STATE OF NEW YORK

PROCEEDINGS

OF THE

COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK

BY THE ASSEMBLY THEREOF

AGAINST

WILLIAM SULZER, AS GOVERNOR

Held at the Capitol in the City of Albany, New York
September 18, 1913, to October 17, 1913

VOLUME 1

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PROCEEDINGS

OF THE

COURT FOR THE TRIAL OF IMPEACHMENTS

IN THE MATTER OF THE IMPEACHMENT OF WILLIAM SULZER, GOVERNOR OF THE STATE

THURSDAY, SEPTEMBER 18, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to notice duly given to the members thereof, the Court for the Trial of Impeachments assembled in the Senate chamber at the Capitol, in the city of Albany, on Thursday, September 18, 1913, at twelve o'clock noon.

The following members of the Court and appearances were present:

Presiding Judge

Hon. EDGAR M. CULLEN, Chief Judge of the Court of Appeals

Judges of the Court of Appeals

Hon. WILLIAM E. WERNER, Rochester
Hon. WILLARD BARTLETT, Brooklyn
Hon. FRANK H. HISCOCK, Syracuse
Hon. EMORY A. CHASE, Catskill
Hon. FREDERICK COLLIN, Elmira
Hon. WILLIAM H. CUDDEBACK, Buffalo
Hon. JOHN W. HOGAN, Syracuse
Hon. NATHAN L. MILLER, Cortland

Senators

Hon. GEORGE F. ARGETSINGER, Rochester
Hon. GEORGE A. BLAUVELT, Monsey
Hon. JOHN J. BOYLAN, New York
Hon. ELON R. BROWN, Watertown
Hon. THOMAS H. BUSSEY, Perry
Hon. DANIEL J. CARROLL, Brooklyn
Hon. WILLIAM B. CARSWELL, Brooklyn
Hon. HERBERT P. COATS, Saranac Lake
Hon. THOMAS H. CULLEN, New York
Hon. JAMES F. DUHAMEL, Brooklyn
Hon. JAMES A. EMERSON, Warrensburg
Hon. JAMES A. FOLEY, New York
Hon. JAMES J. FRAWLEY, New York
Hon. FRANK N. GODFREY, Olean
Hon. ANTHONY J. GRIFFIN, New York
Hon. SETH G. HEACOCK, Ilion
Hon. JOHN F. HEALY, New Rochelle
Hon. WILLIAM J. HEFFERNAN, Brooklyn
Hon. WALTER R. HERRICK, New York
Hon. CHARLES J. HEWITT, Locke
Hon. JAMES D. MCCLELLAND, New York
Hon. JOHN W. MCKNIGHT, Castleton
Hon. JOHN F. MALONE, Buffalo
Hon. JOHN F. MURTAUGH, Elmira
Hon. THOMAS H. O'KEEFE, Oyster Bay
Hon. WILLIAM L. ORMROD, Churchville
Hon. ABRAHAM J. PALMER, Milton
Hon. BERNARD M. PATTEN, Long Island City
Hon. WILLIAM D. PECKHAM, Utica
Hon. HENRY W. POLLOCK, New York
Hon. SAMUEL J. RAMSPERGER, Buffalo
Hon. HENRY M. SAGE, Menands
Hon. FELIX J. SANNER, Brooklyn
Hon. JOHN SEELEY, Woodhull
Hon. GEORGE SIMPSON, New York

Hon. JOHN D. STIVERS, Middletown
Hon. CHRISTOPHER D. SULLIVAN, New York
Hon. RALPH W. THOMAS, Hamilton
Hon. GEORGE F. THOMPSON, Middleport
Hon. HERMAN H. TORBORG, Brooklyn
Hon. HENRY P. VELTE, Brooklyn
Hon. ROBERT F. WAGNER, New York
Hon. J. HENRY WALTERS, Syracuse
Hon. GOTTFRIED WENDE, Buffalo
Hon. CLAYTON L. WHEELER, Hancock
Hon. LOREN H. WHITE, Delanson
Hon GEORGE H. WHITNEY, Mechanicville
Hon. THOMAS B. WILSON, Hall

(Judge John Clinton Gray was absent in Europe and Senator John C. Fitzgerald was absent on account of illness.)

Managers on behalf of the Assembly

AARON J. LEVY, *Chairman*
PATRICK J. MCMAHON
ABRAHAM GREENBERG
WILLIAM J. GILLEN
THEODORE HACKETT WARD
JOSEPH B. FITZGERALD
TRACY P. MADDEN
THOMAS K. SMITH
HERMAN F. SCHNIREL

Counsel for the Managers

Hon. ALTON B. PARKER
Hon. JOHN B. STANCHFIELD
Hon. EDGAR TRUMAN BRACKETT
EUGENE LAMB RICHARDS, Esq.
ISIDOR J. KRESEL, Esq.
HIRAM C. TODD, Esq.
HENDERSON PECK, Esq.

William Sulzer, Respondent

Counsel for the Respondent

Hon. D-Cady Herrick
Hon. Irving G. Vann
Hon. Harvey D. Hinman
Louis Marshall, Esq.
Austen G. Fox, Esq.

Attorneys for the Respondent

Roger P. Clark, Esq.
Charles J. Herrick

Mr. Justice Cullen, President.— The Assembly of the State having presented to the Senate articles of impeachment against William Sulzer, Governor of the State, the president pro tempore of the Senate, in accordance with law, has summoned the senators of the State and the judges of the Court of Appeals to convene at this time and place as a Court of Impeachment.

The first proceeding in order will be to call the roll, to see that a majority of the senators and a majority of the judges of the Court of Appeals are in attendance as required by the Constitution, to constitute a valid court. The clerk will now proceed to call the roll.

The following judges and senators responded to the roll call: Senator Argetsinger, Judge Bartlett, Senators Blauvelt, Boylan, Brown, Bussey, Carroll, Carswell, Judge Chase, Senator Coats, Judges Collin, Cuddeback, Cullen, Senators Cullen, Duhamel, Emerson, Foley, Frawley, Godfrey, Griffin, Heacock, Healy, Heffernan, Herrick, Hewitt, Judges Hiscock, Hogan, Senators McClelland, McKnight, Malone, Judge Miller, Senators Murtaugh, O'Keefe, Ormrod, Palmer, Patten, Peckham, Pollock, Ramsperger, Sage, Sanner, Seeley, Simpson, Stivers, Sullivan, Thomas, Thompson, Torborg, Velte, Wagner, Walters, Wende, Judge Werner, Senators Wheeler, White, Whitney, Wilson.

Judge Gray and Senator Fitzgerald were excused.

The Clerk.— A majority of both branches are present.

The President.— There being a majority of the members of the Senate and also of the judges of the Court of Appeals in attendance, this Court is duly convened.

Crier, make the great proclamation.

The Crier.— Hear ye, hear ye, hear ye, all persons having any business before this High Court of Impeachment held in and for the State of New York, may now draw near, give their attention and they will be heard.

The President.— The next procedure in order is that the clerk shall administer to the Presiding Officer of the Court the constitutional oath.

The Clerk.— You, Edgar M. Cullen, Chief Judge of the Court of Appeals, do solemnly swear to truly and impartially hear, try and determine the impeachment of the Assembly of the State of New York against William Sulzer, Governor of said State, so help you God?

The President.— I do.

The President.— The next duty imposed by law is the administration of the oath to the various members of the Court by the Presiding Officer.

Suggestion has been made as to the personnel of the Court of Appeals, that three of the judges who hold their position in that Court by virtue of assignment from the Supreme Court — the question has been raised whether they under the Constitution should become members of this Court of Impeachment. Personally, I have no doubt on the question. Under the terms of the Constitution, when designated by the Governor in obedience to a call from the Court of Appeals, those persons become judges of the Court of Appeals and the Constitution is explicit that their duties as judges of the Supreme Court shall cease; and, I find that under the old Constitution of 1846 before the Court of Appeals was constituted as at present provided, when there were four elected judges and four judges of the Supreme Court changing every year sat as members of the Court of Appeals, there was an impeachment of one Mr. Dorn, a canal commissioner, and all the

judges of the Supreme Court who were sitting in the Court of Appeals at that time sat in the Court of Impeachment.

Therefore, as I have said, I am entirely clear that the gentlemen who have been judges of the Supreme Court and are sitting in the Court of Appeals by virtue of designation, are in every respect as fully judges of the Court of Appeals as those that are elected.

Still, that is my individual opinion only, and of course the judgment of the majority of the Court must control. Therefore, if any member of the Court entertains a contrary opinion he will please rise and object to their being sworn, in which case I will pass their names, and after the other members of the Court are sworn, submit it to the Court to determine whether they are members of the Court or not. If, however, no objection is made, I shall assume that we are all in accord in the view that they are members of the Court of Impeachment and shall proceed without further allusion to the matter to swear those gentlemen as their names are called.

Mr. Parker.— Presiding Judge, while this is not exactly in line with the direction which you have given, I trust you will permit me to say on behalf of the counsel for the managers and the managers themselves, that having taken up the matter for consideration, while there was some doubt in the minds of some, there was no doubt about the desirability to have Justices Hiscock, Chase and Miller sit.

Mr. Herrick.—May it please the Court, we had supposed this was a matter in which counsel had no concern, but after what has been said it is due to the Court to say that counsel for the respondent have considered this matter and have no doubt about the legality of the learned gentlemen sitting as members of the Court, nor have they any doubt about the desirability of having them act.

The President.— If there is no objection made then, by any member of the Court, the judges may be called in their regular order. As the clerk calls the name, each member of the Court will step forward and be sworn.

The oath was duly administered by the President to each member of the Court, as follows: Senator Argetsinger, Judge Bartlett,

Senators Blauvelt, Boylan, Brown, Bussey, Carroll, Carswell, Judge Chase, Senator Coats, Judges Collin, Cuddeback, Senators Cullen, Duhamel, Emerson, Foley, Frawley, Griffin, Heacock, Healy, Heffernan, Herrick, Hewitt, Judges Hiscock, Hogan, Senators McClelland, McKnight, Malone, Judge Miller, Senators Murtaugh, O'Keefe, Ormrod, Palmer, Patten, Peckham, Pollock, Ramsperger, Sage, Sanner, Seeley, Simpson, Stivers, Sullivan, Thomas, Thompson, Torborg, Velte, Wagner, Walters, Wende, Judge Werner, Senators Wheeler, White, Whitney, Wilson.

As Senator Frawley's name was called, Mr. Herrick addressed the Court as follows:

Mr. Herrick.— May it please the Court, at this time counsel desire to enter a special appearance for the purpose of raising certain objections to the organization of the Court and the jurisdiction of the Court over the respondent. I will file that.

The President.— You may file that.

Mr. Herrick files special appearances with the Court as follows:

STATE OF NEW YORK

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK, BY THE ASSEMBLY THEREOF,

against

WILLIAM SULZER, as Governor

The undersigned appear specially for the respondent for the purpose of raising certain questions relative to the organization of the Court and as to its jurisdiction over the respondent.

D-CADY HERRICK
IRVING G. VANN
AUSTEN G. FOX
LOUIS MARSHALL
HARVEY D. HINMAN

The President.— Under the view the Presiding Officer takes of the statute, the members of the Court must be sworn before any proceedings are taken, and if there is any valid objection and respondent has a right to challenge, as to which the Presiding Officer of the Court expresses no opinion, still if there is such a right it will be reserved to a later stage.

Mr. Herrick.— I simply want to call the attention of the Court to the fact that the practice, as I understand, heretofore has been to challenge and then the challenged person stands aside until the remainder of the Court are sworn in, the same as you indicated was the course to be taken if there were any objections made to any of the judges of the Court of Appeals sitting.

The President.— The Presiding Officer of the Court entertains a different opinion. The precedents are not wholly controlling for the reason that since the last impeachment trial in this State, that of Judge Barnard, the procedure of the Court of Impeachment has been prescribed by the statutes. Statutory provisions will be found in the Code of Criminal Procedure, which declares that the members of the Court must be sworn before taking any action in the impeachment. It is very evident that if there was to be allowed a challenge at this stage and temporarily to set aside the challenged members of the Court, the Court might be without a quorum.

Mr. Herrick.— Of course we yield to the judgment of the Presiding Officer, but we preserve our rights, as I understand it, to challenge at a proper time.

The President.—Yes; without prejudice to any of your rights.

Mr. Herrick.— Permit me to ask if that proper time will arrive after all members of the Court have been sworn in?

Mr. President.— I think it will have to be deferred until after rules have been adopted for the procedure of the Court. Of course the judgment of the Presiding Officer is not controlling if a majority of the Court are adverse.

Mr. Herrick.— It is controlling upon us, sir. We will then renew, or make our challenge after the adoption of rules.

Mr. President.— I think I can state for the Court you will then be allowed the same privilege as if you had made it now.

Mr. Herrick.— We simply want to preserve our rights if we have them.

As Senator Ramsperger's name was called, Mr. Herrick addressed the Court as follows:

Mr. Herrick.— May it please the Court, we would like to reserve our right to challenge Senator Ramsperger also, and for the purpose of not annoying the Court further, also reserve the right to challenge Senator Sanner and Senator Wagner at the proper time.

The President.— The next procedure in order will be to call the parties. Mr. Clerk, call the managers of the Assembly. You need not call them individually.

The Clerk.— The managers of the Assembly.

The President.— Do the managers appear by counsel or in person?

Manager McMahon.— We appear by counsel.

The President.—Give the names of the counsel who appear for the managers of the Assembly.

Manager McMahon.— Alton B. Parker, Edgar T. Brackett, John B. Stanchfield, Eugene Lamb Richards, Jr., Isidor J. Kresel, Hiram C. Todd, Henderson Peck.

The President.— Mr. Clerk, call the Governor.

Mr. Herrick.— We desire to appear specially for the purpose indicated in our special notice of appearance heretofore filed.

The President.— Gentlemen, it does not appear that any further proceedings can be taken by the Court until rules are adopted for its guidance.

Mr. Parker.— With the permission of the Court, do I understand that the counsel decline to enter any general appearance?

The President.— You will have an opportunity for that tomorrow.

Senator Wagner.—I offer the following resolution: "Resolved, That a committee of three be appointed by the President to prepare and report rules of procedure of this Court."

The President.—All in favor of the motion please say aye; all opposed, no. The motion is carried. The President will appoint Senator Wagner, Senator Brown and Judge Willard Bartlett.

Senator Wagner.— Mr. President, if I may be permitted to make a suggestion. I suggest that the President direct the clerk and the doorkeeper to permit no one upon this floor of the Senate except the members of the Court, the counsel in the case, the respondent, the newspaper representatives, and the officers of the Court.

The President.— If there is no objection to that, it seems to the Presiding Officer that it is a proper regulation to be enforced and it will be so enforced.

Senator Wagner.— I now move the Court of Impeachment adjourn until tomorrow morning, at ten o'clock, so as to give an opportunity to the committee on rules to meet.

The President.—All in favor of the motion please say aye. Opposed, no. Carried. Crier, adjourn court.

The Crier.— Hear ye, hear ye, hear ye, all persons having any further business before this High Court of Impeachment, held in and for the State of New York, may depart hence and appear here tomorrow morning at ten o'clock, to which time this Court now stands adjourned.

Thereupon the Impeachment Court adjourned until 10 a. m., Friday, September 19, 1913.

FRIDAY, SEPTEMBER 19, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 o'clock a. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.— The next business before the Court is to receive the report of the committee on rules, if they are ready to report.

Senator Wagner.— Mr. President, in behalf of the committee on rules I have the honor to submit the following report:

PROPOSED RULES OF THE COURT FOR THE TRIAL OF IMPEACHMENTS

RULE I

The Court shall, until otherwise ordered, meet daily, except Saturdays, at 10 a. m., and continue in session until 12.30 p. m., at which hour a recess shall be had until 2 p. m., when it shall meet again and continue in session until 5 p. m., when it shall adjourn for the day; except that on Mondays the Court will convene at 2 p. m., and sit until 6 p. m., and on Fridays the hour of final adjournment shall be 3.30 p. m. But this rule may be changed from time to time by the Court without previous notice being given. For want of witnesses or other reason the Court may take a recess or adjourn at a different hour of the same day, or to any hour of any future day.

RULE II

The managers and the respondent shall be entitled to the process of the Court to compel the attendance of witnesses, which process shall be signed by the Clerk, and sealed with the seal of the Court, and attested in the name of the President of the Court, and may be in the form following:

"*The People of the State of New York, by the Grace of God Free and Independent:*

To .....

Greeting: You and each of you are hereby commanded and re-

quired that, laying aside all other business and all pretences and excuses whatsoever, you be and appear in your own proper persons before our Court for the Trial of Impeachments at ...., on the ..... day of ...., 1913, at ..... o'clock of that day, to be examined as witnesses and to testify the truth and give evidence on our behalf, (or) on behalf of the respondent hereinafter named, concerning certain Articles of Impeachment, then and there to be tried and determined before this Court, which have been made against WILLIAM SULZER, as Governor of the State of New York.

And we command you further that you bring with you and produce at the time and place aforesaid.....
.....
now in your custody or control, and all other deeds, evidences and writings which you have in your custody or power concerning the premises.

And hereof fail not at your peril.

Witness: The HON. EDGAR M. CULLEN, President of the Court for the Trial of Impeachments, this ..... day of ....., 1913.

Attest:

.....
Clerk of the Senate and of the Court for the Trial of Impeachments."

RULE III

All motions made by members of the Court, by the respondent, by the managers, or by counsel, shall be addressed to the President of the Court, and, if he shall require, it shall be reduced to writing, and read at the desk of the clerk; and the decision thereof, after the hearing of the counsel, shall, without debate, be made by the Presiding Judge. The President of the Court may, however, submit the same to the Court for its decision, or any member of the Court may require that the same shall be so submitted.

The decision shall be had without debate, unless a member of the Court may desire to debate the same.

Any member of the Court may move for a private consultation upon any question arising during the trial, and if the same shall be ordered by a majority of the votes of the members voting, the chamber shall be cleared of all but privileged persons, and such consultation shall be had in private.

The decision reached shall be publicly announced by the President of the Court.

All the proceedings in this rule referred to shall be entered upon the records of the Court.

Rule IV

Each witness shall, as he is called, be sworn or affirmed by the clerk, or the deputy clerk, in substantially the following form:

"You do solemnly swear (or affirm) that the evidence which you shall give upon this hearing upon certain articles of impeachment preferred against William Sulzer, as Governor of this State, shall be the truth, the whole truth, and nothing but the truth, so help you God (or this you do affirm)."

The introduction of evidence and the examination of witnesses and the conduct of the trial shall be governed by the rules now prevailing in the Supreme Court of this State. After the close of the examination of a witness by the managers or by their counsel, and by the counsel for the respondent, any member of the Court, after addressing the President of the Court for that purpose, may question the witness further if he so desires.

Rule V

All questions as to the number of counsel to be heard in addressing the Court or in the examination of witnesses and the time to be allowed them, shall be left to the discretion of the President of the Court unless otherwise ordered by the Court.

Rule VI

The final decision of the Court upon the articles preferred shall be taken by the President of the Court, who, upon each of the articles as it shall be separately read by the clerk, shall, with its number propose to each member of the Court, in alphabetical

order, the question, "Senator (or Judge), how say you, is the respondent guilty or not guilty, as charged in the ..... article of impeachment?" Each member of the Court, when so questioned, shall rise in his place and answer "guilty" or "not guilty", and the President of the Court shall also give his vote upon each article, either "guilty" or "not guilty"; and when the roll call shall be completed upon each charge, the result upon each charge shall be announced, and shall be entered upon the records of the Court. If two-thirds of the members present shall concur in the finding guilty, upon any one or more of said articles, the President of the Court shall in the same manner put, and the members of the Court shall in the same manner answer separately, the further questions:

"Shall William Sulzer be removed from his office of Governor of this State, for the cause stated in the article (or articles) of the charges preferred against him upon which you have found him guilty?"

"Shall William Sulzer be disqualified to hold any office of honor, trust or profit under this State?"

And the final judgment of the Court shall be certified by the President of the Court and clerk of the Court.

Rule VII

The President of the Court shall procure the oral testimony, taken by the stenographer, to be printed from day to day, for the use of the Court, the managers and counsel. At the opening of the Court on the day after any part of the printed report of the testimony shall be brought in, any member of the Court, the managers or either of the counsel, may move to correct the same in any particular, to be then stated in writing.

