they may be able to do it with pleasure and advantage, the Viceroy shall have power to grant them, in my name, lands, lots, and waters, provided they affect not the claim of third persons, and be granted during my pleasure.

LAW 5. *The partition of lands shall be with advice of the Cabildo, and the Regidors shall be preferred.*

At the distribution of lands, waters, watering places, and pasturages, among those who are to cultivate them, the Viceroy or Governor, who have the power from us, shall proceed, by the advice of the Cabildos of the towns or villages. But, if the Regidors have no lands or lots proportioned, they shall be preferred. The Indians shall be allowed to retain their lands, improvements, and pasturages, so that they may be supplied with what is necessary, and may have every possible facility for the support of their houses and families.

LAW 6. *Lands to be allotted in presence of the Attorney, (Procurador,) of the place.*

At the distribution of the lands by cavallerias and peonias, which may be made to the inhabitants, we command that the Attorney of the town or village where it is made, shall be present.

LAW 7. *Lands to be distributed without preference of persons, or injury to the Indians.*

We command that the distribution of lands, both in the new settlements, and in the places and Districts already settled, be made with equity, and without any distinction or preference of persons, or injury to the Indians.

LAW 8. *To whom application must be made for lots, lands, and waters.*

We order that application for lands or lots, in towns or villages, where our Audiencia may be established, shall be made by presentation of petitions to the Cabildo, which, after having conferred, shall appoint two Regidors as Deputies to represent to the Viceroy or President the opinion of the Cabildo, and, being examined by the viceroy or President and the Deputies, the warrant shall be signed by all of them, in presence of the Clerk of the Cabildo. If the petition ask lands for the use of mechanical professions, it shall be presented to the Viceroy or President, and he shall remit it to the Cabildo, which, after consultation, shall take the opinion of a Regidor, so that the Viceroy, or President, may thereupon determine the case as may be proper.

LAW 9. *Lands shall not be granted in prejudice of the Indians, and those granted shall be returned to their owners.*

We command that the lands which may be granted to Spaniards, shall be without prejudice to the Indians, and that those granted to their injury, shall be restored to their rightful owners.

LAW 10. *Lands shall be distributed to explorers and settlers, and they shall not sell them to ecclesiastics.*

The lands shall be prudently distributed among the explorers and ancient settlers and their descendants, who may have remained on the lands; of whom, those having the best titles shall be preferred, and they shall not sell them to churches, monasteries, nor any ecclesiastic persons, under penalty of losing them, and of their being granted to others.

LAW 11. *Possession shall be taken of the lands granted, within three months, and planting commenced, under penalty of losing them, in case of failure.*

All the inhabitants and residents to whom lands shall have been distributed, shall be

obliged, within the term of three months, to take possession of them, and shall plant all their boundaries with trees, so that, besides putting the land in good culture, they may have the benefit of wood. If, within the said term, the above requirements be not fulfilled, they shall be subjected to the loss of the lands, which shall be granted to some other settler. This shall have effect, not only in regard to lands, but also to settlements within the limits of every town or village.

LAW 12. *Grazing grounds for cattle to be removed from the villages and fields of the Indians.*

Because of the injury caused to the fields of the Indians, by the cattle, horses, hogs, &c., especially by those left without any watch, we command that the grazing grounds be granted in those places whence injury may not result to the Indians; and, whenever granted, they shall be far from their villages and fields, for there are lands removed at a distance from them where cattle may graze, without prejudice to any. The Justices shall provide that the owners of the herds, and those interested in the public good, place herdsmen sufficient to prevent damages, and, whenever any shall be done, that reparation shall be made.

LAW 13. *Viceroy shall cause the herds to be withdrawn from irrigated lands, and them to be sown with wheat.*

We command the Viceroy to inform themselves of the lands that are watered, and to order the herds to be withdrawn from them, and that they be sown in wheat, unless the owners shall have warrants for holding ground of this character.

LAW 14. *Possessors of lands, grounds, chacras, and cavallerias, under legal titles, shall be maintained therein, and the rest restored to the King.*

As we have succeeded to the entire seignory of the Indies, and as all the lands and soil that have not been granted away by the Kings our predecessors, or by us in our name, belong to our patrimony and Royal Crown, it is proper that all lands held under false and illegal titles should be restored to us; and that all the land that shall remain, after reserving what may be necessary for constructions, commons, and pasturages, for the places which are settled, not only for the present, but for the future; and after distributing to the Indians what may be necessary for tillage and herding, confirming the land they now hold, and granting them more, shall be free for grants and dispositions thereof, at our pleasure. For this purpose, we command the Viceroy and Presidents of Audiencias, to appoint a time at which the possessors shall appear before them and the Ministers of the Audiencias, who shall name the titles of lands, grounds, chacras, and cavallerias, and confirm those who shall possess good ones, or just prescription in the possession thereof, and the rest shall be returned to us, to be disposed of at our pleasure.

LAW 15. *Lands to be admitted to composition.*

Considering the greater benefit of our subjects, we order and command the Viceroy and Presiding Governors not to interfere in the lands fixed by their predecessors, and to suffer the owners thereof to remain in quiet possession. Those who shall have entered upon, and taken up more land than they owned, shall be admitted to moderate composition for the excess, and new patents shall be issued to them. All the lands that shall remain to be adjusted, shall be offered at public sale, and knocked down to the highest bidder, and the rent thereof to be fixed according to the laws and ordinances of the Kingdoms of Castile. We transmit to the Viceroy and Presidents the forms, in which the above shall be executed, so as to be done with the least possible cost; and to avoid what would attend the collection, they shall direct our royal officers of each district to make it themselves, availing themselves of our Royal Audiencias, and, where they are not established, of our Corregidores. And, because some lands have been granted by public officers who had not the power thereto, and which have been confirmed by us, in our Council, we, therefore, order, that all those to whom warrants of confirmation have been issued, may be at liberty to retain them, and shall be maintained in the possession of what land may be specified therein, and they shall be admitted in regard to the excess to the benefit of this law.

LAW 16. *Lands to be sold and granted, under the conditions of this law, and confirmation to be received.*

To avoid the evils and injuries attending the sale or grant of cavallerias, peonias, and

other lots of ground, to the Spaniards, in prejudice of the Indians, upon suspicious information of witnesses, we order and command, that, whenever they may be sold or granted, it shall be with consultation of the Fiscals of our Royal Audiencias, whose care it shall be to ascertain the character of the witnesses and their informations. The Presidents and Audiencias, if they shall govern, may grant or sell them with advice of the Junta of Hacienda, where they shall appear to belong to us, putting them up at public sale, and adjudging them to the highest bidder. Where the Indians bought, or had grants of lands from the Viceroy, they shall be maintained therein. The parties interested must receive the confirmation of their patents, in the usual time observed in the grants of the encomiendas of Indians.

LAW 17. Compositions of lands not allowed, where they have belonged to Indians, or been held under false titles.

To favor and protect the Indians in their rights, we order that no compositions of lands shall be allowed, when they may have been acquired by the Spaniards of the Indians, against our Royal ordinances, or may have been held by false titles, I will that the Fiscal Protectors, or those of the Audiencias, where there are no Fiscal Protectors, shall invalidate such contracts by the means allowed them in the ordinances. And we charge the Viceroy, Presidents, and Audiencias, to render them every assistance in their duty.

LAW 18. Lands to be left to the Indians.

We order, that the sale, grant, and composition of lands be made with regard for the Indians, that they be suffered to retain all and singular the lands, waters, and meadows, which they possessed. And the lands through which they have cut ditches and made after improvements increasing their fertility, shall especially be reserved, and, in no case, shall they be sold or alienated. The Judges appointed for this purpose shall specify the Indians remaining on the lands, and what portion has been left to the old tributaries, Caciques, Governors, the retired, and to communities.

LAW 19. No composition of lands shall be allowed, where they have not been held ten years. The Indians to be preferred.

Composition of lands shall not be allowed, if the party have not held them ten years, although he may urge that he is in possession of them. This argument, alone, shall not be received. The tribes of Indians shall be allowed composition in preference of all other persons.

LAW 20. Viceroy and Presidents may revoke grants of lands made by Cabildos, and admit them to compromise.

We will that the Viceroy and President Governors may revoke and annul the grants of lands made by the Cabildos of towns, within their districts, if they shall not have been confirmed by us; and if they shall have belonged to the Indians, that they order them to be restored; the uncultivated parts to remain as such, and those who shall have held these lands shall be admitted to composition, taking to ourselves what part of them shall be just.

LAW 21. Viceroy and Presidents are not to issue commissions of composition and sales of lands without evident necessity, and advising the King thereof.

If any persons shall have occupied the lands of public places and of corporations, they shall be restored to them, according to the law of Toledo, and those prescribing the form of restitution, and the cases where individuals shall have the right of pre-emption. And we command the Viceroy and Presidents not to furnish commissions for the sale and composition of lands, unless through necessity, and after having advised us of the causes therefor, of the places at which they are, to whom given, and the time they have had them; and we command them, whenever they shall have cause to issue these commissions, that they appoint persons whose age, experience, and good parts, may secure the best execution.

(B.)

ROYAL ORDINANCE.

I, THE KING, influenced by the paternal love which all my subjects, even the most distant, merit of me, and by that sincere desire which I have felt, ever since my elevation to the throne, to render uniform the government of the vast empires that God has entrusted to me, and to place my extensive dominions of the two Americas in proper order and defence, and to render them prosperous, have resolved, from the best information and mature reflection, to establish, in the kingdom of New Spain, Intendants of Army and Province; that, being provided with competent authority and salaries, they may govern the towns and inhabitants in peace, and with justice, as to what is confided to them by these regulations; may preserve their police, and secure the lawful claims of my Royal treasury, with the integrity, zeal, and vigilance, prescribed by the wise laws of the Indies, and the two Royal ordinances published by my august Father and Lord D. Felipe Quinto, and my beloved brother, D. Fernando the Sixth, on the fourth of July, one thousand seven hundred and eighteen, and the thirteenth of October, one thousand seven hundred and forty-nine; whose wise and just laws I wish to be faithfully observed by the Intendants of the said Kingdom, with the extensions and restrictions to be expressed in the Articles of this Ordinance and Regulation.

ARTICLE 1. That my Royal will may have its effect, fully and promptly, I order that Empire to be divided, for the present, into twelve Intendencies, exclusively of the Californias, and that, hereafter, the territory or limits of each Intendency, to bear the name of its capital city, shall be considered as one Province alone. In this capital the Intendant shall reside, and what are at present termed Provinces, shall be called Partidas, (Districts) and bear the names of the former. One of these Intendencies shall be the General Intendency of Army and Province, and shall be established in the capital of Mexico. The eleven others shall be of Province alone, and of which, one shall be established at the city of Puebla de los Angeles; another, at the town and station of New Vera Cruz; one at the city of Merida de Yucatan; at the city of Antequera de Oaxaca; at the city of Valladolid de Mechoacan; at the city of Santa Fe de Guanajuato; at the city of San Louis Potosi; at the city of Guadalajara; at the city of Zacatecas; and one at the city of Durango; the other shall be that already established at the city of Auspe, and extends to the two Provinces of Sanora and Sinaloa. Each of the above Intendencies shall comprehend the jurisdictions, territories, and districts, allotted to them, respectively, at the end of these regulations, which shall be delivered to the new Intendants, whom I may appoint, with their corresponding commissions, (to be issued, for the present, by the office of State and of the General Despatch of the Indies.) I reserve to myself, to appoint, forever, and during my pleasure, to these offices, persons distinguished for their zeal, integrity, intelligence, and deportment, who will relieve me of my cares, by my committing to them the immediate government and protection of my people.

ART. 2. The viceroy of New Spain shall continue, with the full extent of the superior authority, and various powers conferred on him, by my Royal commission and instruction, and by the laws of the Indies, as the Governor and Captain General over that District. To these high offices is added that of President of the Audiencia and Chancery of the Metropolis of Mexico. But the superintendence and regulation of my Royal Treasury, in all its branches and revenue, is committed to the care, direction, and management, of the Intendency General of the Army and Treasury, to be established in the said Capital; and the other Intendencies of Province, which I order by these Regulations to be created, shall be subordinate to it.

ART. 6. *Of the Junta Superior.*—This Junta shall meet once or twice every week, on the days and at the hours which the Superintendent shall appoint, according to his own important occupations, and those of the other Vocals, (Members.) but, if any urgent occasion happen, he shall have power to convene extraordinary Juntas. But all these shall be governed by the present Regulations, and the Orders which I shall furnish in future, for rendering uniform, as far as possible, in the Provinces of the said Empire, the government of, and administration of justice in, matters relating to my Royal Treasury, and to War.

This Superior Junta shall not only have exclusive jurisdiction of these two branches or objects, but of the public property, and revenue, and community, goods of the towns; for the management and judicial superintendence of which, I confer on this Junta what jurisdiction and powers may be necessary, to the absolute exclusion of all my tribunals, and it shall be subordinate to my royal person alone, through the Office of the Universal

Despatch of the Indies. The cases which arise under the ordinary Royal jurisdiction, and those of Police and Government, in appeal from the Intendants, their Sub-delegates, and other common judges, shall remain subject to the Audiencia of the District in which they may occur, as they are by the laws of the Indies.

7. The political Governments of Puebla de los Angeles, of Nueva Vizcaya, Sonora, and Sinaloa, the offices of Corregidor, for Mexico and Antequera de Oaxaca, that of Vera Cruz to be created, and the offices of Superior Alcalde or Corregidor for Valladolid, Guanajuato, San Luis Potosi, and Zacatecas, shall be respectively united with the Intendencies which I establish in said Capitals and their provinces, and the emoluments at present enjoyed by them who hold the said offices, shall cease, and the President Regent of the Audiencia of Guadalaxara, shall, for the present, govern that Intendency. And I command that the Intendants have in charge the four branches or subjects of Justice, Police, Treasury, and War, giving them, for this purpose, as I do, all the necessary jurisdiction and powers. These Intendencies shall be subordinate and dependent, in regard to the two first branches; those of Arispe and Denango, on the Commandant General of their provinces, the other ten on the Vice Roy, and all of them shall be subordinate to the Territorial Audiencias, according to the distinction of commands, the nature of the cases and objects of their cognizance, and conformably with the collected laws of the Indies, as will be explained in the body of this ordinance; for it is my Royal intention that the jurisdictions established therein, shall not all concur in one person, by confounding or changing, or by implication. These regulations are principally intended to prevent the frequent difficulties and questions of jurisdiction that would arise between Governors, Corregidores, or Superior Alcaldes, if these ancient offices should remain distinct, in the capitals and provinces where the new ones are now established.