Rule VIII

The clerk shall keep a book of record of the proceedings, orders and judgments of this Court, and the ayes and nays upon every question in that way decided. Such book of record shall be filed in the office of the Secretary of State upon the final adjournment of this Court.

The names of the members of the Court shall be arranged in alphabetical order upon the division list used by the clerk in calling the roll upon all questions voted upon by the Court.

Rule IX

The President of the Court shall appoint a committee of three members on order whose duty it shall be, subject to the direction of the President of the Court, to maintain order and enforce the proper performance of their duties by all officers and attendants of the Court.

The President.— Has every member of the Court received a copy of these rules?

Senator Wagner.— Yes.

The President.— Then it will be unnecessary for the clerk to read them. Do you move the adoption?

Senator Wagner.— I move the adoption of the rules.

The President.— Any discussion on the subject? Does any gentleman wish to say anything on the subject of the proposed rules?

All those in favor please say aye; contrary minded, no; the motion is carried and the rules are adopted.

The next procedure for the Court is to consider the objections which were raised yesterday by the counsel for the respondent to the sitting and partaking in the Court and partaking in its acts, on the part of certain members of the Senate.

Mr. Herrick.— Mr. President, and gentlemen of the Court. Do you wish that we present these challenges separately, or that we consider them as a whole?

The President.— I think the first question to be argued here, Judge Herrick, is the question whether a challenge lies before the members of the Court of Impeachment.

Mr. Herrick.— Yes, sir. That is the precise question that I am prepared to discuss, and I suppose that in order to do it, and

do it intelligently, we will have to present to our challenges so that you will know upon what our challenges are based.

The President.— Well, you can state generally the subject. The fundamental question is whether a challenge lies at all.

Mr. Herrick.— Yes, sir. I appreciate it. There are three challenges interposed here to senators who were members of the so-called Frawley investigating committee, which gives the opinions expressed in the report that it made to the Legislature. The other challenge is to Senator Wagner, the presiding officer, the president pro tempore of the Senate, based upon the ground that he is interested in the result of this trial because if the respondent is convicted upon this trial he will then succeed to the profits and emoluments of Lieutenant Governor. This is not, if it may please you, Mr. President and members of the Court, a mere formal and perfunctory challenge made for effect, but it is made in the full belief of the strength of our position, and we think these gentlemen ought not to serve — without making any imputation upon their personal integrity. We are perfectly aware of what has taken place in previous impeachments; we are perfectly aware what has been decided upon previous occasions, but the world has moved since the last impeachment trial in this State. Our courts are more subject to keen scrutiny than ever; the bar is more subject to criticism and scrutiny than ever before. This case, the greatest, I was going to say, in some respects, but in all respects of any that has been heard in this country since the trial of President Johnson, is arousing the attention of the whole country. What shall be done now and here is a precedent for future time. More, while this Court is convened for the purpose of trying the Governor of this State, the Court itself, I say with all due respect, is upon trial. It is not sufficient that like Cæsar's wife you should be virtuous, but you must be above suspicion in all your membership.

There can be no question here but what the senators who participated in the investigation of the Frawley committee have deliberately formed and expressed an opinion upon the guilt of the respondent, and upon each and every article of impeachment,

as clearly appears from the following excerpts. I have attached a copy of the report to the challenge interposed:

"During the time of these hearings and investigations William Sulzer, as Governor, has done everything in his power to withhold the truth and obstruct the production of evidence and the course of justice. At his instance and direction both Sarecky, his secretary; Colwell, his dummy, and Harris & Fuller, his brokers, have refused to testify before the committee. His influence in the promotion of Sarecky to an important and lucrative position in the State Hospital Commission as deportation agent — substituting an inexperienced young stenographer for an experienced physician in that position — could only be a reward for Sarecky's silence in protecting the Governor from damaging disclosures.

"Governor Sulzer made a false public statement, when on July 30, 1913, he said that he was away campaigning and that he did not know of the campaign contributions omitted from his sworn statement. The Elkus check was endorsed by Sulzer personally and he acknowledged the letter of Elkus transmitting it as a campaign contribution.

"We submit to the Legislature that it was false when William Sulzer swore that he had received only $5,460 of campaign contributions and that he did so with full knowledge that he had received an amount many times that sum and had converted the same to his private uses; that he used contributions given to aid in his election for the purchase of stocks in Wall street which he or his agents still hold; that he has been engaged in stock market speculations at the time that he, as Governor, was earnestly pressing legislation against the New York Stock Exchange which would affect the business and prices of the Exchange; and that there was evidence before this committee to sustain a finding that as Governor he has punished legislators who opposed him by vetoing legislation enacted for the public welfare, and has traded executive approval for bills for support of his direct primary and other measures.

"We submit to the Senate and Assembly that the facts above stated are sufficiently serious in character and are so violative of the laws of this State and the rules of fitness and conduct in high office, that the public interests demand some action in reference thereto whether through the exercise of powers of the Legislature, or by referring the facts and evidence to other duly constituted officers charged with duties in respect thereof."

Our challenge is founded upon the fundamental principle of justice that every man accused is entitled to be tried by an impartial tribunal, one which has not determined the question of his guilt or innocence in advance.

This is so familiar in all systems of jurisprudence, that I will not weary the Court with any lengthy discussion or citations of authorities, but will simply call your attention to a very few expressions of the courts.

In the case of Oakley v. Aspinwall (3 N. Y. 347), the leading case upon that principle in this State, the court among other things said:

"The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice. . . . The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which makes no distinction between the case of interests and that of relationship, both operating equally to disqualify a judge. Hence the statute declares that 'No judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties.'

"After so plain a prohibition, can anything more be necessary to prevent a judge from retaining his seat in the cases specified? He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit,

and then the revisers of our law declared that they intended to embody this universal sentiment in the form of statutory prohibition, and so they placed this explicit provision before the Legislature, who adopted without alteration and enacted it as the law. . . . The law applies as well to the members of this court as to any other; or if there be any difference, it is rather in favor of its more stringent application to the judges of a court of last resort, as well because of its greater dignity and importance as a tribunal of justice as that there is no mode of redress appointed for the injuries which its biased decisions may occasion. The law and the reasons which uphold it, apply to the judges of every court in the State, from the lowest to the highest."

In M'Laren v. Charrier (5 Paige, 530, 533) the Chancellor said:

"And where a master, or any other judicial officer of this court has been called upon in his official character of solicitor or counselor to give advice, or to prepare any papers or proceedings in a cause or matter pending or to be brought before the court, or where his law partner has been thus consulted or employed, although neither of them is the solicitor or counsel on record in the suit, nor has been regularly retained as such, he ought not afterwards to do any judicial or other act as master, etc., which requires the exercise of judgment or discretion, and which is in any way connected with the cause or matter in which he or his partner had previously been employed in a different character."

In the case of the People v. Hass (105 App. Div. 121) the court said:

"However upright the judge, and however free from the slightest inclination but to do justice, there is peril of his unconscious bias or prejudice, or lest any former opinion formed ex parte may still linger to affect unconsciously his present judgment, or lest he may be moved or swayed unconsciously by his knowledge of the facts which may not be revealed or stated at the trial, or cannot under the rules of evidence. No effort of the will can shut out memory; there

is no art of forgetting. We cannot be certain that the human mind will deliberate and determine unaffected by that which it knows, but which it should forget in that process . . . and there is a further consideration beyond the security of the parties, namely, the fair repute of justice for absolute impartiality."

In the case of McClaughry v. Deming (186 U. S. 49), the court among other things said:

"It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

The members of this Court act both as judges and jurors. They pass not only upon the law, but upon the facts, and surely in a case of this kind, where the honor and dignity of the State is involved, where for the first time in the history of our State a Governor is upon trial for wilful misconduct in office, the tribunal to try him should be as free from any suspicion of bias and partiality as should a court and jury formed to try a man for assault and battery or petit larceny.

Our Code provides as follows:

"Challenge for implied bias may be taken for all or any of the following causes and for no other." . . .

"4. Having served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the person whose death was the subject of the indictment." . . .

"6. Having been one of a jury formally sworn to try the same indictment and whose verdict was set aside or which was discharged after verdict for the cause was submitted to it."

"7. Having served as a juror in a civil action brought against the defendant for the act charged as a crime."

Sec. 377 of Code of Criminal Procedure.

Impeachment proceedings have been likened to an indictment found by a grand jury. If service on a grand jury, or on a coroner's jury, or as a juror in a civil action brought against a person for an act charged as a crime, is sufficient to disqualify such person from afterward serving as a trial juror upon the trial of the indictment, because of supposed bias upon the part of such person, how can it be said that the gentlemen who served upon the investigating committee, and made a report in which they declared their own opinion and judgment as to the acts charged, and which now constitute the articles of impeachment, should not likewise be disqualified from sitting in judgment upon the charges that they have themselves procured to be made?

If, as held in the case of M'Laren v. Charrier, a master or other official is disqualified from thereafter doing any judicial act as master or otherwise, which requires the exercise of judicial discretion in a matter in which he had theretofore been called upon in his official character to give advice, or to prepare any papers or proceedings, why does not the same principle apply to the senators who have been instrumental in having these proceedings brought before this Court?

But without further proceeding with this line of discussion it will be conceded that in England the right to challenge any member of the House of Peers in impeachment cases has never been sustained. The honor and dignity of the peers of the realm are supposed to be so great and sublimated that they may not err; that they are raised above all bias and prejudice. They are not even required to be sworn, but render their judgment upon honor.

And in the case of impeachments brought for trial before the Senate of the United States, challenges of members of the Senate have not been sustained, even in the case of senators, who as members of the House of Representatives, had voted for the ar-

ticles of impeachment, upon which they afterwards passed judgment in the Senate; and in the trial of President Johnson, where Senator Wade, who was the President of the Senate, and who, in the event of the President being convicted, would have become President, was challenged, the challenge was thereafter withdrawn.

The reason for refusing to sustain challenges to the members of the United States Senate was founded upon the wording of the United States Constitution, which reads as follows: "The Senate shall have the sole power to try all impeachments" (art. 1, sec. 3, subd. 6). And that, therefore, they had no right to excuse any member of the Senate from taking part in the trial of impeachments, as the Constitution made every member of the Senate a member of the court for such trials.

The Constitution of our State reads entirely different.

The Court for the Trial of Impeachments in this State is composed not of the judges of the Court of Appeals, not of the senators, but of the major part of each, implying that some may not be of the Court by reason of disability, or refusal to act, or any other cause; and in providing that the Court for the Trial of Impeachments shall be composed, not of the entire membership of the Senate and Court of Appeals, but of the major part of them, it may well have been contemplated that some of the members of either the Court of Appeals or of the Senate would be disabled by reason of some of the causes which disable a judge or juror in civil or criminal proceedings in other courts, and it does not by any means follow from the reading of the Constitution that, no matter what part any senator or judge of the Court of Appeals may have taken in proceedings leading to the impeachments, or how they may be interested by family relationship, prejudice, preconceived opinion or other cause, they may not be challenged for such cause, but must be permitted to sit in this Court when they would not be so permitted to sit in any other court of justice in the land.

The cases of Dorn and Judge Barnard in this State, when analyzed and properly understood, are not decisive of this question.

In the case of Dorn, Senator Sanford was chairman of the committee that investigated the charges and made the report

which resulted in the impeachment of Dorn. Sanford was challenged because of the part he had taken in said investigation.

He was an honorable man and asked to be excused from serving.

The managers, in substance, stated that they had no desire to insist upon Senator Sanford becoming a member of the court, if the court had the power to sustain the challenge, or to excuse him from serving.

It was suggested during the discussion that if Sanford wished to absent himself, that that was his own business.

The challenge was not sustained and Mr. Sanford refused to vote upon any of the charges.

Upon the trial of Judge Barnard the question was raised as to the propriety of Judges Peckham and Allen, who were members of the Court of Appeals, serving as members of the Court for the Trial of Impeachments.

No formal challenge was made to their sitting, but both were highly honorable men, jealous of their fair fame, and asked to be excused.

Judge Peckham, while a justice of the Supreme Court, had come in conflict with Judge Barnard in an action known as the Erie and Susquehanna litigation; Judge Barnard setting aside some of the orders made by Judge Peckham, and Judge Peckham in turn setting aside orders made by Judge Barnard.

Judge Allen, prior to his becoming a member of the Court of Appeals, had been counsel in a litigation out of which grew some of the charges made against Judge Barnard. The question arose as to whether they could impartially in the case.

Among other things it was argued that if they were excused there was danger of the court's being without a quorum if anything happened to two other members of the Court of Appeals, which would render them unable to serve; and it was also contended that they ought not to be excused because there were other articles of impeachment besides those founded upon the litigation in which Judges Peckham and Allen had been concerned, and that while they might be excused from voting upon some of the articles they ought not to be excused from acting upon all the articles.

Without any considerable argument, the objections to their

serving were overruled, and they served upon the trial, but were excused from voting upon many of the charges; Judge Allen upon articles five to nineteen, and Judge Peckham from nine to nineteen, inclusive. (Vol. 1, p. 112; vol. 3, pp. 2178, 79–80.)

Of course, the only purpose of having a court is to pass upon the guilt or innocence of the person charged. What is the object of being a member of the court except to pass upon the guilt or innocence of the person brought to trial, or to pass upon the questions raised during the trial?

As Mr. Watson says in his work on the Constitution:

> "If the right to challenge is denied, where does the Senate get the right or power to excuse a senator from voting? What is the difference in principle between challenging a senator, thus preventing him from hearing the evidence and voting on the guilt or innocence of the impeached, and remaining and hearing the evidence and then being excused from voting as to its sufficiency?" (Page 221.)

If a senator or judge of the Court of Appeals can for any reason be excused from voting because of presumed partially or bias, then a challenge for the same reason ought to be sustained.

If Judges Peckham and Allen could be excused from voting upon the articles arising out of litigations in which they had been concerned, then the senators here should be excused from voting upon all the articles of impeachment here, because they have been concerned in each and every one of them, and have expressed opinions as to the guilt of this respondent.

The time has come when the highest court in this State should determine, once and for all, that its members should be composed, and composed only, of these who are free from even a suspicion of bias and partiality, and that a respondent before it is to be tried upon the same principles of justice that would be applied to the trial of the meanest criminal, for the smallest offense known to the law.

It is provided that the Court of Appeals shall consist of a given number of judges, to whom may be added four justices of the Supreme Court; that no more than seven shall sit, of whom five shall constitute a quorum, and four may render a decision.

The only constitutional provision against their acting in any case is, that no judge thereof shall sit and review a decision made by him, or by any court of which he was at the time a sitting member. (Art. 6, sec. 3.)

This provision of the Constitution was inserted because of the deep feeling, I may say almost scandal, that had been caused by judges of the general term sitting in review of their own decisions made at special or trial terms.

This constitutional provision is supplemented by section 46 of the Code of Civil Procedure, now section 15 of the judiciary law, reading:

> "A judge shall not sit as such in, or take any part in a decision of a cause or matter to which he is a party or in which he has been an attorney or counsel or in which he is interested."

Will it be contended for a moment, that because the Constitution and the Code only provide that a judge shall not sit in review of a decision made by him or by a court of which he was at the time a sitting member, and shall not sit or take part in the decision of any matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, yet, that if a member of the Court of Appeals, before becoming a member thereof, had been appointed referee, not to hear and decide, but simply to take evidence, and report his opinion thereon, and did so, and that a judgment had been rendered upon the evidence so reported, he could sit and review the appeal from that judgment?

Yet he would be in no different position than are the senators here challenged, who have engaged in taking testimony and whose business it was to report thereon, and did so report. They have reported the testimony and expressed opinions thereon and upon that testimony, together with the report so made by them, these articles of impeachment have been found.

Let the Court be so composed that not only will it be impartial, but that all men will, from the beginning, know it is impartial and that this respondent will be tried before a tribunal, no member of which has prejudged his case, and " the fair repute

of justice for absolute impartiality" be preserved. In the language of Edwin Burke, all we ask is "the cold neutrality of an impartial judge."

The President.— Judge Parker.

Mr. Parker.— Presiding Judge and Associate Judges of this High Court of Impeachment.

Mr. Herrick.— I want to call the Court's attention — one moment. In addition to that, under the rules that you have adopted, they are to be excluded from acting because your rules provide that the conduct of the trial shall be governed by the rules now prevailing in the Supreme Court of the State. Rule IV provides that the conduct of the trial shall be governed by the rules now prevailing in the Supreme Court of this State.

The President.— Judge Parker.

Mr. Parker.— Very respectfully, but yet most earnestly, I shall contend before this High Court that it is without authority to exclude any qualified member of the Court. The people of the State of New York, our sovereign, created this Court. The Court was brought into existence by the mandate of this sovereign, and it said, and says, and has from the beginning, it shall be composed of the president of the Senate, the senators or a majority of them, and the judges of the Court of Appeals, or a majority of them. That is the mandate of the people, and you are here by virtue of that command, without power to say to any one of your members, and of any one of them, whether a judge of the Court of Appeals, whether a senator of the State of New York, "you shall not sit in this Court." We borrowed, or inherited, just as you choose, from England not only the great principles of liberty which our fathers incorporated into the several constitutions, Federal and State, but the principles which have governed our courts of equity from the beginning, and the common law which predominates every state, and is made a part of our law by the Constitution of each state; but we also borrowed from England the foundation of our system of impeachment, as the result of which we find ourselves here today engaged in a

judicial proceeding involving the honor, the integrity, the dignity and the protection of the Empire State.

As far back as 1388, it was held that no member of the House of Lords, constituting the court of impeachment in England, could be excused. From that time to this day that rule remained unbroken although there have been circumstances without number, in that country as in this, where much feeling arose from difference of view.

When the framers of the Constitution of this State in the year 1777 created our Constitution, which was ten years in advance of the Federal Constitution, they had before them all the experience of the past in England. They knew what had been accomplished there and they knew the rule that no member of an impeachment court could be challenged. While there were some modifications made in this, our first Constitution, of the impeachment procedure pursued in England, the foundation of it was the same; the changes were few, but one of the changes was, that the framers of our Constitution, for a greater safeguard, for a greater surety, added to the judicial quality of the tribunal by the inclusion of a body of men without special political interest, a body of men trained to the administration of the law, without prejudice, without political bias. That is a great improvement, as all here interested in this procedure and appearing before your Honors, will agree. But there was one change they did not make. They did not provide for a challenge. They did not, by a single word in that portion of the first Constitution providing for impeachment, suggest that the practice of the past was regarded as unwise. On the contrary, while they so altered the character of the body, introducing an element of force and power for the greater stability of the court that it might more surely work out justice, they did not give to anybody, any member of the court, any counsel appearing before it, the right of challenge of any member of this, the most dignified court of the State. A court of impeachment should be strong in number and should be composed only of jurists and tried statesmen, and its numbers must be irreducible.

There has been no change in all the history of impeachment. Let me call your attention now to a few of the accumulated

precedents and just a bit of the argument which has been made in other forums. The thread of the argument we have heard today, not so ably and not so strongly presented as our friend Judge Herrick has presented it, probably, is old and has been made many times before. It was made in the United States Senate long, long years ago. It has been made in high courts of impeachment like this in several states of the Union, as I shall show you presently. But first as to the Supreme Court of the United States. My learned friend seemed to suggest rather than to prove to you, as I thought, that there was some distinction between the Constitution of the United States on this subject and our own Constitution. In the case of the Constitution of the United States he said, "You will observe, that the Senate is the court of impeachment." Yes; but in the case of this State the Constitution says that the court of impeachment shall be composed of the president of the Senate, the senators, or a majority of them, and a majority of the Court of Appeals. Is there any distinction between the two that any of you can work out affecting the question at hand? Is there any one of you that could for a moment be able to suggest that in the one there is no right of challenge, but in the other there is a right of challenge.

Let me call your attention now, please, a little more fully than my friend did, to the impeachment of Andrew Johnson. Senator Hendricks made the challenge — and I ask you to have in mind as I present this to you, that this applies in my judgment to the case of Senator Wagner, only in the event that should the Governor be convicted in this impeachment, Senator Wagner would not become Governor, but in the event of the conviction of President Johnson, the senator challenged would have become President of the United States, a proposition which no senator taking part in that debate for one moment questioned in the forty pages of discussion. Senator Sherman, in opposition to the challenge, said (reading):

> "The Constitution of the United States declares that each state shall be entitled to two senators on this floor, and that court or tribunal for the trial of impeachment, shall be the Senate of the United States. My colleague is one of

the senators from the state of Ohio. He is a member of this Senate, and is therefore made one of the tribunal to try all cases of impeachment. This tribunal is not to be tested by the ordinary rules that may apply in cases of civil law, for the mere interest of a party does not exclude a person from sitting as a member of the Senate for the trial of impeachment; nor does mere affinity or relations by blood or marriage. The tribunal is constituted by the Constitution of the United States and is composed of two senators from each state, and Ohio is entitled to two votes upon the trial of this case."

And each Senate district of this State is entitled to its vote upon the final judgment and in every stage of it.

"So far as the court is concerned," continued the senator, "he is entitled to be sworn as one of the triers of this case as senator from the state of Ohio, without regard to his interest in the result of the trial. His right as a senator from the state of Ohio is complete and perfect, and there is no exclusion of him on account of either interest, affinity, blood relationship or for any other cause."

Senator Howard said (reading): "The Constitution discloses, whatever may be the character of those members, whatever may be the relation to the accused or their interests in the question involved, they shall be component parts of the body trying the impeachment."

And again he says (reading): "The Constitution is mandatory. It is imperative in its very terms. It says how it shall be composed. When a senator offers, therefore, to take the oath, any objection to his taking the oath seems to be out of order because it implies that somebody, or somebody here, may disobey and disregard the imperative mandate of the fundamental law."

Senator Hennessey said (reading): "The Senate had no right to pass, directly or indirectly, any opinion, any reflection upon the right of any senator to participate in the proceedings that are taking place. The question is settled. It was settled when the credentials of the senator were presented, and he was admitted to his seat. It brings us back to the proposition that we

are a senate composed of constituents members, two from every state, sworn to do our duty as senators of the United States; and when you take and exclude a senator from the performance of that duty, you assume functions which are not known in the Constitution and cannot for a moment be recognized. When you attempt to exercise the power, you are attempting to exercise a power which the Senate of the United States, the Senate — no other parties or bodies forming any part of it, is the only body known to the Constitution of the United States for this purpose, and the Senate is composed of two senators from each state."

Senator Morton said (reading): "The Constitution settles the whole question in few words. The Senate shall have the sole power to try all impeachments, and itself shall constitute the tribunal. The Senate is the tribunal. Who compose that tribunal? The senator from Ohio, Mr. Wade, is one of the men who now compose that tribunal."

We cannot escape that. After a discussion covering forty pages in which the majority of the senators spoke upon the subject, agreeing with the senators from whom I have quoted, Senator Hendricks, to his credit, withdrew the challenge.

Back in 1802 in the state of Pennsylvania, in the impeachment of Judge Addison, he personally appeared in court and in his own handwriting challenged three members of the Court of Impeachment; and he challenged them on the ground that they had been members of the house which had impeached him, and that they had voted to impeach him. One of the senators asked permission to withdraw from the Senate. After a conference and after a consultation and argument, in which the judge himself participated, the court refused to accept the excuse of the senator, and refused to exclude any of the members challenged.

Before the United States Senate, as a Court of Impeachment, came the case of Judge Pickering. There were three members of that Senate who had been members also of the House when the impeachment resolution had been passed, and the impeachment articles enacted, and each one of these men had voted in favor of them, and one asked to be excused. The Senate, as a Court of Impeachment, did not exclude them. But I want to read to you four or five sentences from the opinion of one of the

senators, a member of the Court of Impeachment, who had taken part in the preparation and presentation of the resolution and the articles of impeachment in the House, Senator Smith. Senator Smith declared that he would not be influenced from his duty by any false delicacy; that he, for his part, felt no delicacy upon the subject. The vote he had given in the other house to impeach Judge Pickering would have no influence upon him as a member of the court. His constituents had a right to his vote, and he would not by any act of his deprive or consent to deprive them of that right, but would exercise it upon this as upon every other question that might be submitted to the Senate while he had the honor of sitting in it.

In the matter of the impeachment of John L. Brown in 1886, two of the members who had been on the committee that made the investigation which resulted in impeachment charges being preferred against the auditor of the state, presented to the Court of Impeachment this request: "Having by order of the Senate taken part ——" you will see that these men stood as Senator Frawley does here — "Having by order of the Senate taken part in the investigation of the conduct of the office of auditor of the state, we have the honor to request that we be excused from sitting as members of the Senate during these proceedings in the matter of the impeachment of the Hon. John L. Brown, auditor of the state. Very respectfully, your obedient servants, T. W. Burdick and T. B. Glass." There was discussion as to whether or not they should be excused, and the court reached the conclusion that they should not and refused to excuse them.

I now call your attention to the most recent case that we have been able to find, the matter of the impeachment of John H. Schively of the state of Washington in the year 1909. The two houses were called in extraordinary session to investigate certain state departments, and as a result of that investigation the House impeached John H. Schively. There were forty-two members in the court, forty-two senators; the Senate alone constituting the Court of Impeachment. The respondent challenged sixteen of the forty-two members. He excepted to Senator Paulhamus, because of his bias and prejudice and personal enmity and because he had joined in a report to the Senate of the Legis-

lature which recommended the investigation and examination of the affairs of the Insurance Department, and after the filing of the report of the committee and while discussing the call of the extraordinary session of the Legislature out of which these articles of impeachment grew, and while discussing the report in so far as it related to this respondent, he said among other things: "If the public sentiment I have met with is the same elsewhere the Schively incident should be closed within 24 hours after 2 o'clock of the afternoon of June 23d," which was the day of the trial. "It is my belief that there will not be a single vote in either the House or the Senate for the retention of Schively in his present position. I have failed to find a single person that does not believe that Mr. Schively is absolutely guilty and should be removed from office." Senator Allen was also challenged because of bias, prejudice and personal enmity and because he was chairman of the committee which investigated the Insurance Department and because he had expressed an opinion of the guilt of respondent. Senator Fishback was also objected to for the same reason and thirteen other senators were objected to because they were members of the Senate but who authorized the appointment of the committee for the purpose of the investigation. There was a separate ballot taken, that is, each challenge was passed on separately and all the challenges were overruled by an overwhelming majority.

I want to read to you a few sentences from the argument which was addressed to the court on that occasion in behalf of the managers:

> "Mr. President, in reply to the argument of counsel that sixteen members of this body are disqualified from sitting as members of this tribunal, we should determine in what capacity you were acting, have convened as a Senate. You are a constitutional tribunal bound by no law which may limit you save such rules as you have or may hereafter adopt. You follow no precedents save those of the law and customs of parliamentary bodies. Your duty is not to punish or inflict punishment, but to ascertain and determine whether John H. Schively by reason of high crimes and misdemeanors or malfeasance in office, is longer fit to retain

the office of insurance commissioner, and in determining that you are a law unto yourselves bound by the natural progress of equity and justice. Now, gentlemen, being a Senate and sitting as a Senate, can one senator deprive another of his seat, except in a contempt proceeding? Have not your constituents some interest in this matter? Were you not elected to represent them in all matters coming before this body? If the framers of our Constitution had intended that any of you were subject to challenge, would not they have provided some way by which such vacancies might be filled? If sixteen members of this honorable body may be unseated on motion of the respondent, may not others be removed and be barred from sitting upon motion of the managers, and if this be done, or could be done, would not the accused escape justice? By such methods the Senate could be dissolved. One cannot say to another: 'You cannot sit. The Constitution gives you no such right.' It is not only your right but your sworn duty to remain, and to perform your duties to the state at large, and more particularly to the district you represent, sitting and acting in this matter the same as you would upon any other matter coming before the Senate. Remember that each senator's seat and vote belongs to his constituents and not to himself, to be used according to his best judgment in all cases as they arise. This being a political matter, a question in which every person in the state is interested, is it not your right, aye, your duty, to discuss it and to form opinions of the guilt or innocence of the accused?"

I said to you at the beginning that when the framers of our Constitution of 1777, a most remarkable document under all the circumstances as all of you will agree, when the framers came to provide for impeachment, in behalf of the people of this State they adopted the precedents of England, with some modifications, and by the language of the Constitution they made it impossible for the court to exclude any member. Years have passed and we have revised that Constitution several times. These precedents

have been followed in every case I have been able to find except one. In that one, a Tennesee case, a senator was excluded on the ground that he was a brother of the accused, but so far as I am aware that is the only one. I will not take time to consider the circumstances of that case, but the holdings on other propositions which were presented at that time seem to me to demonstrate that as an authority it has no value whatever. All the others are in line with those to which I have called your attention today and I have called your attention to the major part of them. Now, when our constitutional conventions came to consider this subject, they were aware of these precedents, but did they amend the Constitution in this respect? Not at all. In the year 1904 our Constitution was revised but the language of the Constitution on that subject remained the same as in 1846, and the Constitution does make provision for one challenge, but only one. That provision is that in case of the impeachment of the Lieutenant Governor himself or the impeachment of the Governor, then the Lieutenant Governor, otherwise described in that section as the President of the Senate, cannot sit. So that the subject of disqualification was in the minds of the men who drew that Constitution. Again in 1904, when they began to select for disqualification, they selected only the person who was directly interested in the event. In the event that the Governor is on trial for impeachment, the Constitution says that the Lieutenant Governor shall not sit, and apparently in that case for the reason that in the event of conviction he would become the Governor of the State.

When they selected that exception in the strongest possible terms, they affirmed the understanding from 1777 down to this date, that there was no right of challenge.

I want to refer now to the precedents of this State, but I will first say a word about Senator Wagner in this connection. He is not disqualified by this constitutional provision. He is not the Lieutenant Governor. He is the president pro tempore of the Senate. The Lieutenant Governor is in office and is the Lieutentant Governor. True, for the moment he is discharging the duties of Governor, but that is because the Constitution places

upon him the responsibility of performing that duty. He remains in office as the Lieutenant Governor, and I charge you to remember that this Constitution states who may be disqualified, and disqualifies the Lieutenant Governor and the Lieutenant Governor only.

Now then, I want to bring your attention to the precedents in this State, precedents which the constitutional convention in 1904 had before it, for they had happened since the constitutional convention of 1846, and I refer as the first instance to the case of Robert C. Dorn.

In Robert C. Dorn's case I want to read to you the challenge which the respondent made to Senator Sanford's sitting as a member of the High Court of Impeachment. This is it:

> "The counsel for the respondent in defense of his right, guaranteed to him by the Constitution and the laws to have an impartial trial, respectfully protests against Charles Sanford, one of the senators of this State, being sworn as a member of this Court, and respectfully challenges him for principal cause and for that he is not indifferent as between the people of the State and the respondent; and as the ground for this challenge the counsel for the respondent respectfully submits that the said Charles Sanford, as a senator and chairman of the select committee appointed by the committee to investigate the conduct of canals and official persons connected therewith, and the conduct of the Canal Contracting Board, of which respondent was a member, by report dated this date, signed by him, has in substance adjudged the respondent guilty of some of the allegations contained in the articles now exhibited against him; and they further respectfully submit that this report of the said senator as the ground of their accusation against the said respondent and upon that report and the accusations therein contained, the Assembly of this State framed and adopted the articles of impeachment now exhibited against the respondents and thereby the said Senator Charles Sanford is substantially the accuser of the respondent and has prejudged his case; and the counsel respectfully asks this court to determine this challenge as shall seem just to the rights of the respondent."

After argument had been made, the counsel to the managers consented that the senator be excused if the court thought it proper and legal. After still further debate Senator Sanford asked to be excused from acting as a member of this court. Whereupon, on motion of Senator Hale, the court went into private consultation. When the doors were opened, and the proceedings in open court resumed, the President stated, "The court, after consultation, have decided not to grant the request of Senator Sanford to be excused." Counsel for respondent were then given permission to renew their challenge if they so desired, which they did. Thereupon the clerk of the court, by direction of the President, proceeded to call the roll of the court on the question, Shall the challenge be sustained? And it was decided in the negative by a vote of 23 to 1.

Let me say a word about the case of Judge Barnard. That occurred in 1872. The one I have just read, of Commissioner Dorn, occurred in the year 1868.

Judge Allen and Judge Peckham both asked to be excused and it was the most natural excuse in the world that those judges should make. One of them, Judge Allen, as appears by the record, sought excuse because, as counsel, he had been interested in the very litigation which was some of the sort to be used as the grounds of impeachment of Judge Barnard, and he felt that he ought not to sit, and he did not desire to sit.

Judge Peckham, as Judge Herrick has told you, stated, among other things, that he had made orders which had come in conflict with the orders of Judge Barnard and some of those orders formed a part of the articles of impeachment. That is the subject of that part of the articles of impeachment. He asked to be excused.

Here was the question squarely presented to this court by two of the members of the Court of Appeals who asked to be relieved, no personal objection of course being made against them, and the question necessarily up for consideration was whether they should be excused, and only that, and on motion of Senator Wood, after the matter had been presented and talked about, the chamber was cleared for consultation. Later the court reported its decision not to excuse Judges Allen and Peckham.

Mr. Brackett asks me to call your attention to a proposition which is sound, and I think very self-evident to you all, and that is, that if it could be possible under our Constitution to permit challenges, it might be possible — not speaking about this particular case now — but it might be possible since it is required that there shall be a majority of the judges and a majority of the senators, so to reduce the number by challenge as to make it absolutely impossible for the court to convene. The point is, that the court might be so reduced by challenging that there could not be a court and there could be no trial of the impeachment charges.

That undoubtedly is one of the reasons which was taken into consideration by the framers and the revisers of the Constitution from 1770 down to this date.

There are other reasons, but it is not worth while to consider those reasons here today — that is, that the Constitution says thus and so — prescribes who shall compose the Court, naming them. It has continued that phraseology down to and including 1904 when there was an opportunity to change it. With the Dorn case and the Barnard case and the other cases before them, there was no change and there is no disqualification permitted by that Constitution, save one, and that one is not presented for the consideration of your honors.

Mr. Herrick.— Mr. President, and members of the Court: I shall occupy but a very little of your time in reply.

You will perhaps recall that I stated to you that we conceded from the outset that the precedents from England were that the members of the House of Lords were not excused and I gave you the reason for it. Now we are told that we take ours from the common law of England. We do, except when that common law has been changed by our own Constitution or when it is repugnant to the spirit of our own institutions, and our institutions are of that character that we do not believe that men, no matter how high their station, equal to the peers of the realm of England, are fitted to sit in judgment where they have formed an opinion in advance of the guilt or innocence of those whom they are called upon to judge.

It is stated, in almost the conclusion of his argument, that if our right is conceded, that then the court might be broken up by successive challenges. The answer to that is very plain, it seems to me, because of the law and of the cases which hold that where a judge under ordinary circumstances is disqualified to act by reason of interest or any of the other causes that disable him, yet if he constitutes the only tribunal before which the case can be tried, then, ex necessitate, not only is he entitled to serve, but he must serve, so that if the question came to that, that if our challenges endangered a majority of the Senate being present or a majority of the Court of Appeals being present, why then resort must be had to that principle of law, that a judge although interested, if there is no other judge before whom the case can be tried, must act, and is qualified to act.

Let me call your attention to another thing. In discussing the Barnard case my learned and distinguished friend says, in speaking of the requests of Judges Peckham and Allen to be excused, that it was the most natural thing in the world that those judges should ask to be excused. Why natural? Because they had something to do with some of the articles of impeachment that were brought against Barnard. If it was natural for them to ask to be excused, why is it not natural for the senators to be asked to be excused? Why do they not join with my learned friend in his anxiety to protect the dignity and honor of the State, and ask to be relieved from service?

Furthermore, the requests of Judges Allen and Peckham were granted. They asked to be excused because it might be apprehended that their actions upon certain articles of impeachment might be influenced by their actions as Supreme Court judges; and, while they were not excused from acting entirely — because the argument was advanced, as I called your attention before, that there were some articles there with which they were not concerned, and with which it would be conceded they would have no bias or partiality, and they ought to sit — yet they were excused from voting upon any article of impeachment based upon the litigation upon which they had been concerned.

One more. The Shively case has been referred to. I will quote: "You are not a court." You are not a court. Furthermore, that they were laws themselves; they were to determine.

The Senate of Washington was the tribunal to try. It was not constituted a court. It was not considered as a court. Members there did not act as a court. They refused to consider themselves as a court. A little different!

The Constitution makes you a court, the highest, most dignified court in this State, and yet subject to the rules of law just the same as any other court.

Again, I want to reiterate to you this distinction between the two Constitutions which my learned friend I do not think has explained away, the one that makes the Senate, that is, the Constitution of the United States, the Senate without any qualifications, the Senate the sole tribunal for the trial of impeachments; our Constitution which makes not the Senate, not the Court of Appeals or both together, but a major part of them — the major part of the members of each — a concession and an admission in the language of the Constitution itself that there may be some members absent or disabled; the same disability disqualifying a judge of the Court of Appeals or a judge of the Supreme Court from acting; but I do not want to weary you; affinity or consanguinity, which would not relieve a peer of England from serving even to pass judgment upon his own son or brother, would relieve you.

Could you be called upon to act in such a case as that? Now, as I have stated before, times have progressed; more is demanded of courts today. Their proceedings are watched with greater care. There is a greater demand that courts should be above suspicion in all their membership.

Impeachments are peculiar in their nature. They are accompanied by partisan bias, either political or otherwise; and it is of the utmost importance, the greatest importance, that the trial should be above all suspicion of unfairness; and how can that be, when upon the very threshold are taken into its membership men who admittedly have formed and expressed solemn and deliberate opinions upon every charge upon which the respondent is arraigned?

It is of just as much importance to you gentlemen of this Court, of more importance than it is to this respondent, that this challenge be determined upon its merits and that the sense of justice

of mankind shall not be offended by continuing in this great tribunal men whose frame of mind is such that, no matter how honest they may be, they come to this case prejudged, with their opinions of the guilt or innocence of this respondent formed, from which it is very difficult to escape.

One of the most difficult things in the world is to be intellectually honest, to be honest with ourselves; and all those who have been engaged in the investigation of legal questions, know how difficult it is when we have formed an opinion in advance upon any legal subject to deal with it as intellectually honest as we would if we had come to it with virgin minds.

Mr. Parker.— Presiding Judge, would the Court, with the consent of Judge Herrick, allow me two or three minutes, to answer suggestions he has made? I have no objection to his reply.

Mr. Herrick.— I have certainly no objection if you can reply.

The President.—You shall have a reply, Judge Herrick.

Mr. Parker.— I want to call the attention of the Court to a result that might follow were it possible to uphold the contention that members of the High Court of Impeachment may be challenged, if prior to the convening of such court they take such part in some proceeding as indicates the formation of an opinion upon some one or more questions to come before the Court of Impeachment. The challenge made of course affects only senators. An effort was made recently which, if it had been successful, would have enabled counsel to make the same contention as in a challenge lodged against certain of the judges of the Court of Appeals as has been made in support of a challenge of three senators. Suppose the writ of habeas corpus before Mr. Justice Hasbrouck had been reviewed two days after his decision by the Appellate Division and from its decision an appeal promptly taken to the Court of Appeals and by it decided before this Court convened. Necessarily in such a decision the Court would have passed upon the question whether impeachment could take place at an extraordinary session. Would you in such event, and the challenge of seven of the members, for one moment hold that the judges could be challenged? If this Court should so hold it would necessarily

follow that the Court of Impeachment could not proceed with the trial, for the Constitution requires it to be composed of the judges of the Court of Appeals, or a majority of them.

The President.— Judge Herrick.

Mr. Herrick.— I doubted whether it would be a reply, Mr. President.

The President.—What is that?

Mr. Herrick.— I said I doubted whether it would be a reply, Mr. President. My only answer to it is this: That I have too much respect for the good sense of the judges of the Court of Appeals to assume that they would have made any such decision shortly in advance of a meeting of this body of which they were to be members, even if it had been brought before them. I should undertake to say that they would have held up the final decision of that case until they had participated in the deliberations of this Court and awaited its determination. No such supposition can be indulged in.

Mr. Parker.— We have prepared a printed memorandum of the authorities and cases, which are at the service of the Court if they may be distributed.