81. The Intendants shall also be the exclusive judges of the causes and questions that may arise in the district of their provinces, about the sale, composition, and grant of Royal lands, and of seignory, it being required of their possessors and of those who pretend to new grants of them, to produce their rights and institute their claims before the same Intendants, so that these matters being legally prepared in conjunction with a promoter of my Royal Treasury, whom they may appoint, may be decided upon, the opinion of their ordinary Assessors being heard, and they may admit appeals to the Superior Junta de Hacienda; or, if the parties interested do not appeal, they shall communicate to it the original proceedings for its information when they shall judge these proceedings ready for the issuing of the warrant. Being seen by the Junta, they shall be returned, and the warrant issued, unless some difficulty occur; and then, before executing it, the measures found to be neglected by the Junta shall be observed. The proper confirmations shall, in consequence, be furnished by the same Superior Junta, in due time, which shall proceed in the case, as also the Intendants, their sub-delegates and others, in conformity with the royal regulation of the 15th of October, 1754, as far as it may not be opposed to the requirements of the latter, without losing sight of the wise dispositions of the laws cited therein, and of the 9th title 12, lib. 4.

No. 10.—(Belongs to article 81.)

Royal Regulation of October 15, 1754.

Experience having proved the inconveniences that arise to my subjects of the Kingdoms of the Indies, from the decree issued by Royal order of the 24th of November, 1735, that those who would enter upon the Royal possessions of those dominions, should necessarily apply to my Royal person, to obtain their confirmation within the time assigned, under the penalty of losing them, in case of their failure to do so; and many persons having failed to avail themselves of this benefit, from their inability to sustain the expense of an application to this Court to obtain the confirmation of what they compromised for or purchased, it being of small amount, or some few caballerias, (lots) and those who may apply, from their purchases being of greater value, are at great expense, on account of the testimony they must present, the transmission of money, the appointment of agents, and other necessary expenses, that usually exceed the principal sum paid for the composition or purchase of these Royal lands before the Sub-delegates; and as a consequence of this, much land is left uncultivated, which might support the provinces in which they are, by being cultivated and grazing cattle; and it is another result that persons occupy lands illegally, through defect of title, without properly cultivating them, for fear of being denounced and prosecuted for it, and my Royal Treasury also suffering, both in the amount of sales of these lands, and in the consequent neglect of agriculture and tending of cattle: I have therefore resolved, that, in the grants, sales, and compromises of Royal cultivated and uncultivated lands now made, or which shall hereafter be made, the provisions of the regulation shall be faithfully observed and executed.

I. That, from the date of this my Royal Order, the power of appointing Sub-delegate Judges to sell and compromise for the lands and uncultivated parts of the said Dominions, shall belong, thereafter, exclusively to the Vice Roys and Presidents of my Royal Audiencias of those Kingdoms, who shall send them their appointment or commission with an authentic copy of this regulation. The said Vice Roys and Presidents shall be obliged to give immediate notice to the Secretary of State and Universal Despatch of the Indies, of the Ministers whom they shall make Sub-delegates in their respective districts, and places where they have been usually appointed, or where it may seem necessary to appoint new ones for his approbation. Those at present exercising this commission, shall continue. These, and those whom the said Vice Roys and Presidents shall hereafter appoint, may sub-delegate their commissions to others, for the distant parts and provinces of their stations, as was previously done. By virtue of this law, my Council of the Indies, and its Ministers, are excluded from the superintendence and management of this branch of the Royal Hacienda.

II. The Judges and officers, to whom jurisdiction for the sale and composition of the Royal lands (Realengos,) may be sub-delegated, shall proceed with mildness, gentleness, and moderation, with verbal and not judicial proceedings, in the case of those lands which the Indians shall have possessed, and of others when required, especially for their labor, tillage, and tending of cattle.

But, in regard to the lands of community, and those granted to the towns for pasturage and commons, no change shall be made; the towns shall still be maintained in the possession of them; and those that may have seized, shall be restored to them, and their extent enlarged according to the wants of the population; nor shall severe strictness be used towards those already in possession of Spaniards, or persons of other nations, and in regard to all the requirements of laws 14, 15, 17, 18, and 19, title 12, lib. 4, of the Recopilacion de Indias, shall be observed.

III. The present regulations, and the appointment which shall be issued in the form prescribed in the first section, being received by the principal Sub-delegates, they shall furnish on their part General Orders to the Justices of the Capitals and chief places of their respective districts, commanding them to be published therein, in the manner usual with other General Orders issued by Vice Roys, Presidents, and Audiencias, relating to my service, so that every and all persons who shall have possessed Royal lands, whether settled, cultivated, tilled, or not, from the year 1700, till the day of the publication of said order, may prove, before the Sub-delegate, by themselves, their correspondents, or attorneys, the titles and patents in virtue of which they hold their land. For this exhibition an adequate time shall be fixed, proportioned to the distances; and notice shall be given, that they shall be deprived of, and ejected from, such lands, and grants of them made to other persons, if they fail to exhibit their warrants, within the limited time, without just and proper cause.

IV. If it shall appear from the warrants or writings so presented, or from other legal authority, that these persons are in possession of such Royal lands, by virtue of a sale or composition, made by the Sub-delegates so empowered, before the said year 1700, although these acts may not have been confirmed by my Royal Person, nor by the Vice Roys and Presidents, they shall still be suffered to retain free and quiet possession of them, without being caused the least molestation, or deprived of any rights by these orders, conformably with the 15th law, title 12, lib. 4, of the Recopilacion de Indias, already cited.

On these warrants, it shall be noted, that the persons have complied with the obligation of exhibiting them, so that they may not, in future, be disturbed in, or sued for their Royal lands, they nor their successors. If persons have not warrants, their proof of long possession shall be held as a title by prescription. If they shall not have tilled or cultivated these lands, the term of three months, prescribed by the 11th law of the said title and book, shall be allowed them, or whatever time may be thought sufficient for this purpose; and notice shall be given them, that, if they fail to cultivate the lands, they shall be granted to those who shall lodge information thereof, under the same condition of cultivating them.

V. The possessors of lands sold, or compromised for, by the respective Sub-delegates, from the said year 1700, to the present time, shall not be molested, disturbed, nor informed against, now, nor at any time, if it shall appear that they have been confirmed by my Royal person, or by the Vice Roys and Presidents of the respective districts, while in office; but those who shall have held their lands without this necessary requisite, shall apply for their confirmation to the Audiencias of their district, and to the other officers on whom this power is confirmed by the present regulation. These authorities having examined the proceedings of the Sub-delegates, in ascertaining the quantity and the

value of the lands in question, and the patent that may have been issued for them, shall determine whether sale or composition was made without fraud or collusion, and at reasonable prices. This shall be done with the judgment and advice of the Fiscals; after considering every circumstance and the price of the sale or composition, and the respective dues of * Medianata, appearing to have been paid in to the Royal Treasury, and the King's money being again paid in the amount that may seem proper, the confirmation of the patents of the possessors of these lands shall be given in my Royal name, by which their property and claim in the said lands shall be rendered legal, as well as in the waters and uncultivated parts, and they and their successors, general and particular shall not be molested therein.