Mr. Herrick.— We have a memorandum also printed. We shall be glad to distribute it.

The President.— The Presiding Judge is of the opinion that this matter should be determined now, but if my brothers of the Court are of the opinion that they want to consider it, of course they may adjourn to consider it at their pleasure; but, if no such request is made, we will proceed with the disposition of the question before us. No application being made, the Court will proceed to state its disposition. In the first place, I shall say that under the privilege accorded to me under the rules which you have adopted, I intend to submit this point for you to decide, and not decide it myself in the first instance, as I am authorized. But still I feel that by the power you have conferred upon me under your rules, it is my duty to express to you my opinion of what is the proper disposition of the question, and to state briefly my

reasons. That this challenge cannot be entertained is the uniform current of authority. All the precedents are against it. I also think it is not sustained by principle. This, as has been well said, is a court. The Constitution declares it so, and it is elementary law to the lawmakers. The distinction between the disqualification of a juror and the disqualification of a judge is marked.

I shall speak to you of the question from a legal point of view, but do not consider that the question is one which, in the vernacular of the day, may be termed a legal technicality. It is a question of power, and the question is, Have some members of this Court power to exclude other members of the Court, except for reasons defined by law, either in the Constitution or in the statutes? That is the question. I should say in the first place, that there is this marked distinction between a challenge to a juror and a challenge to a judge, though the latter is an entirely inappropriate term to apply to the disqualification of a judge. A disqualification of a juror may be waived by consent. A legal disqualification of a judge renders his judgment void, and consent will not permit him to act. At common law, nothing disqualifies a judge from sitting, except direct interest in the case. It is doubtful whether the disqualifications of members of the Court can be extended or in any way changed from those prescribed by the Constitution. The only disqualification prescribed by the Constitution is that the Lieutenant Governor shall not sit on the impeachment of the Governor, but it is unnecessary to consider whether the statutory disqualifications do apply to the membership of this Court, for the reason that none of the objections suggested by the counsel for the respondent come within the statutory disqualifications. Even in an ordinary court of justice, members of a court could not exclude one of their brethren. This was so decided by the Court of Appeals in the case of People v. Patrick. There it was sought to set aside and vacate a judgment of affirmance rendered by the court on the ground of some relationship between counsel who had appeared in one stage of the proceedings and one of the judges of the court, in fact the judge who wrote the opinion. We held that there being no statutory disqualification, it was a mere

question of propriety, and that it must be judged by the judge himself, the determination of which he was the sole arbiter. In that we simply followed the earlier decision made some twenty odd years previous, in which the late Judge Rapallo wrote. I think the principle is conclusive here. I do not mean to say that, if any member of the Court feels that such action as he has previously taken in regard to the matters which are now to be tried, or his personal feelings toward the respondent are such as to disqualify him or to impair his ability to render a just and fair verdict, according to the oath which he has taken, he may not appeal to the Court to be excused from sitting, but that appeal must be made by himself, and must be considered solely on his application, and cannot be considered as a challenge to his qualification to sit in the Court.

The question which will be submitted to you will be in this form, not as to the right to challenge, but it will be, Shall the Court entertain the challenge which has been interposed by the counsel for the respondent? Before the roll is called, would any of you like to speak on the subject?

The President.— The clerk will call the roll.

Noes.— Senator Argetsinger, Judge Bartlett, Senators Blauvelt, Boylan, Brown, Bussey, Carroll, Carswell, Judge Chase, Senator Coats, Judges Collin, Cuddeback, Senators Cullen, Duhamel, Emerson, Foley, Godfrey, Griffin, Heacock, Healy, Heffernan, Herrick, Hewitt, Judges Hiscock, Hogan, Senators McClelland, McKnight, Malone, Judge Miller, Senators Murtaugh, O'Keefe, Ormrod, Palmer, Patten, Peckham, Pollock, Sage, Seeley, Simpson, Stivers, Sullivan, Thomas, Thompson, Torborg, Velte, Walters, Wende, Judge Werner, Senators Wheeler, White, Whitney, Wilson.— 52.

Senators Frawley, Ramsperger, Sanner and Wagner, upon their own request, were excused from voting.

The President.— The next procedure will be for the clerk to read the articles of impeachment.

The clerk thereupon read the articles of impeachment as follows:

STATE OF NEW YORK

August 13, 1913

ARTICLES EXHIBITED BY THE ASSEMBLY OF THE STATE OF NEW YORK

IN THE NAME OF THEMSELVES AND OF ALL THE PEOPLE OF THE STATE OF NEW YORK, AGAINST WILLIAM SULZER, GOVERNOR OF SAID STATE, IN MAINTENANCE OF THEIR IMPEACHMENT AGAINST HIM FOR WILFUL AND CORRUPT MISCONDUCT IN HIS SAID OFFICE, AND FOR HIGH CRIMES AND MISDEMEANORS.

ARTICLE I

That the said William Sulzer, now Governor of the State of New York then being Governor-elect of said State for the term beginning January 1, 1913, he having been elected at the general election held in said State on the 5th day of November, 1912, was required by the statutes of the State then in force to file in the office of the Secretary of State within twenty days after his said election, a statement setting forth all the receipts, expenditures, disbursements and liabilities made, or incurred, by him as a candidate for Governor at said general election at which he was thus elected, which statement the statute required to include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement exceeding five dollars, the name of the person or committee to whom it was made and the date thereof, and all contributions made by him.

That, being thus required to file such statement, on or about the 13th day of November, 1912, the said William Sulzer, unmindful of his duty under said statutes, made and filed in the office of the Secretary of State what purported to be a statement made in conformity to the provisions of the statute above set forth, in which statement he stated and set forth as follows, to wit: that all the moneys received, contributed or expended by said Sulzer, directly or indirectly, by himself or through any

other person, as the candidate of the Democratic party for the office of Governor of the State of New York, in connection with the general election held in the State of New York on the 5th day of November, 1912, were receipts from sixty-eight contributors, aggregating five thousand four hundred and sixty ($5,460) dollars, and ten items of expenditure aggregating seven thousand seven hundred twenty-four and 9-100 ($7,724.09) dollars, the detailed items of which were fully set forth in said statement so filed as aforesaid.

That said statement thus made and filed by said William Sulzer as aforesaid was false, and was intended by him to be false and an evasion and violation of the statutes of the State, and the same was made and filed by him wilfully, knowingly and corruptly, it being false in the following particulars among others to wit:

It did not contain the contributions that had been received by him, and which should have been set forth in said statement, to wit:

Jacob Schiff	$2,500 00
Abram Elkus	500 00
William F. McCombs	500 00
Henry Morgenthau	1,000 00
Theodore W. Myers	1,000 00
John Lynn	500 00
Lyman A. Spalding	100 00
Edward F. O'Dwyer	100 00
John W. Cox	300 00
The Frank V. Strauss Co	1,000 00
John T. Dooling	1,000 00

That in making and filing such false statement, as aforesaid, the said William Sulzer did not act as required by law, but did act in express violation of the statutes of the State, and wrongfully, wilfully and corruptly and, thereafter, having taken the oath as Governor, and proceeded to perform the duties thereof, the said false statement thus made and filed by him caused great scandal and reproach to the Governor of the State of New York.

Article II

That the said William Sulzer, now Governor of the State of New York, then being Governor-elect of said State for the term beginning January 1, 1913, he having been elected at the general election held in said State on the 5th day of November, 1912, was required by the statutes of the State then in force to file in the office of the Secretary of State within ten days after his said election, as aforesaid, an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself, or through any other person, in aid of his election, giving the names of the various persons who received such moneys, the specific nature of each item and the purpose for which it was expended or contributed; and was further required to attach to such statement an affidavit, subscribed and sworn to by him, such candidate, setting forth, in substance, that the statement thus made was in all respects true and that the same was a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly, by himself, or through any other person, in aid of his election.

That, being thus required to file such statement, and attach thereto such affidavit, on or about the 13th day of November, 1912, the said William Sulzer, unmindful of his duty under such statutes, made and filed in the office of the Secretary of State what purported to be a statement made in conformity to the provisions of the statute above set forth, in which statement he stated and set forth as follows, to wit:

That all the moneys received, contributed or expended by said Sulzer, directly or indirectly, by himself or through any other person, as the candidate of the Democratic party of the office of Governor of the State of New York, in connection with the general election held in the State of New York, on the 5th day of November, 1912, were receipts from sixty-eight contributors, aggregating five thousand four hundred and sixty ($5,460) dollars, and ten items of expenditure aggregating seven thousand seven hundred and twenty-four and 9–100 ($7,724.09) dollars, the detailed items of which were fully set forth in said statement so filed as aforesaid.

That attached to such statement thus made and filed by him as aforesaid was an affidavit, subscribed and sworn to by said William Sulzer, stating that said statement was in all respects true and that the same was a full and detailed statement of all moneys received or contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election.

That said statement thus made and filed by said William Sulzer, as aforesaid, was false, and was intended by him to be false and an evasion and violation of the statutes of the State and the same was made and filed by him wilfully, knowingly and corruptly, being false in the following particulars, to wit:

It did not contain the contributions that had been received by him, and which should have been set forth in said statement, to wit:

Jacob Schiff	$2,500 00
Abram I. Elkus	500 00
William F. McCombs	500 00
Henry Morgenthau	1,000 00
Theodore W. Myers	1,000 00
John Lynn	500 00
Lyman A. Spalding	100 00
Edward F. O'Dwyer	100 00
John W. Cox	300 00
The Frank V. Strauss Co	1,000 00
John T. Dooling	1,000 00

That said affidavit thus subscribed and sworn to by said William Sulzer was false and was corruptly made by him.

That in making and filing such false statement as aforesaid, the said William Sulzer did not act as required by law, but did act in express violation of the statutes of the State and wrongfully, knowingly, wilfully and corruptly; and, in making said affidavit as aforesaid, the said William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State and was guilty of bribing witnesses, and of a violation of section 1620 of the Penal Law of the State; and, thereafter, having taken the oath

as Governor, and proceeded to perform the duties thereof, the said false statement and affidavit thus made and filed by him caused great scandal and reproach to the Governor of the State of New York.

ARTICLE III

That the said William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State and was guilty of bribing witnesses, and of a violation of section 2440 of the Penal Law of said State, in that, while a certain committee of the Legislature of the State of New York named by a concurrent resolution of said Legislature to investigate into, ascertain, and report at an extraordinary session of the Legislature then in session, upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by and on behalf of any such candidate for moneys or things of value received or paid out in aid of his election, and their compliance with the present requirements of law relative thereto — while such committee was conducting such investigation, and had full authority in the premises, he, the said William Sulzer, in the months of July and August, 1913, fraudulently induced one Louis A. Sarecky, one Frederick L. Colwell, and one Melville B. Fuller, each, to withhold true testimony from said committee, which testimony it was the duty of said several persons named to give to said committee when called before it, and which, under said inducements of said William Sulzer, they and each of them refused to do.

That, in so inducing such witnesses to withhold such true testimony from said committee, the said William Sulzer acted wrongfully and wilfully and corruptly, and was guilty of a violation of the statutes of the State and of a felony, to the great scandal and reproach of the said Governor of the State of New York.

ARTICLE IV

That the said William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt con-

duct in his office as such Governor of the State and was guilty of suppressing evidence and of a violation of section 814 of the Penal Law of said State, in that, while a certain committee of the Legislature of the State of New York named by a concurrent resolution of said Legislature to investigate into, ascertain, and report at an extraordinary session of the Legislature then in session, upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by and on behalf of any such candidate for moneys or things of value received or paid out in aid of his election, and their compliance with the present requirements of law relative thereto — while such committee was conducting such investigation and had full authority in the premises, he, the said William Sulzer, practised deceit and fraud and used threats and menaces, with intent to prevent said committee and the people of the State from procuring the attendance and testimony of certain witnesses, to wit: Louis A. Sarecky, Frederick L. Colwell and Melville B. Fuller, and all other persons, and with intent to prevent said persons named, and all other persons, severally, they or many of them having in their possession certain books, papers and other things which might or would be evidence in the proceedings before said committee, and to prevent such persons named and all other persons, they, severally, being cognizant of facts material to said investigation being had by said committee, from producing or disclosing the same, which said several witnesses named, and many others, failed and refused to do.

That, in thus practising deceit and fraud and using threats and menaces as, and with the intent, aforesaid, and upon the persons before named, the said William Sulzer acted wrongfully and wilfully and corruptly and was guilty of a misdemeanor, to the great scandal and reproach of the Governor of the State of New York.

Article V

That the said William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State and was guilty of preventing and dissuading a witness from attending

under a subpoena in violation of section 2441 of the Penal Law of said State, in that, while a certain committee of the Legislature of the State of New York named by a concurrent resolution of said Legislature to investigate into, ascertain, and report at an extraordinary session of the Legislature then in session upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by and on behalf of any such candidate, for moneys or things of value received or paid out in aid of his election, and their compliance with the present requirements of law relative thereto — while such committee was conducting such investigation and had full authority in the premises, he, the said William Sulzer, wilfully prevented and dissuaded a certain witness, to wit: Frederick L. Colwell, who had been duly summoned or subpoenaed, to attend as a witness before said committee hereinbefore named for the 8th day of August, 1913, from attending pursuant to said summons or subpoena.

That, in so preventing or dissuading said Frederick L. Colwell, who had thus been duly summoned or subpoenaed to appear before said committee on said day named, from attending before said committee pursuant to said summons or subpoena, the said William Sulzer acted wrongfully and wilfully and corruptly and was guilty of a violation of the statutes of the State and of section 2441 of the Penal Law, and was guilty of a misdemeanor, to the great scandal and reproach of the Governor of the State of New York.

Article VI

That the said William Sulzer, now Governor of the State of New York, was duly and regularly nominated by the Democratic party of said State as its candidate for Governor, at a regular convention of said party held in the city of Syracuse, on or about the 1st day of October, 1912, such nomination having been made on or about the 2d day of October, 1912, and he was, thereafter, until the 5th day of November, 1912, when he was elected to such office of Governor, such candidate of said party for said office.

That being, and while, such candidate for said office of Governor, various persons contributed and delivered money, and

checks representing money, to him, said William Sulzer, to aid his election to said office of Governor, and in connection with such election; that said money and checks were thus contributed and delivered to said William Sulzer as bailee, agent, or trustee, to be used in paying the expenses of said election and for no other purpose whatever; that the said William Sulzer, with the intent to appropriate the said money and checks representing money, thus contributed and delivered to him as aforesaid, to his own use, having the same in his possession, custody, or control as bailee, agent, or trustee as aforesaid, did not apply the same to the uses for which he had thus received them, but converted the same and appropriated them to his own use and used the same, or a large part thereof, in speculating in stocks, through brokers operating on the New York Stock Exchange, and thereby stole such money and checks and was guilty of larceny.

That among such money and checks thus stolen by said William Sulzer was a check of Jacob H. Schiff for $2,500; a check of Abram I. Elkus for $500; a check of William F. McCombs for $500; a check of Henry Morgenthau for $1,000; a check of John Lynn for $500; a check of Theodore W. Myers for $1,000; a check of Lyman A. Spalding for $100; a check of Edward F. O'Dwyer for $100; a check of John W. Cox for $300; a check of Frank V. Strauss Co. for $1,000; a check of John T. Dooling for $1,000; and cash, aggregating $32,850.

That in so converting and appropriating said money and checks to his own use, the said William Sulzer did not act as required by law, but did act wrongfully and wilfully and corruptly, and was guilty of a violation of sections 1290 and 1294 of the Penal Law, and of grand larceny, and the same was done for the purpose of concealing, and said action and omission of said William Sulzer did conceal, the names of persons who had contributed funds in aid of his election and defeated the purposes of the provisions of the statute which required such publication that the people might know whether, or not, said Governor, after he had taken office, was attempting to reward persons who had so contributed in aid of his election, by bestowing official patronage, or favors, upon them, and thereafter, having taken the oath as Governor of the State of New York and proceeded to perform the duties

thereof, the said appropriation to his own use, and his larceny of the same, caused great scandal and reproach of the Governor of the State of New York.

Article VII

That the said William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State, and was guilty of the corrupt use of his position as such Governor, and of the authority of said position, and of a violation of section 775 of the Penal Law of said State, in that, while holding a public office, to wit: the office of Governor, he promised and threatened to use such authority and influence of said office of Governor for the purpose of affecting the vote or political action of certain public officers; that among such public officers to whom the said William Sulzer promised, or threatened, to use his authority and influence as Governor, for the purpose of affecting their votes, said persons to whom such promises or threats were made were, Hon. S. G. Prime, Jr., a member of Assembly for the county of Essex for the year 1913, the promise being that if said Prime would vote for certain legislation in which said William Sulzer was interested and, as Governor, was pressing to passage, he, said Sulzer, would sign a bill that had already passed the Legislature and was pending before him, reappropriating the sum of about $800,000 for the construction of roads in said county of Essex and counties adjoining thereto, the said Governor at the time of said promise well knowing that the said Assemblyman S. G. Prime, Jr., was desirous of having said bill for said appropriation for roads signed by the Governor.

Hon. Thaddeus C. Sweet, a member of Assembly for the county of Oswego for the year 1913, the threat being that if the said Sweet did not vote for certain legislation in which said William Sulzer was interested and, as Governor, was pressing to passage, he, said Sulzer, would veto a bill that had already passed the Legislature and was pending before him, appropriating certain moneys for the construction of a bridge in said county of Oswego, the said Governor at the time of said threat well

knowing that the said Assemblyman Thaddeus C. Sweet was desirous of having said bill for said appropriation signed.

That in so using the position and authority of the office of Governor the said William Sulzer acted wrongfully and wilfully and corruptly and was guilty of a violation of the statutes of the State, and of section 775 of the Penal Law, and of a felony, to the great scandal and reproach of the Governor of the State of New York.

ARTICLE VIII

That the said William Sulzer, then Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State, and was guilty of the corrupt use of his position as such Governor and of the authority of said position, and of a violation of section 775 of the Penal Law of said State, in that, while holding a public office, to wit: the office of Governor, he corruptly used his authority, or influence, as such Governor to affect the current prices of securities listed and selling on the New York Stock Exchange, in some of which securities he was at the time interested and in which he was speculating, carrying, buying or selling, upon a margin or otherwise, by first urging, recommending and pressing for passage legislation affecting the business of the New York Stock Exchange and the prices of securities dealt in on said exchange, which legislation he caused to be introduced in the Legislature, and then by withdrawing or attempting to withdraw from the consideration of the Legislature such legislation which was then pending therein — all the time concealing his identity in said transactions by subterfuge.

That, in so using the position and authority of the office of Governor, the said William Sulzer acted wrongfully and wilfully and corruptly and was guilty of a violation of the statutes of the State, and of section 775 of the Penal Law, and of a felony, to the great scandal and reproach of the Governor of the State of New York.

And the said Assembly saving to themselves by protestation the liberty of exhibiting any other articles of impeachment against the said William Sulzer, Governor as aforesaid, and also of replying to the answers which he may make to the impeachment

aforesaid, and of offering proof of the said matters of impeachment, do demand that the said William Sulzer, Governor as aforesaid, be put to answer all and every of the said matters, and that such proceedings, trial and judgment may be thereunder had and given as are conformable to the Constitution and Laws of the State of New York; and the said Assembly are ready to offer proof of the said matters at such time as the honorable Court for the Trial of Impeachment may order and appoint.

Albany, New York, August 13, 1913.

AARON J. LEVY
PATRICK J. McMAHON
ABRAHAM GREENBERG
WILLIAM J. GILLEN
THEODORE HACKETT WARD
JOSEPH V. FITZGERALD
TRACY P. MADDEN
THOMAS K. SMITH
HERMAN F. SCHNIREL

ATTEST:

ALFRED E. SMITH,
Speaker

GEORGE R. VAN NAMEE,
Clerk

The President.— What answer does the respondent interpose to the articles presented by the Assembly?

Mr. Herrick.— May it please, Mr. President, we filed a notice of special appearance for the purpose of reserving to ourselves the right of making certain objections, which Mr. Marshall will now present.