VI. If, by the proceedings that should have been used for the sales and compositions unconfirmed since the year 1700, it shall appear, that these Royal lands have not been surveyed nor valued, as is understood to be the case in some provinces, the confirmation shall be withheld until this be executed; and the King's money shall be regulated by the increased value of the lands, as determined by the survey and valuation, which money must precede the confirmation.

VII. There shall also be contained, in the general orders to be issued, as before said by the Sub-delegates, to the Justices of the chief towns and places of their district, a clause that those who shall have exceeded the limits of the purchase or composition, adding thereto, and entering upon more land than was granted, whether the principal part be confirmed or not, shall necessarily apply to them for the composition of these lands, so that, after a survey and valuation of them, the patents and confirmation of them may be issued.

Notice shall also be given, that the lands so occupied shall be adjudged, in a moderate quantity to those who shall inform of them, and that the Royal lands occupied without title shall be adjudged to be the property of the King, if, within the time appointed, the intruding possessors shall not discover them, and treat for their composition and confirmation. This shall be observed and fulfilled, without exception of persons or communities, of what state or description they may be.

VIII. A proper reward shall be given to those who shall inform of lands, grounds, places, waters, and of uncultivated and desert lands, and shall be allowed a moderate portion of those of which they shall have informed, as being occupied without title. This shall also be included in the public notice which the Sub-delegates to be appointed shall cause to be published in their respective districts.

IX. The Audiencias shall issue the confirmations by Provinces, and in my Royal name; after an examination by the Fiscal, as before said, without greater judicial expense to the parties than what is required by the regulated prices for such act. For this purpose, they shall collect from the Sub-delegates of their district the proceedings that have taken place in the sale or composition of that for which confirmation shall be required. With these, and in proportion to the estimated value of the lands, and considering at the same time the benefit which it was my pleasure to grant to those my subjects, by relieving them from the expense of applying to my Royal person, they shall determine the sum to be paid me for this new favor.

X. To avoid costs and delay in this business, which would happen, if, after the patents have been issued by the Sub-delegates, the Audiencias should determine upon new surveys, or valuations, or other measures, the Sub-delegates shall report to the respective Audiencias the original proceedings upon each matter. These they shall consider as finished and prepared for the issuing of the patents, and after being examined by the Audiencias, and the opinion of their Fiscals being received, they shall be returned, and, if no objection is made, the warrants be issued, or the measures used, that shall be dictated as previously necessary, and in this way shall be facilitated the prompt issue of the Royal confirmations, without a duplication of new patent.

XI. These Audiencias shall be a court of appeal for trying the decisions and sentences of the Sub-delegates pronounced by them in any suit about the sale or composition of Royal lands, the information lodged concerning them and their survey and valuation. By this provision the expensive recourse to the Council will be avoided, and the necessity will no longer exist of abandoning claims, which some persons have been obliged to do from their inability to sustain the consequent expense of the recourse.

XII. In the distant Provinces of the Audiencias, or where sea intervenes, as Caracas, Havana, Carthagena, Buenos Ayres, Panama, Yucatan, Cumana, Margarita, Puerto Rico, and in others of like situation, confirmations shall be issued by their Governors, with the advice of the Oficiales Reales, (King's Fiscal Ministers,) and of the Lieuten-

* First fruits of the half year.

ant General Letrado, where he may be stationed. The same officers shall also determine the appeals from the Sub-delegates, who shall have been, or shall be appointed in each one of the said Provinces and Islands, without recourse being had to the Audiencia or Chancery of the District, unless the two decisions be at variance, and, then, this is to be officially, and by way of consultation, to avoid the expenses of appeal. Wherever there shall be two *Oficiales Reales*, the younger in office shall be the Advocate of the Royal Treasury in these causes, and the elder, the Associate Judge of the Governor, using the aid of counsel, where there is no Auditor or Lieutenant Governor, and, if the question is a point of law, by applying to any lawyer within or out of the district. And where there shall be but one *Oficial Real*, any intelligent person of the place may be appointed as the Advocate of the Royal Treasury. It shall also be the duty of the Governors, with their Associate Judges, to examine concerning the compositions of the Sub-delegates as provided in respect to the Audiencias.

XIII. The money arising from the sales and compositions of each Audience and District, and from the King's money paid for confirmations, shall be deposited in the proper office, and an account kept of them in a separate book; and the Audiencias and Presidents thereof, the Governors and *Oficiales Reales* of the Districts shall furnish me an account, through my Secretary of Despatch of the Indies, of what this branch of the Royal revenue may have produced in each year, so that, upon their information, I may be able to make the proper disposition of this revenue.

XIV. The Sub-delegates who may be appointed for the administration of this business, shall not exact any fees from the parties for what services they may have rendered; I therefore assign to each one, by way of gratuity, two per centum on the amount of their sales and compositions, as was allowed by the Council, in their regulation of the year 1696; and the Clerks, alone, before whom the proceedings, shall receive the regular fees, which shall be certified at the end of the records. In case of a violation of this rule, the respective Audiencias and the Governors shall proceed against them.

I will that all the provisions of this regulation be strictly and punctually observed by my Vice Roys, Audiencias, Presidents, and Governors of all my Dominions of the Indies, and by the Sub-delegates and other persons whom its observance does, or may concern, and that it be not violated for any cause or pretext, as it is proper for my service, and the good of those subjects. And I command, that notice be taken of this regulation by the General Accounting Office of the Council of the Indies, by the Audiencias and Chanceries, Governments and Cities, by the Tribunals and Accounting Offices of the Royal Treasury, by their recording it, and by all other offices whom it may concern, so that it may be understood and faithfully observed by all.

I, THE KING.

Given at San Lorenzo el Real, October 15, 1754.

DON JULIAN DE ARRIAGA.

NOTE.—This Royal Ordinance is recognized by the King of Spain, June 5th, 1814, as applicable to Florida.—See Post.

By the regulations of Morales, No. 3, of Chap. 5, in Appendix, it will be seen that the above Royal Ordinance was extended to the Provinces of Louisiana and West Florida, on the 24th August, 1770, to be exercised by the Civil and Military Government; and by the decree of 22d October, 1798, was conferred on the Intendant.

(F.)

REGULATIONS FOR THE GRANTING OF LAND UNDER THE SPANISH GOVERNMENT OF LOUISIANA, AND MR. GALLATIN'S INSTRUCTIONS TO THE LAND COMMISSIONERS IN LOUISIANA AND MISSOURI.

No. 1. *Don Alexander O'Reilly, Commander of Benfayon, of the order of Alcantara, Inspector General of Infantry, appointed, by special commission, Governor and Captain General of this Province of Louisiana.*

Divers complaints and petitions which have been addressed to us by the inhabitants of Opelousas, and Attakapas, Nachitoches, and other places of this province, joined to the knowledge we have acquired of the local concerns, culture, and means, of the inhabitants, by the visit which we have lately made to the Cote des Allemands, Cote des Accadians, Hyberville, and La Pointe Coupee, with the examination we have made of the report of the inhabitants assembled, by our order in each district, having convinced us that the tranquillity of the said inhabitants, and the progress of culture required a new

regulation, which would fix the extent of the grants of lands which shall hereafter be made, as well as the enclosures, cleared lands, roads, and bridges, which the inhabitants are bound to keep in repair, and to point out the damage by cattle, for which the proprietors shall be responsible: for these causes, and having nothing in view but the public good and the happiness of every inhabitant, after having advised with persons well informed in these matters, we have regulated all those objects in the following articles:

1. There shall be granted to each newly arrived family who may wish to establish themselves on the borders of the river, six or eight arpens in front, (according to the means of the cultivator,) by forty arpens in depth, in order that they may have the benefit of the cypress wood; which is as necessary as useful, to the inhabitants.

2. The grants established on the borders of the river, shall be held bound to make, within the three first years of possession, mounds sufficient for the preservation of the land, and the ditches necessary to carry off the water. They shall, besides, keep the roads in good repair, of the width of at least forty feet between the inner ditch, which runs along the mound, and the barrier; with bridges of twelve feet over the ditches which may cross the roads. The said grantees shall be held bound, within the said term of three years' possession, to clear the whole front of their land to the depth of two arpens; and, in default of fulfilling these conditions, their land shall revert to the King's domain, and be granted anew; and the Judge of each place shall be responsible to the Governor for the superintendance of this object.

3. The said grants can neither be sold, nor aliened by the proprietors, until after three years of possession, and until the abovementioned conditions shall have been entirely fulfilled. To guard against every evasion in this respect, the sales of the said lands cannot be made without a written permission from the Governor General, who will not grant it until, on strict inquiry, it shall be found that the conditions above explained have been duly executed.

4. The points formed by the lands on the Mississippi river, leaving, in some places, but little depth, there may be granted, in these cases, twelve arpens of front; and, on a supposition that these points should not be applied for by any inhabitant, they shall be distributed to the settlers nearest thereto, in order that the communication of the roads may not be interrupted.

5. If a tract belonging to minors should remain uncleared, and the mounds and roads should not be kept in repair, the Judge of the quarter shall inquire into the cause thereof. If attributable to the guardians, he shall oblige him to conform promptly to this regulation; but, if arising from want of means in the minors, the Judge, after having, by a verbal process, attained proof thereof, shall report the same to the Governor General, to the end that the said land may be sold for the benefit of the minors, (a special favor, granted to minors, only;) but, if no purchaser shall, within six months, be found, the said land shall be conceded gratis.

6. Every inhabitant shall be held bound to enclose, within three years, the whole front of his land which shall be cleared; and, for the remainder of his enclosure, he will agree with his neighbors, in proportion to his cleared land and his means.

7. Cattle shall be permitted to go at large from the eleventh of November to the fifteenth of March, of the year following; and, at all other times, the proprietors shall be responsible for the damage that his cattle may have done to his neighbors. He who may have suffered the damage, shall complain to the Judge of the district; who, after having satisfied himself of the truth thereof, shall name experienced men to estimate the value of the same, and shall then order remuneration without delay.

8. No grant in the Opelousas, Attakapas, and Nachitoches, shall exceed one league in front by one league in depth; but when the land granted shall not have that depth, a league and a half in front by half a league in depth may be granted.

9. To obtain, in the Opelousas, Attakapas, and Nachitoches, a grant of forty-two arpens in front by forty-two arpens in depth, the applicant must make appear that he is possessor of one hundred head of tame cattle, some horses, and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants to be made of greater extent than that declared in the preceding article.

10. All cattle shall be branded by the proprietors; and those who shall not have branded them at the age of eighteen months, cannot thereafter claim a property therein.

11. Nothing being more injurious to the inhabitants than strayed cattle, without the destruction of which tame cattle cannot increase, and the inhabitants will continue to labor under those evils of which they have often complained to us; and considering that the province is, at present, infested by strayed cattle, we allow to the proprietors, until the first day of July of the next year, one thousand seven hundred and seventy-one, and

no longer, to collect and kill, to their use, the said strayed cattle; after which time they shall be considered wild, and may be killed by any person whomsoever; and no one shall oppose himself thereto, or lay claim to a property therein.

12. All grants shall be made, in the name of the King, by the Governor General of the province; who will, at the same time, appoint a Surveyor to fix the bounds thereof, both in front and depth, in presence of the Judge ordinary of the district, and of two adjoining settlers, who shall be present at the survey. The abovementioned four persons shall sign the verbal process which shall be made thereof, and the Surveyor shall make three copies of the same; one of which shall be deposited in the office of the Scrivener of the Government and Cabildo, another shall be delivered to the Governor General, and the third to the proprietor, to be annexed to the titles of his grant.

In pursuance of the powers which our Lord, the King, (whom God preserve,) has been pleased to confide to us, by his patent, issued at Aranjues, the 16th of April, 1763, to establish in the military, the police, and in the administration of justice and his finances such regulations as should be conducive to his service and the happiness of his subjects in this colony; with the reserve of his Majesty's good pleasure, we order and command the Governor, Judges, Cabildo, and all the inhabitants of this province, to perform punctually all that is required by this regulation.

Given at New Orleans, the 18th of February, 1770.

SPANISH REGULATIONS FOR THE ALLOTMENT OF LANDS.

No. 2. *Instructions of Governor Gayoso for the administration of the posts, and distribution of lands.*

Instructions to be observed by the Commandants of the posts in this province, for the admission of new settlers:

1. If the new settler comes from another post in the province, where he has obtained a grant of land, no other grant shall be made to him; and if he undertakes to fix himself down, he must buy lands, or produce my special permission for the grant; and in order to determine whether he has before obtained land or not, the Commandant of the posts from which he goes, shall express it in his passport.

2. If the new settler is a stranger, and is not a farmer, nor married, nor has property in negroes, merchandise, or money, he shall have no right to solicit a grant of lands, until he has remained four years, conducting himself well, in some honest and useful occupation.

3. Artizans shall be fully protected, but no land shall be granted to them until they have acquired property, and have lived three years in the exercise of their art or profession.

4. To no unmarried emigrant, who has not a trade or profession, shall lands be granted, till after the expiration of four years, and then only on his showing that he has been, without interruption, honestly employed in the cultivation of the earth, without which necessary circumstance he shall not be entitled to a grant.

5. If any person, as described in the last article, after having lived in the country two years, shall obtain a recommendation from a farmer of honesty, who shall be willing, from his industry and application, to give him his daughter in marriage, as soon as the marriage is accomplished in due form, he shall be entitled to receive a grant of land, agreeably to the terms contained in this instruction.

6. The privilege of enjoying liberty of conscience is not to extend beyond the first generation. The children of those who enjoy it, must positively be Catholics. Those who will not conform to this rule are not to be admitted; but are to be sent back out of the province immediately, even though they possess much property.

7. In the Illinois, none shall be admitted but Catholics of the classes of farmers and artizans. They must also possess some property, and must not have served in any public character in the country from whence they come. The provisions of the preceding article shall be explained to the emigrants already established in the province, who are not Catholics, and shall be observed by them; the not having done it until this time being an omission, and contrary to the orders of his Majesty, which required it from the beginning.

8. The commandants will take particular care that no Protestant preacher, or one of any sect other than the Catholic, shall introduce himself into the province. The least neglect in this respect, will be a subject of great reprehension.

9. To every new settler, answering the foregoing description, and married, there shall be granted two hundred arpens of land; fifty arpens shall be added for every child he shall bring with him.

10. To every emigrant, possessing property, and uniting the circumstances before mentioned, who shall arrive with an intention to establish himself, there shall be granted two hundred arpens of land; and, in addition, twenty arpens for every negro that he shall bring: provided, however, that the grant shall never exceed eight hundred arpens to one proprietor. If he has such a number of negroes, as would entitle him, at the above rate, to a larger grant, he will also possess the means of purchasing more than that quantity of land if he wants it; and it is necessary, by all possible means, to prevent speculations in lands.