Mr. Marshall.— May it please the Court: The above named respondent, William Sulzer, now comes and appears specially for the purpose of moving this honorable Court to dismiss the proceedings instituted by the Assembly of the State of New York for his impeachment, on the ground that the said proceedings are

without jurisdiction and null, void and of no effect, and in support of said motion the respondent alleges:

He was duly elected Governor of the State of New York at the general election held in November, 1912. He entered upon the performance of the duties of his office on January 1, 1913, having taken the constitutional oath of office.

The regular session of the Legislature of 1913 began on the first Wednesday of January, 1913, and adjourned sine die on May 3, 1913.

On May 8, 1913, the respondent, as Governor of the State of New York, by proclamation made in due form and pursuant to the Constitution and statutes of said State in such case made and provided, directed the Legislature of the State of New York, to wit, the Senate and Assembly of said State, to convene in extraordinary session, at the Capitol, at Albany, New York, on June 16, 1913, at 8.30 o'clock in the evening of that day.

Pursuant to said proclamation, the Legislature of the State of New York, to wit, the Senate and Assembly, duly convened at the Capitol, at Albany, New York, in extraordinary session, at the time named in said proclamation, and remained in extraordinary session, for the transaction of legislative business, until July 23, 1913, when, by concurrent resolution, alleged to have been adopted by a majority of the members duly elected to each branch of the Legislature, but, as respondent is informed and believes, in fact by the vote of less than a majority of the members of each of said branches of the Legislature, the Senate and Assembly, respectively, undertook to adjourn until the evening of August 11, 1913, at which time they respectively again convened, at the Capitol, in the city of Albany, and thereafter, at 5 o'clock in the morning of August 13, 1913, by a vote of seventy-nine (79) of its members, the Assembly undertook to impeach the respondent, and thereupon, on the same day, preferred against the respondent, to the Senate of the State of New York, the articles of impeachment for the trial of which this Court has been convoked.

Neither in the proclamation of the respondent, as Governor of the State of New York, by which the extraordinary session of the Legislature was convened, nor in any message, communication, or

otherwise, did the respondent recommend to the Legislature of the State of New York, or to its Assembly, the subject of his impeachment, or the consideration of any charges against him, or the taking of any action with respect to his impeachment, or with respect to any charges presented against him, in any manner whatsoever.

The Legislature and the several branches thereof, to wit, the Senate and Assembly, were convened in extraordinary session, solely for the purpose of taking action on various subjects which were recommended to them, respectively, for consideration by the respondent, none of which subjects included his impeachment, or the consideration of any charges presented against him.

Prior to the adoption by the Assembly of the State of New York of the articles of impeachment against the respondent, and the consideration of the subject of his impeachment, no notice whatsoever was given to the respective members of the said Assembly, that the subject of the impeachment of the respondent, or the consideration of charges against him, would be taken up at the alleged adjourned session beginning on August 11, 1913, or at any other time.

There were absent at said adjourned session, and at the time when the subject of the impeachment of the respondent was under consideration, and was voted upon, twenty-six (26) members of the Assembly, to none of whom was there given any notice of said proposed action. In consequence whereof, the respondent was deprived of the benefit and advantage of the attendance at said time, of the said members of the Assembly who were thus absent, and had not received notice as aforesaid of the proceedings with respect to his impeachment.

By reason of the premises, the action taken by the Assembly with respect to the impeachment of the respondent was without constitutional authority, and the articles of impeachment which the Assembly preferred against the respondent to the Senate, were null, void and of no effect, and the proceedings which are now before this tribunal for trial do not constitute due process of law, and are in violation of the provision of the Constitution of the State of New York and of the Fourteenth Amendment to the Con-

stitution of the United States, and this Court is without jurisdiction to entertain or determine the same.

Wherefore, the respondent prays for a dismissal of the said proceedings.

The President.— The Court desires to ask the honorable managers of the Assembly whether they intend to take issue on the facts stated in that special appearance, not on the conclusions. Of course, this Court is not expected to proceed with the technical attitude which is required in ordinary litigation but it would seem to be much better if we could get the issue narrowed down as far as possible.

Senator Carswell.— Mr. President, before the Court adjourns, I would like to move the adoption of the following resolution:

> "Resolved, that the members of the Senate assemble in the Senate lobby promptly at the time appointed for the opening of court at each session and there await the arrival of the members of the Court of Appeals, and enter together the court room set aside for the Court for the Trial of Impeachments."

The President.— I suppose the purport of the resolution is to proceed into the court room before its convening in the manner usually adopted in other courts. All those in favor of the motion please say aye.

The motion was unanimously carried.

Thereupon, at 12.25 o'clock p. m. the Court took a recess until 2 p. m.

AFTERNOON SESSION

Pursuant to adjournment, the Court convened at 2 p. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Brackett.— If the Court please, we will have our replication here in just a moment.

Mr. Stanchfield.— If the Court please, the form of the pleas to the jurisdiction interposed by the respondent necessitates upon the part of the board of managers the interposition of a replication. We had not the time during the recess hour to complete it and it will be here in a few minutes, but in order to expedite this proceeding I will call attention to those allegations in the pleas to the jurisdiction which are traversed by the board of managers. The first allegation is a conclusion of law as follows:

> "William Sulzer now comes and appears specially for the purpose of moving this honorable Court to dismiss proceedings instituted by the Assembly of the State of New York for his impeachment on the ground that the said proceedings are without jurisdiction and null, void and of no effect."

That we deny.

The allegation as to the election of the Governor is admitted.

Likewise the allegation to the general effect that by proclamation in due form and pursuant to the Constitution he directed the Legislature of the State of New York to convene in extraordinary session at the Capitol at Albany on June 16th. Then follows this allegation:

> "Pursuant to said proclamation the Legislature of the State of New York, to wit, the Senate and Assembly, duly convened at the Capitol at Albany, New York, in extraordinary session at the time named in said proclamation and remained in extraordinary session for the transaction of legislative business until July 23, 1913, when, by concurrent resolution, alleged to have been adopted by a majority

of the members duly elected to each branch of the Legislature, but as respondent is informed and believes, in fact the vote of less than a majority of the members of each of said branches of the Legislature, the Senate and Assembly, respectively, undertook to adjourn until the evening of August 11, 1913, at which time they respectively again convened at the Capitol in the city of Albany, and thereafter, at 5 o'clock in the morning of August 13, 1913, by a vote of 79 of its members the Assembly undertook to impeach the respondent and thereupon, on the same day, preferred against the respondent, to the Senate of the State of New York, the articles of impeachment for the trial for which this Court has been convoked."

We interpose a denial in effect that that concurrent resolution for adjournment was not regularly passed. We traverse the allegation and contend that it was regularly passed.

The next allegation to the effect that there was nothing in the proclamation of the Governor authorizing the special session to consider his impeachment is admitted by not being denied.

I think, if the Presiding Judge please, I will follow the course I have adopted instead of commencing now to read the replication.

The next allegation is to the effect that the Legislature and the several branches thereof, to wit, the Senate and Assembly, were convened in extraordinary session solely for the purpose of taking action on subjects which were recommended to them respectively for consideration by the respondent, none of which subjects included his impeachment or the consideration of any charges presented against him.

We traverse the allegation that it convened solely for the purposes indicated in the message by which he brought them together.

The President.— By that do you mean to raise any other than questions of law?

Mr. Stanchfield.— That raises simply, sir, the legal question as to whether, being in session under the call, it had other power to act.

The President.— But the fact that there was no allusion to the subject matter, that is conceded.

Mr. Stanchfield.— Yes, sir.

The next allegation to the general effect that no notice whatever was given to the respective members of the Assembly that the subject of the impeachment of the respondent or the consideration of charges against him would be taken up at the alleged session beginning August 11, 1913, or at any time, we deny.

The next allegation that there were absent at said adjourned session at the time when the subject of the impeachment of the respondent was under consideration, and was voted upon, twenty-six members of the Assembly, to none of whom was there given any notice of said proposed action, we likewise deny.

Mr. Marshall.— May I interpose to ask you whether you mean the whole or only the last part.

Mr. Stanchfield.— We deny the latter part of that, technically speaking.

Mr. Marshall.— That stands like a negative pregnant, so I want to know what you do deny.

Mr. Stanchfield.— The latter part of it.

Mr. Marshall.— The latter part of it. You admit there were twenty-six absentees.

Mr. Stanchfield.— I think that is correct. I want to say to counsel in making these denials or admissions, if there is any mistake in the record we would ask permission to correct it, because the time has been very short to prepare the replication.

The President.— Each side shall be granted most liberally the right of amendment.

Mr. Stanchfield.— The conclusion of law that by reason of the premises the action taken by the Assembly with respect to the impeachment of the respondent was without constitutional authority, is denied; and we file, Mr. President, with the Court the formal replication.

Replication filed, as follows:

STATE OF NEW YORK

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK

against

WILLIAM SULZER, GOVERNOR OF THE STATE OF NEW YORK

The managers on the part of the Assembly, having considered the plea of the respondent to the jurisdiction of this Court, say that it is not true that the proceedings now pending before this Court are without jurisdiction, or null or void, or of no effect, and protest that this proceeding should not be dismissed, as prayed for by said respondent.

The managers on the part of the Assembly allege that this Court has jurisdiction to try the respondent, under the articles of impeachment heretofore filed with this Court, and served upon the respondent; that the said articles of impeachment were duly and regularly adopted by the Assembly of the State of New York.

And said managers say further that it is not true, as alleged in the respondent's plea, that a concurrent resolution adopted by the Legislature of the State of New York on July 23, 1913, providing that said Legislature then stand adjourned until the 11th day of August, 1913, was not adopted by a majority of the members duly elected to each branch of the Legislature, but that, on the contrary, said concurrent resolution was duly adopted by a majority of the members duly elected to each branch of said Legislature, and that pursuant to said concurrent resolution said Legislature regularly, duly and lawfully reconvened on said 11th day of August, 1913.

And the managers aforesaid further say that it is not true that the several branches of the Legislature of the State of New York were convened in said extraordinary session solely for the purpose

of taking action on various subjects which were recommended to them for consideration by the respondent as Governor of the State of New York, and said managers say that on said 13th day of August, 1913, when the Assembly impeached the respondent herein, and when said articles of impeachment were adopted, the said Assembly was duly, regularly and lawfully convened and in session, and that the resolution impeaching the respondent and said articles of impeachment were duly, regularly and lawfully adopted by a majority of all of the members elected to said Assembly.

And the managers on the part of the Assembly do further say that it is not true that no notice was given to the members of the Assembly, prior to the adoption by the said Assembly of said articles of impeachment, that the subject of the impeachment of the respondent, or the consideration of charges against him, would be taken up at the session of said Assembly beginning on August 11, 1913, or at any other time.

And the managers do further say that it is not true that at the time that the subject of the impeachment of the respondent was under consideration and was voted upon, there were absent about twenty-six members of the Assembly, to none of whom any notice of said proposed action was given.

And the managers on the part of the Assembly do further say that it is not true that the impeachment of the respondent by the Assembly as aforesaid was without constitutional authority, and that the articles of impeachment preferred against the respondent were null, void and of no effect, and that the proceedings now before this Court do not constitute due process of law and are in violation of the provision of the Constitution of the State of New York, and of the Fourteenth Amendment to the Constitution of the United States, and that this Court is without jurisdiction to entertain or to determine the same, but that the said managers say that the action taken by the Assembly with respect to the impeachment of the respondent and each and every step therein taken and adopted by said Assembly, was taken pursuant to the provisions of the Constitution of the State of New York, and was regular and lawful in every particular and within the jurisdiction of the said Assembly, and that said articles of impeachment preferred against the respondent are legal and in full force and effect, and

that none of the proceedings before said Assembly resulting in the impeachment of the respondent and the preferring of articles of impeachment to the Senate either constitutes a violation of the provisions of the Constitution of the State of New York, or of the Fourteenth Amendment to the Constitution of the United States, or of any provision of said Constitution and said managers do say that this Court has full jurisdiction in the matter to entertain and determine the same.

And the managers on the part of the said Assembly reserve to themselves all objections to the insufficiency of the matters alleged in said plea for that the same, as alleged, do not constitute any lawful or valid reason why this Court should not entertain and determine this proceeding or any defense to said articles of impeachment or any objection to the sufficiency of the impeachment.

Dated, Albany, N. Y., September 19, 1913.

(Sig.)

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Managers

Mr. Marshall.— May it please the Court: As I read this replication, the only denial practically is the denial first that there was not an adjournment on the 23d of July, 1913, to August 11, 1913, by the vote of a majority of each of the two houses, and then the second denial, as to the giving of notice to the members of the Assembly of the fact that the subject of the articles of impeachment would be considered at the session of the Assembly beginning on the evening of August 11, 1913.

The only point as to which it might be necessary to present proof, therefore, would be the proposition as to the giving of notice to the various members of the Assembly.

I think that we will probably be able to agree as to the facts between now and Monday.

I would therefore, with the reservation of the privilege if we desire to do so, either stipulate the facts or swear a witness to show what notice, if any, was given, state that we will be prepared to argue the case upon the pleadings as they have been interposed.

The President.— If the President is correct in his recollection, with that exception the only issue of fact between you is the adjournment of the Legislature.

Mr. Marshall.— Yes, and the matter of notice.

The President.— Yes. Now, you accept their statement.

Mr. Marshall.— I shall not take issue upon the statement as to the vote by which there was an adjournment from the 23d of July until the 11th of August. I do, however, wish to reserve the privilege of interposing evidence as to the character of notice, if any, that was given by the Assembly, or given to the members of the Assembly, that the subject of impeachment would be taken up at the meeting held on the 11th of August.

The President.— Well, now, Mr. Stanchfield, what do you say to that objection?

Mr. Stanchfield.— I don't think, Mr. Presiding Judge, that we can agree on just the form or character of notice that was given. We have not the evidence at hand at the moment.

Mr. Marshall.— We can argue these questions later subject to the interposition of the evidence if the Court reaches the conclusion that that is a material issue in the case.

Mr. Stanchfield.— There is no objection from us.

The President.— Then, if you agree, you will proceed. Now, the proposition that you intend to argue to the Court, Mr. Marshall, is that the Assembly had no jurisdiction at the extra-

ordinary session to prefer charges of impeachment against the Executive, the Governor, who called it into extraordinary session.

Mr. Marshall.— Yes, sir, and that this Court therefore has no jurisdiction to consider the charges.

Mr. Herrick.— And that no notice was given.

Mr. Marshall.—And that no notice was given. That will be incidental.

May it please the Court: A valid impeachment by the Assembly is a condition precedent to the exercise of jurisdiction by this Court. Without such impeachment by the Assembly, acting in conformity with the constitutional safeguards, there is such an absence of due process of law as will render the proceedings pursuant to which this tribunal has been convoked, a nullity. It has been frequently declared by the highest authorities that an impeachment by the House of Commons, the House of Representatives or the Assembly, is the equivalent of an indictment. The impeaching body acts as the accuser, or, as Blackstone phrases it, as "the grand inquest," and can exercise that function only when it observes the requirements of the organic law and has been set in motion in accordance with its provisions. Hence, if it should appear that it has acted without constitutional authority, or in contravention of the terms and conditions imposed by the Constitution, its action goes for naught and cannot be made the basis of any proceedings before a Court for the Trial of Impeachments. A valid impeachment is an essential prerequisite to the exercise of jurisdiction by the Court.

In the epigrammatic words of Mr. Justice Brown, who but a few days ago died in the fullness of years:

> "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and the evidence." Illinois Central R. R. Co. v. Adams, 180 U. S. 34.

The parallel between an impeachment and an indictment has always been recognized (4 Bl. Com. 259–62 and authorities hereafter cited). It was regarded as complete in the course of the

discussions in the Johnson and Barnard impeachment trials. In the quaint phrase of 1 Hale's Pleas of the Crown 150, quoted by Blackstone (vol. 4, p. 259):

> "But an impeachment before the lords by the commons of Great Britain, in Parliament, is a prosecution of the already known and established law, . . . being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom."

It is, therefore, clear that the decisions relating to the finding of an indictment by a grand jury are of the utmost importance and should be deemed controlling whenever the validity of an impeachment is to be determined.

In Ex parte Bain, 121 U. S. 1, a question very similar to that now to be determined was passed upon by the Supreme Court of the United States. There Bain had been indicted and convicted for having made a false report as the cashier of a national bank. The indictment charged that he had made the report with the intent to deceive an agent appointed by the Comptroller of the Currency to examine the affairs of the association. On motion subsequently made the court ordered the indictment to be amended by striking out the reference to the Comptroller of the Currency. Thereupon Bain made an original application to the Supreme Court for a writ of habeas corpus, urging in support of his application that the court which had convicted had no jurisdiction or authority to try him, since the indictment, as amended, was no longer the indictment of the grand jury. His contention was sustained, the court holding that the declaration in article 5 of the Amendments to the Federal Constitution 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" was jurisdictional; that no court of the United States had authority to try a person without an indictment or presentment in such cases; that the indictment referred to was the presentation to the proper court under oath, by a grand jury, duly impanelled, of a charge describing an offense against the law for which the party charged might be punished, and that although an indictment had originally been

found by the grand jury, when it was amended there was nothing to which the prisoner could be held to answer, and the indictment being void, there was nothing to try.

The court, after reaching the conclusion that the indictment could not be amended, and quoting the language of Mr. Justice Field in 2 Sawyer 667, in which he said that the grand jury was "an informing and accusing tribunal only," said, at page 12:

> "It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of Jones v. Robbins, 8 Gray 329, 'individual citizens' 'from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury'; and 'in cases of high offences' it 'is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecution.' . . . We are of the opinion that an indictment found by a grand jury was indispensable to the power of a court to try the petitioner for the crime with which he was charged. . . .
>
> "It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

In Harlan v. McGourin, 218 U. S. 448, this case was cited with approval.

In Post v. U. S., 161 U. S. 583, where an act provided that "all criminal proceedings instituted for the trial of the offences against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offences were committed," it was held that the court had no jurisdiction of an indictment thereafter presented by the grand jury for the district in one division, for an offence committed in another division before the passage of the act, and for which no complaint had been made against the defendant. In sustaining this ruling, Mr. Justice Gray, quoting from In re Bonner, 151 U. S. 242, 256, 257, said:

> "As said by this court in a recent case, 'in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits, in any essential requirements, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms.' 'It is plain that such court has jurisdiction to render a particular judgment, only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void.'"

Justice Gray added:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate." Virginia v. Paul, 148 U. S. 107, 119, 121; Rex v. Phillips, Russ. & Ry. 369; Regina v. Parker, Leigh & Cave, 459; s. c. 9 Cox Crim. Cas. 475.

In State v. Leese, 37 Neb. 92, s. c. 20 L. R. A. 579, Ex parte Bain, with other similar decisions, was cited in a case which involved the validity of an impeachment proceeding. Under the Constitution of Nebraska, "the Senate and House of Representatives, in joint convention, shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention for the purpose of acting upon such resolution, within three days of such notification." The trial of the impeachment takes place before the Supreme Court. Pursuant to the constitutional provision, the Legislature of Nebraska presented to the court articles of impeachment against Leese, who had been attorney general, charging him with misdemeanors in office during his incumbency of it. After answer had been interposed to the articles of impeachment exhibited, the managers appointed by the Legislature to prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in the articles of impeachment. In sustaining its decision Mr. Justice Norval, speaking for the court and referring to the terms of the Constitution which have been above quoted, said:

> "The authority thus given carries with it the power of the Senate and House of Representatives, under like restrictions, to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the Legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter or amend one which has been duly passed; and in neither case does the right exist. Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to permit the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court no amendment of the instrument,

in matter of substance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indictment. People v. Campbell, 4 Park. Crim. Rep. 386; Gregory v. State, 46 Ala. 151; Johnson v. State, Id. 212; McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; State v. McCarty, 2 Pinney, 513, 54 Am. Dec. 150; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849.

"We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeachment exhibited against the respondent. If they could do that, it necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the Legislature, might have rejected had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the Constitution."

It is thus clear that, in order to give this Court jurisdiction, the articles of impeachment must have been adopted by the Assembly, on the vote of a majority of the members elected thereto, when lawfully convened; otherwise there would be an entire absence of jurisdiction, and this Court might as well be called upon to act on charges presented by a private citizen, by the managers of a political party, or by the anonymous enemies of the person sought to be impeached. Jurisdiction depends on the action of a constitutional body, duly called together and empowered to act and acting in strict conformity with the mandate of the Constitution.