11. No lands shall be granted to traders; as they live in the towns, they do not want them.

12. Immediately on the arrival of a new settler, the oath of fidelity shall be required of him. If he is married, he shall prove that the wife whom he brings with him is his lawful wife. If he has goods, or personal property, they shall both declare what part of them belongs to the portion of the wife, and whether any part belongs to any person who is absent; giving them to understand that if the contrary of what they assert is proved, the lands which are granted to them shall be taken back, with all the improvements they may have made upon them.

13. At the time when they take the oath, the above particulars are to be attended to; and no lands are to be granted for any negroes which are not proved to be lawfully and wholly the property of the emigrant; nor for the wife whom he brings with him, unless she is proved to be his lawful wife. In default of making such proofs, he is to be taken as coming within the description given in the second article.

14. The new settler to whom lands have been granted, shall lose them without recovery, if, in the term of one year, he shall not begin to establish himself upon them; or if, in the third year, he shall not have put under labor ten arpens in every hundred.

15. He shall not possess the right to sell his lands until he shall have produced three crops, on the tenth part of his lands, which shall be well cultivated; but, in case of death, he may leave them to his lawful heir, if he has a resident in the country. If he has no heir in the country, they shall, in no event, go to an heir who is not of the country, unless such heir shall resolve to come and reside in it, conformably to the established conditions.

16. Debts contracted out of the Province cannot be paid with the produce of lands thus granted, if there are debts due in the Province, until after five harvests have been gathered. If, for bad conduct, it shall become necessary to eject the settler from the country before he shall have made the three crops necessary to give him the dominion of the soil, and the right to dispose of it, the lands shall then again become united to the domain of the King; and, in the same state, shall be granted alternately to the young man and to the young woman, residing within one league of the land which shall thus become vacant, who, by their good conduct, shall best deserve such a gift. The question, who is entitled to this preference, shall be decided in an assembly of the most considerable People, headed by the Commandant; which decision they shall make without any expense. They shall only consult me in the case, making known the circumstances for my approbation; and shall, without delay, put the deserving person in possession.

17. The forms established by my predecessors, in which to petition for lands, shall be followed, under the conditions expressed in this order, with the difference only that, when the quantity of land amounts to, or exceeds, three hundred arpens, the fees to the Secretary must be paid.

18. It shall not be permitted to any new settler to form an establishment at a distance from other settlers. The grants of lands must be so made as not to have pieces of vacant ground between one and another; since this would offer a greater exposure to the attacks of the Indians, and renders more difficult the administration of justice, and the regulation of the police, so necessary in all societies, and more particularly in new settlements.

MANUEL GAYOSO DE LEMOS.

New Orleans, 9th September, 1797.

(No. 3.)

GENERAL REGULATIONS AND INSTRUCTIONS OF MORALES FOR CONCEDING LANDS.

Don John Bonaventure Morales, Principal Comptroller of the Army and Finances of the Provinces of Louisiana and West Florida, Intendant (par interim) and Sub-Delegate of the Superintendence, General of the same, Judge of Admiralty, and of the Lands, &c. of the King, &c.

The King, whom God preserve, having been pleased to declare and order, by his decree, given at Sta. Lorenzo, the 22d of October, of the last year, 1798, that the Intendency of these Provinces, to the exclusion of all other authority, be put in possession of the privilege to divide and grant all kind of land belonging to his Crown; which right, after his order of the 24th of August, 1770, belonged to the civil and military Government; wishing to perform this important charge, not only according to the 81st article of the ordinance of the Intendants of New Spain, of the regulation of the year 1754, cited in the said article, and the laws respecting it, but also with regard to local circumstances, and those which may, without injury to the interests of the King, contribute to the encouragement, and to the greatest good of his subjects already established, or who may establish themselves in this part of his possessions:

After having examined, with the greatest attention, the regulation made by His Excellency Count O'Reilly, the 18th February, 1770, as well as that circulated by His Excellency the present Governor, Don Manuel Gayoso de Lemos, the 1st of January, 1798, and with the counsel which has been given me, on this subject, by Don Manuel Serrano, assessor of the Intendency, and other persons of skill in these matters; that all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted or sold; that those who are in possession without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants, as Sub-delegates of the Intendency, may be informed of what they ought to observe; that the Surveyor General of this City, and the particular Surveyors who are under him, may be instructed of the formalities of which they ought to make surveys of lands, or lots, which shall be conceded, sold, or arranged for; that the Secretary of the Finances may know the fees he is entitled to, and the duties he has to discharge; and that none may be ignorant of any of the things which may tend to the greatest advantage of an object so important in itself as the security of property, under the conditions to enlarge, change, or revoke, that which time and circumstances may discover to be most useful and proper, to the attainment of the end to which the benevolent intentions of his Majesty are directed; I have resolved that the following regulations shall be observed:

ART. 1. To each newly arrived family, (*à chaque famille nouvelle*.) who are possessed of the necessary qualifications to be admitted among the number of cultivators of these Provinces, and who have obtained the permission of the Government to establish themselves on a place which they have chosen, there shall be granted, *for once*, if it is on the Bank of the Mississippi, four, six, or eight arpens in front on the river, by the ordinary depth of forty arpens; and if it is at any other place, the quantity which they shall be judged capable to cultivate, and which shall be deemed necessary for pasture for his beasts, in proportion according to the number of which the family is composed; understanding that the concession is never to exceed eight hundred arpens in superficies.

ART. 2. To obtain the said concession, if they are asked for in this city, the permission which has been obtained to establish themselves in the place from the Governor, ought to accompany the petition; and if in any of the *posts*, the commandant at the same time will state that the lands asked for are vacant, and belong to the domain, and that the petitioner has obtained permission of the Government to establish himself; and referring to the date of the letter or advice they have received.

ART. 3. Those who obtain concessions on the bank of the river, ought to make, in the first year of their possession, *levees* sufficient to prevent the inundation of the waters, and canals sufficient to drain off the water when the river is high; they shall be held, in addition, to make, and keep in good order, a public highway, which ought to be at least thirty feet wide, and have bridges of fifteen feet over the canals or ditches which the road crosses; which regulations ought to be observed, according to the usages of the respective districts, by all persons to whom lands are granted, in whatever part they are obtained.

ART. 4. The new settlers who have obtained lands shall be equally obliged to clear and put in cultivation, in the precise time of three years, all the front of their concessions, or the depth of at least two arpens, on the penalty of having the lands granted remitted to the domain, if this condition is not complied with. The commandants and Syndics will watch that what is enjoined in this and the preceding article be strictly observed; and occasionally inform the Intendant of what they may have remarked, well understanding that, in case of default, they will be responsible to his Majesty.

ART. 5. If a tract of land, belonging to minors, remain without being cleared, or as much of it as the regulations require, and that the bank, the road, the ditches, and the bridges, are not made, the Commandant or Syndic of the district will certify from whom the fault has arisen; if it is in the guardian, he will urge him to put it in order; and, if he fails, he shall give an account of it; but, if the fault arises from want of means of the minor to defray the expense, the Commandant or Syndic shall address a statement of it to the Intendency, to the end that sale of it may be ordered for the benefit of the minor, to whom alone this privilege is allowed, if in the space of six months any purchaser presents, if not, it shall be granted gratis to any person asking it, or sold for the benefit of the Treasury.