Continuing a study into the practical identity of an impeachment with an indictment, which is universally recognized, we will be aided in the present case by referring to the numerous decisions by which indictments have been declared invalid because of the improper constitution of the Court, in connection with which the grand jury finding the indictment sat, or the irregular manner in which such grand jury was convened.

Thus it is well established that an indictment found by a grand jury at a term of court held at a time unauthorized by law or at a term at which no grand jury is authorized, is a nullity as are all proceedings based thereon. State v. Brown, 127 N. C. 562; s. c., 37 Southeastern Rep. 330; Davis v. State, 46 Ala. 80.

In the absence of a statute permitting it, and indictment found or presented in vacation time by a grand jury convened in vacation time is void. Miller v. State, 69 Ind. 284; State v. Corbett, 42 Tex. 88, 90.

In order that an indictment or presentment may be valid the grand jury must have jurisdiction. Therefore, to render such indictment or presentment valid, the court in which the grand jury is acting must have jurisdiction. Shepard v. State, 64 Ind. 43; Rex v. Jones, 6 C. & P. 137.

This is well illustrated by the decision in People v. Knatt, 156 N. Y. 302. The defendant was indicted for maliciously destroying property. The act was a misdemeanor and not a felony. The indictment was found by a grand jury without the certificate provided for by section 57 of the Code of Criminal Procedure, by a county judge or justice of the Supreme Court, to the effect that it was reasonable that such charge should be prosecuted by indictment. It was held that in the absence of such certificate jurisdiction of the grand jury did not attach and the court in which the indictment was found could only proceed by indictment in a case of that character on condition that the statutory certificate had been first filed. See also Post v. U. S., 161 U. S. 583, *supra*.

It follows from these authorities that it is equally necessary to the validity of an indictment that the court in which it is found shall be legally organized and constituted, otherwise there is no jurisdiction.

In the case of Northrup v. People, 37 N. Y. 203, the Court of Appeals went further and decided that where the justices of the Supreme Court of a judicial district in the performance of their duty to appoint the times and places of holding courts within their district designated that the trial term should be held at White Plains in and for the county of Westchester, and the court after convening at White Plains adjourned the further proceedings to the court house at Bedford in that county, the trial of an indict-

ment for murder which proceeded at Bedford was void for want of jurisdiction. Judge Fullerton, writing for the court, said:

> "The power to fix the times and places of holding courts was committed by statute to all the judges and not to a single judge of a judicial district. In virtue of this power, White Plains was the only place appointed for holding the courts of oyer and terminer, for the year 1867, in the county of Westchester. It was not in the power of a single judge, at any time, and certainly not after all the judges had united in making the appointments, to appoint any other place for holding courts in that county. . . . The policy of the law is to inspire confidence in the administration of justice. It is the right of every citizen to know the times and places for holding the courts, where his liberty or property may be put in jeopardy, and that would be a lax system of legislation, indeed, which would leave them the subjects of sudden and perhaps capricious changes. Our Legislature has not so left them; they have solemnly determined, that all the judges of each district shall unite in designating the places of holding courts, and require that the appointments thus made shall be published in the state paper, for three weeks, before any court shall be held in pursuance of them. To sanction the court at which the prisoner was convicted, is to annul entirely all these provisions.
>
> "I have not failed to consider the argument, that Bedford was one of the places which might have been designated for holding the court in Westchester county. But the answer to this proposition is, that it was not designated and published as the statute required, and for that reason was not a place for holding court."

This case was cited with approval in People v. Sullivan, 115 N. Y. 191.

In People v. Nugent, 57 App. Div. 542, it was also cited. There a term of the county court of Erie county convened pursuant to an order which was not published as required by section 356 of the Code of Civil Procedure "once in each week for three successive weeks before a term is held," or "of four successive

weeks previous to the time of holding the first term under such order" as required by the Code of Civil Procedure. The term was fixed for such a time that the four weeks' publication required under the latter code could not be made. It was held that the court was improperly convened and that an indictment found at such term was a nullity. Mr. Justice Williams said (p. 548):

> "These provisions should be complied with, and one of the essential prerequisites to the holding of a legally constituted term is the publication of the order appointing the same as provided for by the statutes of the State. No question of notice was involved in the Youngs case. The Northrup case seems to be an authority directly upon the point we are considering and never to have been overruled or criticised even. In a case of this kind it would be an unsafe rule to hold that a county judge, who has the sole power and authority to appoint the time for holding county courts should be permitted to appoint and hold such courts at his own will, disregarding the statute, and making appointments for such times as to render a compliance with the statute as to publishing the order impossible. Such a rule would enable a county judge in times of public excitement, to call a term of his court into existence without any notice to persons charged with crime, and thus seriously interfere with their rights under the Constitution and the laws of the State. We think the court was in error in denying defendant's motion to dismiss the indictment in question, requiring him to plead thereto and to stand his trial thereon. . . .
>
> "The court not having been properly convened and held, the indictment was invalid, as were all the proceedings had by the court with reference thereto."

In O'Byrnes v. The State, 51 Ala. 25, a conviction founded on an indictment presented by a grand jury not summoned on a venire by the judge, was reversed. The judge had issued a venire but on the return he quashed it and then without a new venire ordered the sheriff to summon more jurors and under this order the jury was summoned.

Bickell, J., said (pp. 28, 29):

"We cannot doubt that a grand jury constituted in any other manner than prescribed by statute is, in the language of this court, in State v. Brooks, supra, 'without legal warrant' a grand jury is not a mere assemblage of fifteen or eighteen persons in the jury box, congregated by an order of the court, or by their own volition or at the summons or at the behest of an unauthorized persons." . . .

"If the court could legally set aside the venire drawn and summoned by the officers having authority to draw and summon it, the power is unlimited. The jurors summoned under its order could be set aside in the exercise of the same power, and so from time to time, until a jury was organized to meet the caprice and prejudice of the judge."

In U. S. v. Reed, 27 Fed. Cases No. 16134 (N. Y.), a motion was made to quash an indictment on various grounds, among which were irregularity in the marshal drawing jury, the fact that no order was made by district judge for a venire to summon the grand jury, and that one of the jurors was a volunteer and had never been summoned. Mr. Justice Nelson, then a member of the United States Supreme Court, and who had previously been Chief Justice of the Supreme Court of New York, said (pp. 729, 731):

"By the law of New York certain preliminary notices are necessary in getting together a grand jury. Can these notices be entirely dispensed with, and a mere voluntary body come together as a grand jury, and yet no objection be afterwards made by a party indicted by such a body? Suppose the case of a grand jury not drawn at all but admitted to have been packed. Can a man indicted by it be cut off by the provisions of the Revised Statutes from raising the objection?" . . .

"It being thus (at common law) a ground of challenge to the array in a given case, that the jury have selected, summoned and returned by a person unfit to summon an indifferent jury to sit and judge in the case and it being the presumption that such a person would summon a jury not indifferent, but prejudiced, as respects the case to be heard,

the challenge to the array, so authorized, necessarily though perhaps more remotely touches and reaches the proper qualifications of the panel to sit and act in a particular case."

This brings us to a consideration of the provisions of the Constitution which relate to the jurisdiction of the Assembly to act as an informing and accusing body, and thus to set this tribunal in motion.

Article 6, section 13, of the Constitution, declares:

"The Assembly shall have the power of impeachment, by a vote of the majority of all the members elected."

Article 3, section 1, provides for the creation of a Senate and Assembly. Section 2 provides that the Senate shall consist of fifty members, except as thereafter provided, and that the Assembly shall consist of one hundred and fifty members. Section 5 provides that the members of the Assembly shall be chosen by single districts, and gives directions as to their apportionment among the several counties of the State. Section 10 permits a majority of "each house" to constitute a quorum to do business. Section 11 requires "each house" to keep a journal of its proceedings, and the doors of "each house" to be kept open, except when the public welfare shall require secrecy, and then declares that "neither house" shall, without the consent of the other, adjourn for more than two days. Section 12 absolves the members from being questioned in any other place "for any speech or debate in either house of the Legislature."

Article 10, section 6, reads:

"The political year and legislative term shall begin on the first day of January; and the Legislature shall, every year, assemble on the first Wednesday in January."

Finally, article 4, section 4, which deals with the duties and powers of the Governor, among other things provides:

"He shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. At extraordinary sessions, no subject shall be acted upon, except such as the

Governor may recommend for consideration. He shall communicate by message to the Legislature at every session the condition of the State, and recommend such matters to it as he shall judge expedient."

It is our contention that the Assembly has no power of impeachment, except when duly convened at a regular session of the Legislature, or, if when convened at an extraordinary session of the Legislature, the Governor shall have recommended for consideration the impeachment of the person sought to be proceeded against.

The impeachment managers contend that the Assembly, whenever and however convened, has the power of impeachment, at any time. In fact it has been argued on their behalf, that, even though not convened, a majority of all of the members elected to the Assembly possess the power of impeachment.

The opinion of the Attorney General, rendered on August 18, 1913, asserts that the Assembly can adopt articles of impeachment by convening a majority of its members anywhere and at any time. He says:

"I understand it to be claimed that the Assembly was without jurisdiction to make and present the articles of impeachment in question, because at the time of the adoption thereof the Legislature was not in regular session but was in extraordinary session and the subject of impeachment was not a matter submitted to the Legislature for consideration by the Governor.

"After an examination of this question I have come to the conclusion that it is clearly based upon a misapprehension of the nature of the functions of the Assembly when adopting and presenting the articles. This is in no sense a legislative function; it is judicial."

Further on he continues:

"The power of the Assembly to present articles of impeachment is in no manner connected with its powers as one of the bodies of the Legislature. . . . Its powers are defined in article 6 of the Constitution which treats of the judiciary."

And again he says:

> "The question as to how the Assembly came in session is not pertinent to the inquiry, and the method by which such convention of the Assembly was had does not affect its jurisdictional power to act. . . .
>
> "In impeachment proceedings the Assembly acts judicially pursuant to power conferred upon it by the Constitution. This power not being limited in extent nor restricted as to procedure may be exercised at any time the Assembly may determine upon."

Mr. Justice Hasbrouck, in his recent opinion at Special Term in People ex rel. Robin v. The Warden, etc., practically adopted these views.

Assuming, for the purpose of argument, that the function of the Assembly in preferring articles of impeachment is judicial in its nature, although we shall later argue to the contrary, we urge that the conclusion of the Attorney General is unsound and his reasoning fallacious.

We have shown that every reference in the Constitution to "the Assembly" is a definite and specific reference to it as one of the "Houses" of the Legislature. The Constitution does not recognize any entity under the name of "the Assembly," except that body which exists as a constituent branch of the Legislature. There is but one Assembly. It is "*the* Assembly." It is not one organism in respect to article 3, and another when referred to in article 6 of the Constitution.

The mere fact that article 6 conferred upon the Assembly the power of impeachment, which the Attorney General is pleased to call judicial, does not operate as a metamorphosis of the nature of that body. It is still "the Assembly" and nothing more. It remains a constituent branch of the Legislature. It is not transformed into anything other or different than an integral part of the Legislature; a branch of it; one of its houses; endowed, if you please, with the quasi-judicial power of impeachment, but still acting merely within the orbit which the Constitution has assigned to it, as a part of the Legislature, and governed by the limitations imposed upon the Legislature.

The Attorney General assumes that because "the Assembly" has had conferred upon it this special function, it thereby necessarily and *ipso facto* loses its character and nature as a branch of the Legislature, is no longer the body referred to in all parts of the Constitution as "*the Assembly,*" but a different body, superior to the Constitution, without limitation as to its method of procedure, as to the time or place of its meeting, a law unto itself — not a fixed star, but a comet pursuing a course eccentric and erratic, subject to no restraint save that which it may itself place upon the whim and caprice of the majority of its members.

Nowhere in the State Constitution is the body which we know as "the Assembly" referred to by any other characterization than as "the Assembly." Everywhere it is *the* Assembly that is spoken of, and our opponents must certainly admit that in every case where it is mentioned, except in article 6, section 13, it is subject to the provisions of the Constitution, in regard to the time and place and conditions under which it shall convene.

But it is insisted that, when this same body is exercising its so-called judicial functions conferred by article 6 of the State Constitution, it is superior to, and can act with absolute freedom untrammeled by any of the provisions of the State Constitution relating to the Legislature or to "the Assembly," and this extraordinary claim of superiority of the Assembly is inferred, in spite of the limitation contained in the Constitution, which expressly negatives the existence of omnipotent power.

Nowhere in article 6 of the Constitution, which confers such alleged judicial power, nor in any other article of the Constitution, is there to be found a word or a syllable permitting the inference that when the Assembly acts as an accusing body, it is absolved from obedience to the beneficent limitations and restraints of the Constitution, which specifically and in clear and unambiguous language refer to and affect "the Assembly."

The question thus presented is one of the most important that has ever arisen in the political and judicial history of this State. Upon the determination of it depend the orderly government of this great commonwealth, the sanctity of the Constitution, and the "continuance of regulated liberty." For it is self-evident that, if one branch of the Legislature can convene a majority of

its members at any time or place, with or without notice to the others, or if such majority, without convening (and this is the logical consequence of the primary position taken by the impeachment managers), should be empowered to prepare articles of impeachment against any officer of the State, revolution and anarchy will inevitably result. Our government would effectually be Mexicanized.

In order to simplify the discussion of this proposition, fraught as it is with tremendous consequences, not only in the present case, but in cases which may hereafter arise, if a vicious precedent be now established, it should first be considered as though it were one which involved the impeachment of a judge of the Court of Appeals, or of a justice of the Supreme Court, and the impeachment had been instituted at a time when the Legislature was not convened either at a regular or at an extraordinary session. For, if the contention of the impeachment managers is reduced to its logical results, it means that a self-convened fraction of the Assembly, or a majority of its members, even though not convened, may lawfully impeach any judicial or executive functionary of the State. At this stage of the argument, therefore, we may leave out of consideration altogether the fact that, when the impeachment now sought to be tried was voted, the Legislature was convened in extraordinary session, and the Governor had not recommended, as a subject for action, the matter of impeachment.

Let us then suppose that the Legislature is not in session, and that it is sought to impeach a judge of one of our superior courts. There are one hundred and fifty members of the Assembly, scattered throughout the State, each county having at least one member. Each of them is engaged in his ordinary vocation. The business of some of them is apt to take them out of the State. It occurs to some individual, who may not even occupy an official capacity but who is possessed of powerful influence over a considerable number of the members of the Assembly, that he desires to have one or more of the judges impeached. There is no way known to the Constitution or to the law, by which the Assembly can be convened, except automatically on the first Wednesday in January, at the regular session, or by the proclamation of the Governor to meet in extraordinary session. But the regular

session may have adjourned sine die, and the Governor may have refused to call an extraordinary session, or may not even have been requested to call such session.

How can the Assembly be convened under such circumstances? At whose instance? Certainly not at that of the private individual, who is interested in bringing about the impeachment of a judge. Certainly not by any member of the Assembly who should desire to assume authority to convene that body and to usurp the functions vested exclusively in the Executive. It is inconceivable that the one hundred and fifty members of the Assembly should spontaneously assemble, at one and the same place, and at one and the same time. Who is to summon the assemblymen? Upon whose mandate are they to be called together? What is the penalty of the refusal of any of them to meet his fellows? Can the sergeant-at-arms who had served at the adjourned session forcibly bring them to the place of meeting? By whose sanction would he exercise control over the persons of the unwilling members? Where is the source of power which enables him, for such a purpose, and under such circumstances, to hale to a place of meeting and put under arrest the recalcitrant assemblymen? What would be his defense to an action for false imprisonment, or assault and battery? Kilbourn v. Thompson, 103 U. S. 168.

Assuming that, by concert of action, by the exercise of potent personal or political influence, a bare majority of the elected members of the Assembly should be brought together, what is there to prevent them, under such circumstances, from meeting in secrecy, at a private house, in a hotel, at a political club, in an atmosphere supercharged with prejudice, hatred and malice, without giving notice to the other members of the Assembly, and to concoct under the knout of an absolute despot and under cover of darkness, articles of impeachment against a judicial officer who because not subservient has gained the enmity of him who initiated so extraordinary a convocation?

Who, under such circumstances, would be charged with the duty of giving notice to all the members of the Assembly? What would be the nature of the notice to be given? What length of time would intervene between the announcement of the purpose of convening the Assembly, and its actual coming together?

Would one day's notice be sufficient? Would it be by public proclamation? If so, who would make the proclamation?

It is easy to perceive that such a situation is replete with the potentiality of fraud, connivance and collusion. Those in the secret of the projectors of such a movement might easily manipulate the proceedings so as to eliminate such members who might be reasonably expected to oppose impeachment, and who might be able by their arguments and presentation of facts to convince a majority that impeachment would be improper and injurious to the best interests of the State. If such procedure should now be declared to be within the spirit of the Constitution, the time may come when, as a result of momentary excitement, the rhetoric of a demagogue, or headlong passion, a bare majority of the Assembly may be brought together by malign influences, for the very purpose of impeaching every member of the Court of Appeals and every justice of the Supreme Court.

Under article 6, section 13, of the Constitution, "no judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the Senate, until he shall have been acquitted." Under such circumstances, chaos and anarchy would reign, and grim revolution would stalk throughout the State. This is not a mere figment of the imagination. There have been frequent occasions when decisions by the highest courts of the land have been stigmatized by demagogues or by those impatient of restraint as calling for the impeachment of the judges who pronounced them, when adjudications which have given effect to constitutional limitations designed for the protection of life, liberty and property, have been attacked as reactionary and as the medium of accomplishing injustice; when inflammatory orators have, from the forum and the hustings, denounced judges who fearlessly dared to do right, and, against their own sympathies, observed their oaths to support the Constitution, which they were called upon to interpret.

If the contentions of the impeachment managers in the present case were upheld, would it not, at such periods of storm and stress as are apt to arise in every decade of our history, seal the fountains of justice and paralyze the arm of the judiciary? And this would be the more likely to occur if such an attack upon the

judiciary were endorsed by influential or popular newspapers, or by individuals capable of fanning into flame the smouldering embers of animosity and to whet the voracious appetite of class interest.

But, let us proceed and assume that the Assembly or a fragment of its membership shall have thus convened itself, how shall it, in the case supposed, "prefer to the Senate" the articles of impeachment as contemplated by the language of section 13 of article 6, which clearly ordains that they must be so preferred? How is the Senate to be convened? Under what constitutional sanction? Upon whose mandate? At what time and where? What, until it so convenes, is to become of the impeachment, and what of the official against whom it is directed?

It is thus apparent that this situation bristles with insuperable difficulties, that perils lurk at every turn, and that the permanency of our Government is threatened if the Assembly or its members were thus permitted to convene or to act without convening.

Most careful research has failed to discover instances, in the history of Congress, and of the Legislatures of the several states of the Union, when a legislative body, or one of its component parts, has ever undertaken to initiate proceedings to convene itself, or to meet otherwise than at a regular or extraordinary session, called in conformity with the terms of the organic law. The absence of precedent is a most eloquent argument against the existence of such a power. It is recognized as contrary to the spirit of our republican institutions, for one of the coordinate departments of the Government to usurp authority, and to undertake the exercise of a function which is impliedly denied it by the fundamental law.

Our Houses of Representatives and Assemblies are modeled upon the House of Commons; our Senates upon the House of Lords. Even in England, where Parliament is said to be omnipotent, where there is no written Constitution to limit and circumscribe and define its power, even that body is incapable of convening itself for any purpose. It can only assemble pursuant to a royal mandate, and it has been only in times of revolution when it ventured to act without such mandate. But, mark you, whenever it so acted, it was deemed necessary, by means of

curative legislation, to confirm the acts of a Parliament thus irregularly assembled.

With his customary clarity, Blackstone deals with this subject (1 Black. Com. ch. 2, 150), saying:

> "1. As to the manner and time of assembling. The Parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no Parliament can be convened by its own authority, or by the authority of any except the king alone. And this prerogative is founded upon very good reasons. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met and half absented themselves, who shall determine which is really the legislative body, the part assembled or that which stays away? It is therefore necessary that the Parliament should be called together at a determined time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and, of the three constituent parts, this office can only appertain to the king; as he is a single person whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the Legislalature that has a separate existence, and is capable of performing any act at a time when no Parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no Parliament in being, the last Parliament revives, and it is to sit again for six months, unless dissolved by the successor; for this revived Parliament must have been originally summoned by the crown.
>
> "It is true, that by a statute, 16 Car. I. c. I., it was enacted that, if the king neglected to call a Parliament for three years, the peers might assemble and issue out writs for

choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated; and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. I. From thence therefore no precedent can be drawn.