ART. 6. During the said term of three years, no person shall sell nor dispose of the land which has been granted to him, nor shall he ever after the term, if he has failed to comply with the conditions contained in the preceding article; and to avoid abuses and surprise in this respect, we declare that all sales made without the consent of the Intendency, in writing, shall be null and of no effect; which consent shall not be granted until they have examined, with a scrupulous attention, if the conditions have or have not been fulfilled.

ART. 7. To avoid, for the future, the litigations and confusions of which we have examples every day, we have also judged it very requisite that the Notaries of this city, and the Commandants of Posts, shall not take any acknowledgment of conveyance of land obtained by concession; unless the seller (grantor) presents and delivers to the buyer the title which he has obtained, and in addition, being careful to insert in the deed the metes and bounds, and other descriptions, which result from the title, and the *procès verbal* of the survey which ought to accompany it.

ART. 8. In case that the small depth which the points, upon which the land on the river is generally formed, prevent the granting of forty arpens, according to usage, there shall be given a greater quantity in front to compensate it; or, if no other person asks the concession, or to purchase it, it shall be divided equally between the persons nearest to it, that may repair the banks, roads, and bridges, in the manner as before prescribed.

ART. 9. Although the King renounces the possession of the lands sold, distributed, or conceded, in his name, those to whom they are granted or sold ought to be apprized that His Majesty reserves the right of taking from the forests, known here under the name of Cypress Woods, all the wood which may be necessary for his use, and more especially which he may want for the Navy, in the same manner, and with the same liberty, that the undertakers have enjoyed to this time; but this, notwithstanding, they are not to suppose themselves authorized to take more than is necessary, nor to make use of splitting those which are cut down, and which are found to be unsuitable.

ART. 10. In the posts of Opelousas and Attakapas, the greatest quantity of land that can be conceded, shall be one league front by the same quantity in depth; and when forty arpens cannot be obtained in depth, a half league may be granted: and, for a general rule, it is established, that, to obtain in said posts a half league in front, by the same quantity in depth, the petitioner must be owner of one hundred head of cattle, some horses, and sheep, and two slaves, and also in proportion for a larger tract, without the power, however, of exceeding the quantity before mentioned.

ART. 11. As much as it is possible, and the local situation will permit, no interval shall be left between concessions; because it is very advantageous that the establishments touch, as much for the inhabitants, who can lend each other mutual support, as for the more easy administration of justice, and the observance of rules of police, indispensable in all places, but more especially in new establishments.

ART. 12. If, notwithstanding what is before written, marshy lands, or other causes, shall make it necessary to leave some vacant lands, the Commandants and Syndics will take care that the inhabitants of the District alone may take wood enough for their use only, and well understanding that they shall not take more; or, if any individual of any other post shall attempt to get wood, or cut fire-wood, without having obtained the permission of this Intendency, besides the indemnity which he shall be held to pay the Treasury for the damage sustained, he shall be condemned, for the first time, to the

payment of a fine of twenty-five dollars; twice that sum for the second offence; and, for the third offence, shall be put in prison, according as the offence may be more or less aggravated; the said fines shall be divided between the Treasury, the Judge, and the informer.

ART. 13. The new settler, (*comme le nouveau colon*) to whom land has been granted in one settlement, cannot obtain another concession without having previously proven that he had possessed the first during three years, and fulfilled all the conditions prescribed.

ART. 14. The changes occasioned by the current of the river, are often the cause of one part of a concession becoming useless, so that, we have examples of proprietors pretending to abandon and re-unite to the domain a part of the most expensive, for keeping up the banks, the roads, the ditches, &c., and willing to reserve only that which is good, and seeing that, unless some remedy is provided for this abuse, the greatest mischief must result to the neighbors, we declare that the Treasury will not admit of an abandonment or re-union to the domain of any part of the land the owner wishes to get rid of, unless the abandonment comprehends the whole limits included in the concession or act in virtue of which he owns the land he wishes to abandon.

ART. 15. All concessions shall be given in the name of the King, by the General Intendant of this Province, who shall order the Surveyor General, or one particularly named by him, to make the survey and mark the land, by fixing bounds, not only in front, but also in the rear; this [survey] ought to be done in the presence of the Commandant or Syndic of the District, and of two of the neighbors; and these four shall sign the *procès-verbal* which shall be drawn up by the Surveyor.

ART. 16. The said *procès-verbal*, with a certified copy of the same, shall be sent by the Surveyor to the Intendant, to the end that, on the original, there be delivered, by the consent of the King's Attorney, the necessary title paper; to this will be annexed the certified copy forwarded by the Surveyor. The original shall be deposited in the office of the Secretary of the Treasury, and care shall be taken to make annually a book of all which have been sent, with an alphabetical list, to be the more useful when it is necessary to have recourse to it, and for greater security, to the end that, at all times, and against all accidents, the documents, which shall be wanted can be found. The Surveyor shall also have another book, numbered, in which the *procès-verbal* of the survey he makes shall be recorded; and, as well on the original, which ought to be deposited on record, as on the copy intended to be annexed to the title, he shall note the folio of the book in which he has enregistered the figurative plat of survey.

ART. 17. In the Office of the Finances there shall also be a book, numbered, where the titles of concessions shall be recorded; in which, beside the ordinary clauses, mention shall be made of the folio of the book in which they are transcribed. There must also be a note taken in the Contadoria (or Chamber of Accounts) of the Army and Finances, and that under the penalty of being void. The Chamber of Accounts shall also have a like book; and, at the time of taking the note, shall cite the folio of the book where it is recorded.

ART. 18. Experience proves that a great number of those who have asked for land think themselves the legal owners of it; those who have obtained the first decree, by which the Surveyor is ordered to measure it, and to put them in possession; others, after the survey has been made, have neglected to ask the title for the property; and, as like abuses, continuing for a longer time, will augment the confusion and disorder which will necessarily result, we declare that no one of those who have obtained the said decrees, notwithstanding, in virtue of them, the survey has taken place, and that they have been put in possession, can be regarded as owners of land until their real titles are delivered, completed with all the formalities before recited.

ART. 19. All those who possess lands in virtue of formal titles (*titres formels*) given by their Excellencies the Governors of this Province, since the epoch when it became under the power of the Spanish, and those who possessed them in the time when it belonged to France, so far from being interrupted, shall, on the contrary, be protected and maintained in their possessions.

ART. 20. Those who without the title or possession mentioned in the preceding article, are found occupying lands, shall be driven therefrom, as from property belonging to the Crown; but, if they have occupied the same more than ten years, a compromise will be admitted to those who are considered as owners, that is to say, they shall not be deprived of their lands. Always that, after information, and summary procedure, and with the intervention of the Procurer of the King, at the Board of the Treasury, they shall be obliged to pay a just and moderate retribution, calculated according to the extent of the lands, their situation, and other circumstances, and the price of estimation for once paid into the Royal Treasury. The titles to property will be delivered, on referring to that which has resulted from the proceedings.

ART. 21. Those who are found in a situation expressed in the 18th Article, if they have not cleared nor done any work upon the land they consider themselves proprietors [of.] by virtue of the first decree of the Government, not being of the number of those, who have been admitted in the class of *new comers*, in being deprived or admitted to compromise, in the manner explained in the preceding Article; if they are of that class, they shall observe what is ordered in the Article following.