"It is also true, that the convention-parliament, which restored King Charles the Second, met above a month before his return; the lords of their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of Parliament; and that the said Parliament sat till the twenty-ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good Parliament, notwithstanding the defect of the king's writ. So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers whether even this healing act made it a good Parliament; and held by very many in the negative; though it seems to have been too nice a scruple. And yet out of abundant caution, it was thought necessary to confirm its acts in the next Parliament, by statute 13 Car. II. c. 7 & c. 14.

"It is likewise true, that at the time of the revolution, A. D. 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange, afterwards King William, met in a convention and therein disposed of the Crown and Kingdom. But it must be remembered this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that King James

the Second had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei,* that the form of the royal writs must be laid aside, otherwise no Parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would undisputably vacate the throne; in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention of 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M. st. 1, c. 1, that this convention was really the two houses of Parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, and each of which, by the way, induced a revolution in the government, the rule laid down is in general certain, that the king, only, can convoke a Parliament.

"And this by the ancient statutes of the realm he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a new Parliament every year but only to permit a Parliament to sit annually for the redress of grievances, and dispatch of business if need be. These last words are so loose and vague, that such of our monarchs as were inclined to govern without Parlia-

ments, neglected the convoking them sometimes for a very considerable period, under the pretence that there was no need for them. But to remedy this, by the statute 16 Car. II. c. 1, it is enacted that the sitting and holding of Parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2 c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, Parliaments, ought to be held frequently. And this indefinite frequency is again reduced to a certainty by statute 6 W. & M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new Parliament shall be called within three years after the determination of the former."

In 1 Anson's Law and Custom of the Constitution (edition of 1911), the author says, at page 53:

"The existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same royal proclamation issued by the king on the advice of the privy council under the great seal. The proclamation discharges the existing Parliament from its duties of attendance, declares the desire of the crown to have the advice of its people, and the royal will and pleasure to call a new Parliament. It further announces an order addressed by the crown in council to the chancellors of Great Britain and Ireland to issue the necessary writs, and states that this proclamation is to be their authority for so doing.

"Until recent times it was the practice for a warrant under the sign manual to be given by the crown to the chancellor to issue the necessary writs. This has ceased to be done; an order in Council is made directing that writs shall be issued, but, as matter of fact, the royal proclamation is treated by the crown office in chancery as the authority for the issue. . . . The writs were returnable according to the provisions of Magna Charta, within forty

days of their issue; this period was extended after the union with Scotland to fifty days, and has been reduced by an act (15 Vict. c. 23) to thirty-five days."

At page 70 he continues:

"A dissolution brings the existence of Parliament to an end; a prorogation brings the session of Parliament to an end; an adjournment brings about a cessation of the business of one or other house for a period of hours, days or weeks. The adjournment of either house takes place at its own discretion, unaffected by the proceedings of the other house. The crown cannot make either house adjourn; it has sometimes signified its pleasure that the houses adjourn, but there is no reason why its pleasure should also be the pleasure of the houses. The crown has, however, a statutory power to call upon Parliament to meet before the conclusion of an adjournment contemplated, where both houses stand adjourned for more than fourteen days. The power is exercised by proclamation declaring that the houses shall meet on a day not less than six days from the date of the proclamation.

"Prorogation takes place by the exercise of the royal prerogative; it ends the session of both houses simultaneously; and terminates all pending business. A prorogation is to a specified date, but it may be necessary either to postpone or to accelerate the meeting of Parliament.

". . . The power to accelerate a meeting of Parliament which has been prorogued is governed by statute. An act of 1797 empowered the king to advance the meeting from a date to which prorogation had taken place to a date not earlier than fourteen days from the date of the proclamation and this period was reduced to six days by an act of 1870."

At page 302 he asserts:

"It would seem then that, apart from the general expression of the act of Edward III, the only statutory se-

curities which we have ever possessed for the frequent summons and sittings of Parliament are the act of Charles II, providing that Parliament shall sit at least once in every three years, and the act of William and Mary to the effect that we shall not be more than three years without a Parliament. Nor do the statutes say what is to happen if the crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the crown might not fulfil the law."

In 21 Halsbury's Law of England, title "Parliament," page 687, it is stated:

"A new Parliament can be called together for the transaction of business only by the crown."

In volume 6 of the same work, title "Constitutional Law," page 389, we find this pronouncement:

"A new Parliament cannot legally assemble without the royal writ, and though on certain occasions, through necessity occasioned by the king's absence or abdication, the two houses have met and transacted business in an irregular manner without the royal writ, such meetings are termed Convention Parliaments, to distinguish them from Parliaments proper, and their proceedings are not recognized unless subsequently ratified by statute."

In a note it is added:

"This is significant in that it shows that Parliament acting on its own initiative and convening itself for the purpose of transacting business is *ultra vires* and irregular and to have any force and effect legally it is necessary that there be a subsequent ratification by that body constitutionally convened."

Also, Cushing's Law and Practice of Legislative Assemblies (1913 edition), section 216, is to the same effect.

In providing in the Federal and State Constitutions for the meetings of the Congress and Legislature, the English model was departed from only so far as to provide a fixed date for the annual meeting of those bodies. Where the date of meeting is fixed, no summons is needed. But they cannot be convened in extraordinary session without the summons of the President in one case, and of the Governor in the other. There must be either a fixed date or a summons by authority. In New York the Legislature may act in extraordinary session only on subjects recommended to it by the Governor, so that our opponents have been obliged to concede that if the Assembly could rightfully impeach at an extraordinary session, it could impeach of its own motion without being called by any sort of summons.

We have said that there is no precedent in any of our states where a Legislature attempted to convene itself. This is perhaps slightly but not entirely inaccurate, because, in People v. Hatch, 33 Ill. 9, the Supreme Court of that state had occasion to pass upon an attempt of the Legislature to convene itself after it had been adjourned to a certain day, before that day came. The Constitution of Illinois provided that, in case of disagreement between the two houses with respect to the time of adjournment, the Governor shall have power to adjourn the General Assembly by his proclamation. Acting under this authority, the Governor assumed to adjourn the General Assembly to a specified date. Both houses adopted a protest against his action as illegal, and a large number of the members returned to their homes. No adjourning order of either house appeared on the journals, and for a period of ten days no entries were made in the journals. At the expiration of that time, but before the date for reconvening fixed by the Governor, an attempt was made to reconvene the Legislature. It was held that the power did not exist, Mr. Justice Breese saying (p. 163):

> "The session having thus terminated, it is needless to inquire if it could be resumed at a future day, without a previous vote of the two houses, or by the proclamation of the Governor. Should a legislative body be dispersed by any sudden irruption, or insurrection, or by any external force, their power might, perhaps, remain, and the duty

also, to reassemble without any previous vote for such purpose. When such dispersion is the result of its own action, I know of no mode by which it can be brought together again, as a legislative assembly, in the absence of such previous vote, without a call from the executive.

"Blackstone says, if, at the time of an actual rebellion, or imminent danger of invasion, the Parliament shall be separated by adjournment or prorogative, the king is empowered to call them together by proclamation, with fourteen days' notice of the time appointed for their assembling (1 Black. Com. 145, ch. 2). The spontaneous meeting of all the members, except in the case stated, at a time not appointed by law, and without a previous vote for such purpose, would avail nothing. The executive, if he desired, could not recognize it as a legislative body, nor could it perform a legislative act, having any binding authority. This being so, it follows a less number than a quorum cannot meet and hold a legislative session, no matter under what convictions they may assemble, or what rights they may suppose they can preserve by such meeting. It would be a proceeding not sanctioned by our Constitution or laws."

So, in French v. State Senate, 146 Cal. 604; s. c., 80 Pac. Rep. 1031, 69 L. R. A. 556, the Senate of California expelled the petitioners for malfeasance in office, consisting of the taking of a bribe to influence their conduct as senators. It was claimed that the Senate did not give them a hearing or afford them a trial upon charges made nor permit them to make any defence thereto, and that the charges of bribery were false. A writ of mandamus was prayed for to compel the Senate to restore them to membership therein. The application was denied, and in the course of his opinion Mr. Justice Shaw said:

"An attempt by this court to direct or control the Legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions which it is expressly forbidden to do.

"Even if the court should attempt to usurp this legislative function, there is no means whereby it could carry its

judgment into effect and give the relief demanded. The thirty-sixth session of the Legislature has adjourned *sine die;* it is a thing passed, and cannot be reconvened upon the mandate of the judicial power (Const., art. 3). The Senate could not reinstate the petitioners as members of that session except when lawfully in session. Nor can the body which composed the thirty-sixth session be again called together except in special session and at the behest of the Governor."

The great case of Luther v. Borden, 7 How. (U. S.) 1, indicates the possibilities which might result from a decision permitting the Legislature, or either of its component parts, to convene itself. The state of Rhode Island, until May, 1843, did not possess a Constitution such as those which had been adopted by the other states. It conducted its government under the charter granted by Charles II to the Colony of Rhode Island and Providence Plantations. In 1841 a portion of the people held meetings and formed associations, which resulted in the election of delegates to a convention to form a new Constitution, to be submitted to the people for their adoption or rejection. The convention framed such a Constitution, directed a vote to be taken upon it, and declared afterwards that it had been adopted and ratified by a majority of the people of the state. The Charter Government did not, however, acquiesce in these proceedings, but in May, 1843, another Constitution, framed by a convention called together by the Charter Government, went into operation. In consequence of these proceedings, the state, for a time, was placed under martial law. The Constitution of 1843 was eventually recognized as controlling. Although there were serious evils which were sought to be obviated by those who brought about the adoption of the Constitution of 1841, they sought to make a virtue of what they believed to be a necessity, by convoking the constitutional convention on their own initiative. The inevitable consequence of such action was a miniature civil war, which would be most likely to be precipitated in any state of the Union, if a Legislature, or a branch of it, should undertake to convene itself under conditions such as would be likely to

occur, if it should be now determined that such power may be exercised at any time, anywhere, and in any way, that the members of the Legislature or either of its branches or a part of them, may choose.

The soundness of our contention finds remarkable corroboration in the Constitution of Alabama adopted in 1901, where it was found necessary to make provision for the very situation which is presented in this case.

This was done in article 7, section 173, where after providing for the impeachment of various state officers before "the Senate sitting as a Court of Impeachment, under oath or affirmation, on articles or charges preferred by the House of Representatives," the Constitution proceeds:

> "If at any time when the Legislature is not in session, a majority of all the members elected to the House of Representatives shall certify in writing to the Secretary of State their desire to meet to consider the impeachment of the Governor, Lieutenant Governor, or other officer administering the office of Governor, it shall be the duty of the Secretary of State immediately to notify the speaker of the House, who shall, within ten days after receipt of such notice summon the members of the House by publication in some newspaper published at the capital, to assemble at the capitol at a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the Secretary of State, to consider the impeachment of the Governor, Lieutenant Governor or other officer administering the office of Governor. If the House of Representatives prefer articles of impeachment, the speaker of the House shall forthwith notify the Lieutenant Governor, unless he be the officer impeached, in which event he shall notify the Secretary of State, who shall summon, in the manner herein above provided for, the members of the Senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the House, for the purpose of organizing as a court of impeachment. The Senate when thus organized, shall hear and try such articles of impeachment against the Governor,

Lieutenant Governor or other officer administering the office of Governor as may be preferred by the House of Representatives."

Appendix A, which I shall submit with this argument, contains the Alabama provision with respect to extraordinary sessions of the Legislature. Here we find, therefore, full recognition of the proposition that neither the Legislature nor a branch thereof can convene itself, and that when it is sought to impeach a Governor, if he fails to call the Legislature together in extraordinary session to act on charges made against him, full constitutional machinery for such convocation by other methods must be provided; otherwise action must be deferred until the regular session of the Legislature.

In opposition to our contention, it has been urged by the impeachment managers that it is a general rule that, where the Constitution gives a general power, or enjoins a duty, it also gives, by implication, every opportunity for the exercise of the one or the performance of the other. This is, however, only a partial statement of the rule.

As shown in the leading case of Field v. People, 3 Ill. 79, it is modified by the further rule, that where the means for the exercise of a granted power are also given, no other or different means or powers can be implied, either on account of convenience or because they may be more effectual. The settled doctrine is, that construction for the purpose of conferring power should be resorted to with great caution, and only for the most persuasive reasons.

The present case is one which admirably illustrates the wisdom of this qualification of the rule invoked by those who claim that the Assembly has the right of convening itself. Not only would such an interpretation confer an extraordinary and unusual power, one which has never been heretofore exercised, either in England or in the United States, but it would entirely ignore the power which is now lodged under the Constitution in the Governor to convene the Legislature in extraordinary session, as supplementing the explicit provision of the Constitution whereby both houses of the Legislature are convened automatically on the

first Wednesday in January of each year. There is, therefore, no occasion for indulging in any implication in order to supply the means for convening the Assembly. They are fully provided for by the express terms of the Constitution, and where express power is granted, there is no occasion or justification for the implication of other or different power.

If the Assembly cannot convene itself and act when so convened, it scarcely requires argument to sustain the proposition that it cannot act without being convened, by independent and separate individual action.

It will suffice to consider the analogy presented by the authorities dealing with the acts of the directors of a modern corporation. For if they cannot act, unless regularly convened, *a fortiori,* the Legislature of the State, and its several branches, cannot so act.

When the Constitution refers to the functions performed by the Assembly in impeachment proceedings, it refers to action by the Assembly, as an entity, not to the assemblymen who compose it. The Assembly, that is, the constitutional organism known as such, has the power to impeach by the vote of a majority of all the members elected. The action taken is not that of the members but of the body which all of them taken together constitute. It is inconceivable that the members of that body acting separately and singly, and not as an assembled whole, can ever be considered as " the Assembly."

Directors or trustees of a corporation cannot vote and act as a board without coming together. Their assent to a proposition separately and singly is void. They are chosen to meet and confer and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner. Brinkerhoff Co. v. Boyd, 192 Mo. 597; Demarest v. Spiral, etc., Co., 71 N. J. L. 14; Audenreid v. East, etc., Co., 68 N. J. Eq. 450; Tradesman Pub. Co. v. Knoxville Car Wheel Co., 91 Tenn. 634; Re Haycraft, etc., Co. (1900) 2 Ch. 230; Pierce v. Morse-Oliver Co., 94 Me. 406; Buttrick v. Nashua R. R. Co., 62 N. H. 413; Columbia Bank v. Gospel Tabernacle, 127 N. Y. 361.

The separate assent of the board of trustees of a religious corporation to the performance of a corporate act is void. The

members must meet and confer before their action can have any validity. Peoples Bank v. St. Anthony's Church, 109 N. Y. 512.

A separate assent of a township committee to the construction of a street railway is illegal. West Jersey Traction Co. v. Camden Co., 53 N. J. Eq. 163.

Where a tax is assessed by two trustees in meeting assembled, who subsequently obtain the separate and private assent of the third trustee, the action taken is void. Keeler v. Frost, 22 Barb. 400; Schuman v. Seymour, 24 N. J. Eq. 143.

The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. Taymouth v. Koehler, 35 Mich. 22.

A majority of a school board cannot act separately and singly, no meeting being held. Herrington v. District, 47 Iowa 11.

In Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 208, the learned Vice Chancellor said, in a case which depended upon the validity of the action of the board of trustees of a church, where it appeared that a majority of the trustees, while acting as a council, had approved of the adoption of certain resolutions which indicated their intention with regard to the matter which was to be acted upon by the board of trustees:

> "The conference or council was a board clothed with the spiritual regulation and government of the church. It had nothing to do with the control or direction of its temporalities. The statutes vested those duties in the trustees. The fact that a majority of the trustees were present, acting as a council, does not make the resolutions of the council the act of the board of trustees. Suppose in the case of a bank, that at a general meeting of the stockholders certain resolutions should be adopted to sell land, or do any other corporate act, and it should be made to appear that all the directors of the bank were present assenting to what was done; the corporation would not be bound unless the directors at a meeting of the board, should concur in the resolutions.
>
> "The directors in the bank, and the trustees in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them,

they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class in which they are but a component part, be a valid corporate act. In thus acting they are distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear on the trustees, which, in their proper board, would be unheeded; and no one can say with certainty, that their vote in the latter event would have been the same.

"It was held in the Case of the Corporations, 4 Coke's Rep. 77, *b*, that where the power to make a by-law was in the mayor and aldermen, a by-law made by the mayor, aldermen and commonalty was void. And see Ex parte Rogers, and note *a*, 7 Cowen 526, 530; The King v. Miller, 6 Term Rep. 268; Willcock on Municipal Corporations, 101, 102; Brown v. Porter, 10 Mass. 99, per Sewall, J."

This principle has been extended to the action of political bodies.

Thus, in People ex rel. Henry v. Nostrand, 46 N. Y. 375, 383, the validity of the action of two members of a board of highway commissioners, which was by statute composed of three members, during the existence of a vacancy in the board was under consideration. Chief Judge Church said:

"The statute appointing them confers the power upon three and provides that whenever the number of commissioners is reduced below three the vacancy shall be filled by the county judge. It is quite evident that the Legislature intended to intrust the powers conferred to three persons,

and that the judgment of that number should be requisite to the discharge of their duties. I am not aware of any principle, which enables two persons to discharge a public duty expressly devolved upon three without consultation with the third. At common law two could act in such a case, but it was indispensable that the three should meet and deliberate upon the subject. (Crocker v. Crane, 21 Wend. 211; 7 Cow. 526, note *a*; 22 Barb. 400.) . . . A majority may perform the duty after all have met and deliberated, but two cannot do this when the office of the third is vacant any more than they could if the third had not met or been consulted."

It is likewise an elementary proposition, that stockholders can hold elections and transact such other business as they as a body are qualified to transact, only at corporate meetings duly called and convened. Consequently, all action taken elsewhere than at such a meeting, and all separate consents by individual stockholders, are void. Commonwealth v. Cullen, 13 Pa. St. 133; Livingston v. Lynch, 4 Johns. Ch. 573, 597; Torrey v. Baker, 83 Mass. 120; De La Verne Co. v. German Sav. Institution, 175 U. S. 40.

In other words, a corporation and its stockholders are separate and independent entities, and the action of stockholders can only bind the corporation when they are duly convened at a meeting held for the purpose of performing a corporate act. Medina G. & E. L. Co. v. Buffalo L. T. & S. D. Co., 162 N. Y. 67; Saranac &c. R. R. Co. v. Arnold, 167 N. Y. 368; MacDonnell v. Buffalo L. T. & S. D. Co., 193 N. Y. 92; England v. Dearborn, 141 Mass. 590.

What is true in the case of a corporation as to the necessity of notice to its directors with respect to the holding of a special meeting and of the business to be transacted thereat, must be likewise true of a self-convened meeting of the Legislature or of one of its branches, especially when it is claimed that it is to act not in the exercise of its usual legislative functions, but judicially.

A special meeting at which less than all of the board of

directors of a corporation attend, no notice having been given to the other directors as to the time for holding the meeting and the business to be transacted by it, invalidates the action of those who attend. Every director has not only the duty, but the right, to attend, in order that he may present to his associates the views which he entertains and be enabled to pursuade them to adopt his views rather than those which they are inclined to act upon.

The very purpose of a deliberative body would be destroyed if only a portion of those who have a right to attend and to be heard and to vote, are enabled to avail themselves of those privileges, not so much for their own advantage, but for the benefit of those whom they represent.

Thus in Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78, it was said:

> "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings, that is, such as are provided for by charter or the by-laws fixing time and place, then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting."

A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. First National Bank v. Asheville Co., 116 N. C. 827.

A special meeting of directors is void if no notice is given to absent directors. The fact that a director who owns or controls a majority of the stock is present, does not validate such a meeting even though he favor the action taken. Hill v. Rich Hill Co., 119 Mo. 9.

To the same effect are Smith v. Dorn, 96 Cal. 73; Harding v.