ART. 22. In the precise and peremptory term of six months, counting from the day when this regulation shall be published in each post, all those who occupy lands without titles from the Governor, and those who, in having obtained a certain number of arpens, have seized a greater quantity, ought to make it known, either to have their titles made out, if there is any, or to be admitted to a compromise, or to declare that the said lands belong to the domain, if they have not been occupied more than ten years; understanding, if it passes the said term, if they are instructed by other ways, they will not obtain neither title nor compromise.

ART. 23. Those who give information of lands occupied, after the expiration of the term fixed in the preceding article, shall have for their reward the one-fourth part of the price for which they are sold, or obtained by way of compromise; and, if desirable, he shall have the preference, either by compromise, at the price of appraisement, and there shall be made a deduction of one-fourth, as informer.

ART. 24. As it is impossible, considering all the local circumstances of these Provinces, that all the vacant lands belonging to the domain should be sold at auction, as it is ordained by the law 15th, title 12th, book 4th, of the collection of the laws of these Kingdoms, the sale shall be made according as it shall be demanded, with the intervention of the King's Attorney for the Board of Finances, for the price they shall be taxed, to those who wish to purchase; understanding, if the purchasers have not ready money to pay, it shall be lawful for them to purchase the said lands at redeemable quit-rent, during which they shall pay the five per cent. yearly.

ART. 25. Besides the moderate price, which [the] land ought to be taxed, the purchasers shall be held to pay down the right of *media annata*, or half year's, to be remitted to Spain, which, according to the custom of Havana, founded on law, is reduced to two and a half per cent. on the price of estimation, and made eighteen per cent. on the sum, *by the said two and a half per cent.*; they shall also be obliged to pay down the fees of the Surveyor and Notary.

ART. 26. The sales of land shall be made subject to the same condition, and charges of banks, roads, ditches, and bridges, contained in the preceding Article. But the purchasers are not subject to lose their lands, if, in the three first years, they do not fulfil the said conditions. Commandants and Syndics shall oblige them to put themselves within the rule, begin to perform the conditions in a reasonable term, and, if they do not do it, the said work shall be done at the cost of the purchasers.

ART. 27. Care shall be taken to observe, in the said sales, that which is recommended in the 11th Article, seeing the advantage and utility which result from consolidating the establishments always when it is practicable.

ART. 28. The titles to the property of lands which are sold, or granted by way of compromise, shall be issued by the General Intendant, who, after the price of estimation is fixed, and of the *media annata* [half year's] or rent, or quit-rent, the said price of estimation shall have been paid into the Treasury, shall put it in writing, according to the result of the proceedings which has taken place, with the intervention of the King's Attorney.

ART. 29. The said procedure shall be deposited in the Office of the Finance, and the title be transcribed in another book, intended for the recording of deeds and grants of land, in the same manner as is ordered by the 17th Article, concerning gratuitous concessions. The principal Chamber of Accounts shall also have a separate book, to take a note of the titles issued for sales and grants under compromise.

ART. 30. The fees of the Surveyor, in every case comprehended in the present regulation, shall be proportionate to the labor, and that which has been customary till this time to pay. Those of the Secretary of Finances, unless there has been extraordinary labor, and where the new settlers are not poor, (for, in this case, he is not to exact any thing of them,) shall be five dollars; and this shall include the recording and other formalities prescribed, and those of the appraisers, and of the interpreter, if, on any occasion, there is reason to employ him to translate papers, take declarations, or other acts, shall be regulated by the ordinance (*tarif*) of the Province.

ART. 31. Indians who possess lands within the limits of Government, shall not, in any manner, be disturbed; on the contrary, they shall be protected and supported; and to this, the Commandants, Syndics, and Surveyors, ought to pay the greatest attention, to conduct themselves in consequence.

ART. 32. The granting nor sale of any lands shall not be proceeded in without formal information having been previously received that they are vacant; and, to avoid injurious mistakes, we premise that, beside the signature of the Commandant or Syndic of the District, this information ought to be joined by that of the Surveyor, and of two of the neighbors, well understanding. If, notwithstanding this necessary precaution, it shall be found that the land has another owner besides the claimant, and that there is sufficient reason to restore it to him, the Commandant, Syndic or Surveyor, and the neighbors, who have signed the information, shall indemnify him for the losses he has suffered.

ART. 33. As far as it shall be practicable, the inhabitants shall endeavor that the petitions presented by them, to ask for lands, be written in the Spanish language; on which they ought, also, to write the advice or information which the Commandants have given. In the posts where this is not practicable, the ancient usage shall be followed.

ART. 34. All the lots or seats belonging to the domain, which are found vacant, either in this city, or boroughs, or villages, already established, or which may be established, shall be sold for ready money, with the formalities prescribed in Article 24th, and others, which concern the sale of lands.

ART. 35. The owners of lots or places, which have been divided, (*repartis*,) as well those in front, as towards the N. E. and S. W. extremities, N. E. and S. W. shall, in three months, present to the Intendency the titles which they have obtained; to the end that, in examining the same, if any essential thing is wanting, they may be assured of their property in a legal way.

ART. 36. The same thing shall be done before the Sub-delegates of Mobile and Pensacola, for those who have obtained grants for lots in these respective establishments; to the end that this *Intendency*, being instructed thereon, may order what it shall judge most convenient to indemnify the Royal Treasury, without doing wrong to the owner.

ART. 37. In the (Contadorerie) Office of the Comptroller, Contadoria of the Army, or Chambers of Accounts of this Province, and other Boards under the jurisdiction of this Intendency, an account shall be kept of the amount of sales or grants of lands, to instruct his Majesty every year what this branch of the Royal revenue produces, according as it is ordered in the 13th article of the ordinance of the King, of the 15th October, 1754.

ART. 38. The Commandants, or Syndics, in their respective districts, are charged with the collection of the amount of the taxes or rents laid on lands; for this purpose the papers and necessary documents are to be sent to them; and they ought to forward, annually, to the General Treasury, the sums they have collected, to the end that acquittances, clothed with the usual formalities, may be delivered them.

And that the present regulation may come to the knowledge of every body, and that the thirty-eight articles of which it is composed may have their full and entire effect, until it pleases his Majesty to order otherwise, it shall be translated into French, by M. Pierre Derbigny, the King's interpreter; shall be printed in the two languages; forwarded to all places and posts within the jurisdiction of this Intendency, that the Commandants, as Sub-delegates thereof, shall make it known to the inhabitants in the usual form, and that it be published in this city. There shall, also, be sent a copy to M. the Governor, and to the most illustrious Cabildo, to the end that they please to lend their aid in the execution of that which has been before ordered, conformable to the laws and ordinances which have been made on this subject, and in the persuasion that this can be done without injury to the King's interest, and tend the more to the encouragement, the welfare, and prosperity, of his subjects in this Colony.

JUAN VENTURA MORALES.

New Orleans, July 17, 1799.

NOTE.

[After the acquittal of Judge Peck, Mr. Buchanan reported a Bill from the Judiciary Committee of the House of Representatives, on the subject of Contempts, which was concurred in by the Senate, and became a law, as follows:]

“ An Act Declaratory of the Law concerning Contempts of Court.

[SEC. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempts of Court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said Courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said Courts in their official transactions, and the disobedience or resistance by any officer of the said Courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said Courts.

[Sec. 2.] *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence.

[Approved March 2d, 1831.]

THE END.

32 KS