Vandewater, 40 Cal. 77; Moore v. Hammond, 6 Barn. & Co. 456; Doyle v. Mizner, 42 Mich. 332.

Notice to all the trustees of a religious corporation is necessary. Thompson v. West, 59 Neb. 677.

These rules have been applied to the governing bodies of municipal corporations. Smyth v. Darley, 2 H. L. 789; Rex v. Carlisle, 1 Strange 385.

Bonds issued under authority of a meeting of two commissioners of a town, without notice to a third commissioner, are not valid. Pike County v. Rowland, 94 Pa. St. 238.

Having sufficiently considered the propositions affecting the power of the Assembly to convene itself, and having shown that such power does not exist, I come to the all-important point that the Assembly had no power to impeach at the extraordinary session, in the absence of action by the Governor enabling it to deal with that subject.

Under the Constitutions of 1821 and 1846 the Governor was empowered to convene the Legislature or the Senate only on extraordinary occasions. It was left absolutely to his discretion, as it is under the present Constitution, to determine as to whether he would convene either the Senate or both houses in extraordinary session. It was never suggested that, if he declined to do so, the Senate could convene itself or both houses could convene themselves.

Unquestionably there can be no extraordinary session of the Senate or of the Legislature unless the Governor calls it into being. His discretionary power in that regard is absolute. It cannot be controlled either by the individual legislators, by statute, by resolution, or by rule; nor can it be compelled by judicial action. However great the necessity for such a session; however imperative the public necessity, his *non volo,* is conclusive. The power conferred on the Governor is political power in the exercise of which, as was said in Marbury v. Madison, 1 Cranch 137, "he is accountable only to his country in his political character, and to his own conscience, and whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion."

In re Governor's Proclamation, 35 Pac. 530, Elliot, J., speaking for the Supreme Court of Colorado, said:

> "The Governor is thus invested with extraordinary powers. He alone is to determine whether there is an extraordinary occasion for convening the Legislature, and he alone is to designate the business which the Legislature is to transact when thus convened."

In Farrelly v. Cole, 56 Pac. 592 (s. c. 60 Kansas 356, 54 L. R. A. 464), Smith, J., said:

> "We will suppose again that the Constitution empowers the executive to convene the Legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the Constitutional sense. It is obvious that the question is addressed exclusively to the executive department and neither the Legislature nor the judicial department can interfere to compel action, if the executive decides against it or to enjoin action, if, in his opinion, the proper occasion has arisen."

See also Re Legislative Adjournments, 18 R. I. 824; s. c. 22 L. R. A. 716.

In Pillsbury's Petition, 217 Pa. 227 (1907); s. c. 66 Atl. Rep. 348; aff'd., 207 U. S. 161, the Governor had called the Legislature together in extra session by proclamation, and then issued a second proclamation, which right was questioned. Brown, J., at page 230, said:

> "Whether the General Assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The Constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread epidemics or general calamities of any kind, requiring instant convening of the Legislature, and, in the power given to the Governor to call it, no time for notice is too short, if it can reach the members of the General Assembly."

This leaves to the discretion of the Governor the calling together of the Legislature. There is not even the suggestion that in any of the serious exigencies enumerated (which are of much more import to the welfare of the people of the State than even the misconduct of a Governor) the Legislature can convene of its own volition for the purpose of dealing with them.

The power which was thus conferred on the Governor was intended to be the counterpart of that which was vested in the English sovereigns with respect to the convocation of Parliament. It was found in actual practice that when the Governor convened the Legislature in extraordinary session it was apt to prolong its deliberations, necessarily involving the State in large expense, and especially where the Governor and the Legislature represented different political parties, occasioning irritation and undue friction in the transaction of the public business.

It was for that reason that in the constitutional convention of 1867 it was deemed desirable that there should be a limitation placed upon the business which could be transacted at an extraordinary session, and various projects were presented and debated at some length bearing on this subject.

In volume 2 of Lincoln's Constitutional History of New York, page 330, the author summarized the debate on this proposition as follows:

> "The committee on legislative powers and duties reported a section relating to extraordinary sessions of the Legislature, and which provided, in substance, that the Governor should specify in his proclamation the subjects to be considered at such session, and the Legislature was prohibited from considering any others. The original report of the committee on the Governor and Lieutenant Governor did not contain this recommendation, but, in the progress of the consideration of the subject, the provision was included in a section in the executive article reported by the committee on revision. Mr. Church sought to amend the section so as to permit the Legislature to transact business not included in the Governor's proclamation. He thought the Governor should not have the power to limit the business to be transacted by the

Legislature at an extraordinary session. The convention declined to accept Mr. Church's amendment, but did adopt a suggestion by Judge Comstock, that laws enacted at a special session must relate to the subjects included in the proclamation. Judge Comstock said this was intended to confine legislation to subjects specified in the proclamation, but to permit the Legislature to exercise the power of appointment at a special session, either by electing officers, or acting on nominations by the Governor."

For the full text of this debate, we refer to volume 5 of the Proceedings of the Constitutional Convention of 1867, pages 3614 to 3619.

The proposed amendment as thus formulated, and as submitted at the election held in 1869, reads as follows (2 Lincoln, p. 439):

"Art. IV, sec. 6. Extraordinary sessions. The Governor may convene the Senate on extraordinary occasions, and may call special sessions of the Legislature by proclamation, in which shall be stated the particular object or objects for which they are called; and no law shall be enacted at any special session except such as shall relate to the objects stated in the proclamation."

The election of 1869 resulted in the rejection of all the projects of the convention of 1867, except the judiciary article. It was recognized, however, that the Constitution required further amendment and thereupon, in compliance with the recommendations of Governor Hoffman contained in his annual message of 1872, in which he advocated constitutional reform, a commission of thirty-two eminent citizens was elected to consider and report to the Legislature recommendations of changes in the Constitution. Such a commission was appointed, six of the number having been members of the convention of 1867, and all of them being lawyers of high standing and great experience. Among them were George Opdyke, Augustus Schell, William Cassidy, David Rumsey, Erastus Brooks, Francis Kernan, John D. Van Buren, Benjamin D. Stillman, Samuel W. Jackson, Daniel Pratt, Lucius

Robinson, George B. Bradley, Horace V. Howland and Sherman S. Rogers (2 Lincoln, p. 470).

The commission, after protracted deliberation, presented a report to the Legislature proposing various amendments, which were finally submitted to the people at the election held in November, 1874, and adopted to go into effect on January 1, 1875. Among other amendments thus ushered into existence was the amendment to article 4, section 4, which added to the then existing Constitution, the following clause:

> "At extraordinary sessions no subject shall be acted upon, except such as the Governor may recommend for consideration."

Mr. Lincoln shows (vol. 2, pp. 512, 513) that this clause was proposed by Mr. Van Buren. The comment which he makes upon it is:

> "In the preceding chapter I have given the history of a similar provision in the convention of 1867, where, after much discussion, the limitation was confined to the enactment of laws relating to the objects stated in the proclamation, leaving the Legislature free to act on appointments and other incidental matters. The commission, in its report to the Legislature, said concerning this clause that 'in limiting the action of the Legislature at extraordinary sessions, the commissioners believed that on such occasions it was unwise to engage in general legislation, and, therefore, it is proposed to confine the Legislature to the subjects recommended by the Governor.'"

It is at once observed that the language adopted by the commission of 1872 is more comprehensive and far reaching than the language proposed by Judge Comstock at the convention of 1867. The latter merely restricted the Legislature when it convened in extraordinary session to the passage of such laws as were recommended by the Governor, but allowed the Legislature unlimited scope with respect to all other matters.

With full knowledge of such purpose and of the debates held in the convention of 1867, which were still ringing in their ears, the commissioners deliberately adopted phraseology which ex-

cluded all action by the Legislature, whether legislative or otherwise, except such as the Governor might recommend for consideration. "No subject shall be acted upon, except such as the Governor may recommend for consideration."

It was not that no law should be enacted, except, etc. It was not that there should be no legislation, except, etc.; nor that no bill should be passed except, etc.; nor that no subject should be acted upon by the Legislature; nor was any other similarly limited form of expression used. Its prohibition related to all action upon any subject, except, etc. No subject shall be acted upon, except, etc. No words could be more general and all-embracing. Every possible subject on which a legislative body, or either of its component parts, may act is covered, and any possible action on any conceivable subject is prohibited unless the constitutional condition precedent is complied with. The prohibition against action was directed not only against the Legislature but against its integral parts, the Assembly as well as the Senate. Omne majus in se continet minus.

Nor is it possible to coin a phrase which excludes ambiguity more completely than does that which was so chosen. We have already proved that the choice of this language was not accidental; it was intentional and deliberate for the very purpose of obviating what had been recognized as an existing evil.

The men who chose this language were familiar with the history of the State and its jurisprudence. They were men of culture, who understood the meaning of words and who knew what it meant to frame the organic law.

The word "subject" has long been defined and understood to mean that which is brought under thought or examination; that which is taken up for discussion. (People v. Parvin (Cal.), 14 Pac. 783, 784, quoting Webster's Dictionary.)

The Century Dictionary gives as one of the definitions of the word "subject" the following:

> "II. 4. That on which mental operation is performed; that which is thought, spoken or treated of."

As an illustration, the following lines from Pope's translation of the Iliad are given:

"But this, no more the subject of debate,
Is past, forgotten, and resign'd to fate."

When, therefore, the Constitution was thus amended, so as to limit the Legislature and the Senate to action at extraordinary sessions on such subjects only as the Governor recommended, it meant, and could mean nothing else than, that the Legislature and both of its houses were powerless to take any action, except such as the Governor expressly recommended. These words did not relate merely to legislation, but to the power of making appointments, or of electing such public officers whom under the law the Legislature was empowered to choose. They necessarily also included the power to impeach, because certainly that was a "subject"— one which would presumptively call for thought, examination and discussion. Hence, impeachment came not only within the very terms of this constitutional provision, but also within the reasons which actuated those who had framed it to make it a part of our organic law.

Ordinarily, whenever there has been an impeachment the preliminaries, as well as the debate, have occupied many days. It is not to be expected that in a deliberative assembly the presentation of a large volume of testimony and of articles of impeachment would be followed by a vote at the dead of night and within a few hours after the presentation of the subject for consideration. All the impeachment proceedings which had occurred prior to 1872 occurred before the days of the long distance telephone, and rapid transit was a thing still undreamed of. In those days impeachment was considered a matter of such seriousness that weeks and months elapsed before resort was had to that drastic remedy. There was, therefore, a strong reason why the subject of impeachment should not be treated as *sui generis*.

As bearing on the interpretation to be given to this addition to the Constitution (if interpretation has any office to perform with respect to so lucid an ordinance) it is important to bear in mind that when the commission of 1872 met, this State had just passed

through a unique experience with respect to the subject of impeachment. Five proceedings had but shortly before been completed which dealt with the removal from office of high officials; the trial of Judge Smith, of Herkimer county, of Mr. Dorn, Canal Commissioner, of Judge Barnard, of Judge McCunn and of Judge Curtis. Never before in the history of any state of the Union had the public attention been so persistently directed to the removal from office of important functionaries by the action of one or both houses of the Legislature than at this very time. In 1868 took place the trial of the most important impeachment in history — that of Andrew Johnson. In the same year occurred the remarkable impeachment of Governor Reed of Florida which attracted widespread interest (1 Foster on the Const., p. 679 et seq.). Governor Clayton of Arkansas was impeached and Governor Butler of Nebraska was convicted on an impeachment at about the same time, and in 1872 came the second impeachment of Governor Reed.

It would be presumptuous even to suggest that the distinguished public men who composed the commission of 1872 should, in the face of these facts, have overlooked or forgotten that the impeachment or removal from office, even of Governors, was a subject with which the Legislature might be called upon to deal.

The fact, therefore, that they chose to limit the power of the Legislature and of the Senate at an extraordinary session in the manner that they did, employing the phraseology which they adopted, makes it evident that they acted with full appreciation that, unless the Governor recommended action on the subject of removal from office or of impeachment in a communication to the Legislature, that subject was to be excluded from legislative consideration to the same extent as any other business would be excluded, which he did not specifically bring to the attention of the Legislature or of the Senate.

Under the Constitution as it had stood previously, the Governor had the power to convene the Legislature or the Senate only on extraordinary occasions. There was a reason for permitting this to be done with regard to the Senate only which did not apply to the Assembly. Many appointments to office can only be made

by the Governor by and with the advice and consent of the Senate, and it was therefore desirable that to enable the public business to be carried on without let or hindrance the Senate should be called together for the purpose of acting on such appointments. The very fact, however, that it was expressly permitted that the Senate might be convened alone, in extraordinary session, and that there was no provision which permitted the Governor to call the Assembly alone to convene on an extraordinary occasion, presents a formidable reason for the argument that it was not intended that the Assembly should at any time be convened alone, and that if convened as a part of the Legislature at an extraordinary session it could act only on such such subjects as were recommended to it by the Governor. Hence, without his recommendation, the subject of impeachment could not be taken under consideration by it.

We will not now discuss the question as to whether or not it would be likely that the Governor would recommend the consideration of his own impeachment. That phase of the case will be taken up at a future stage of the discussion.

We wish to emphasize, however, that the Governor is only one of the many public officers who can be proceeded against by impeachment. There are one hundred Supreme Court justices, ten judges sitting in the Court of Appeals, upwards of sixty county judges, almost as many surrogates, and numerous executive State officers. We must therefore consider the language of the Constitution in its application to all of these numerous public officials.

It is believed that New York was the first of the states which undertook to limit the power of the Legislature at an extraordinary session. In Appendix A, I have furnished a transcript of the Constitution of the several states which refer to special sessions of their Legislatures, and which it is believed will throw a flood of light upon the meaning of the language contained in our Constitution and will sustain the correctness of the interpretation which we are now seeking to give it.

The effect of provisions in the Constitutions of other states of cognate character, on the interpretation of similar provisions

in our Constitution, is admirably discussed by Mr. Justice Bockes in People ex rel. Bush v. Thornton, 25 Hun 466, 467, as follows:

"In England bribery in procuring an office created a disability to hold it (5 and 6 Edw. VI Chap. 16; and 49 Geo. III, Chap. 126). In Iowa it is provided by law that an election to a county office may be contested 'when the incumbent has given or offered to any elector . . . any bribe or reward in money, property or thing of value for the purpose of procuring his election.' Carrothers v. Russell (*supra*) was decided in view of that statutory provision. In Kansas it is declared by constitution that no person guilty of giving or receiving a bribe, . . . shall be qualified to vote or to hold office. The case of the State v. Stevens (23 Kan. 456) was a proceeding for mandamus and has no application to the question of disability here under examination. In Oregon it is declared by Constitution that every person shall be disqualified from holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to procure his election. It was in view of this provision that the State v. Dustin (*supra*) was decided. In Wisconsin the statute declares a disqualification to hold office against such persons as should obtain it by bribery; and in Ohio disqualification is declared by law. Research has not been further extended, and it may be that similar constitutional or legislative inhibitions may exist in some other states of the Union. We have not in this State any similar provision, either in the Constitution or laws. It may be here pertinently asked, What need of expressly declaring this inhibition in those states if it existed there, as it claimed to exist here, without so declaring it? The disability was doubtless made constitutional in some states and was declared by law in others, under the belief, well founded, too, as we think, that it was necessary to make such express declaration and provision in order to create the disability thus pronounced. We are cited to no case in which it has been held that disability to hold office exists in the absence of a constitutional or legislative provision so declaring."

These constitutional provisions, as by reflected light, enable us to understand and appreciate the all-inclusive character of the cognate clause in our Constitution. In some of them it is provided that there shall be no legislation upon subjects other than those designated in the proclamation of the Governor. In others, that no other business than that specified in the Governor's proclamation shall be transacted.

In still others "no other business shall be transacted than that named in the proclamation"; or the Legislature, when convened, shall have no power to "legislate on any subjects" other than those specified; or the Governor shall have power to convene the Legislature for "the transaction of executive business"; or the Legislature shall "transact no legislative business" other than that for which it is specially convened. Again it is provided, that no laws shall be enacted at called sessions "except such as shall relate to the object stated, or the objects specially enumerated."

The Constitution of Mississippi provides that the Legislature, when so convened, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the Governor or by which the session is called, except impeachments and examination into the accounts of state officers.

There is of course a manifest distinction between a prohibition against legislation and one against acting on any subject whatsoever, other than that recommended by the Governor, and the significant fact that the framers of the Constitution of Mississippi, which was undoubtedly modeled upon the Constitution of New York, found it necessary to except impeachments from the effect of the language which was borrowed from our Constitution, in order to enable the Legislature, without regard to the action of the Governor, to deal with that subject, absolutely demonstrates that, but for such exception, the institution of an impeachment at an extraordinary session without the Governor's recommendation, would have been prohibited.

The President.— You may suspend now. We will hear you further on Monday. Before the Court adjourns, I desire to announce the appointment of a committee required by rule 9 to maintain order and enforce the proper performance of their

duties by all officers and attendants of the Court. The committee will consist of Senator Murtaugh, Senator Walters and Judge Hogan.

Mr. Parker.— Presiding Judge, before the Court adjourns we would like a direction for the witnesses who have been subpoenaed here on the part of the managers, that they appear here on Monday at the opening of the Court.

The President.— The clerk will announce that all witnesses summoned by either side to attend at this meeting of the Court, must be in attendance at the time to which the Court adjourns, next Monday, at 2 o'clock.

The Clerk.— All witnesses summoned to appear by either side shall be here at the time of the meeting of the Court on Monday next at 2 o'clock.

Thereupon, at 3.35 o'clock p. m., the Court adjourned to meet again on Monday, September 22, 1913, at 2 o'clock p. m.

(The challenges entered today by counsel for the respondent against Senators Sanner, Ramsperger, Frawley and Wagner are printed immediately following.)

CHALLENGE TO SENATOR JAMES J. FRAWLEY

STATE OF NEW YORK
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK, BY THE ASSEMBLY THEREOF,
against
WILLIAM SULZER, As Governor

Counsel for the respondent respectfully protest against Senator James J. Frawley, one of the senators of the State, being sworn as a member of this Court, and respectfully challenge him for the principal cause that he is not indifferent as between the people of the State and this respondent.

And as the grounds for this challenge, counsel for the respondent respectfully submit the following:

That heretofore on May 3, 1913, the Legislature of the State of New York during its regular session by concurrent resolution of that date, did authorize the appointment of a joint legislative investigating committee for the following purpose and none other, to wit:

> "To examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, which are supported either wholly or in part by State moneys, or which report officially to the State; into the functions of any or all State departments concerned in the management, supervision or regulation of any of such departments, the methods of making purchases, fixing salaries, awarding contracts for supplies, buildings, repairs and improvements, the sale of manufactured articles, and the conduct generally of the business of all such institutions and departments, for the purpose of reporting to the next session of the Legislature such laws relating thereto, as the committee may deem proper."

That thereupon the president of the Senate and the speaker of the Assembly appointed the said Senator James J. Frawley, Senator Felix J. Sanner, Senator Samuel J. Ramsperger and Senator Elon R. Brown, as the Senate members of such joint committee; that thereafter and at an extraordinary session of the Legislature on June 25, 1913, by a concurrent resolution of the Senate and Assembly, claimed to have been passed and adopted by a majority of the members duly elected to each branch of the Legislature, it was attempted to confer further and additional power upon said legislative committee, and to investigate among other things:

> "For the information of the Legislature, the whole subject of any unlawful or improper methods or wrongful or unlawful acts aforesaid and of receipts and expenditures of candidates for an elective office to be filled by the votes of the electors of the whole State be referred to a certain joint legislative committee of the Senate and Assembly to ex-

amine into the methods of financial administration and conduct of all institutions, societies or associations of the State, etc., heretofore appointed under joint resolutions, dated the second day of May, 1913, to ascertain and report to the Legislature at this extraordinary session, or, if not ready, as soon thereafter as possible, whether any unlawful or improper methods have been employed, used or pursued or wrongful or unlawful acts done by any private person or public officer to influence the votes of legislators on election or primary legislation at the last regular or the present extraordinary session of the Legislature; and further to investigate into, ascertain and report upon all expenditures made by any candidates voted for at the last preceding election by the electors of the whole State and upon all statements filed by or on behalf of any such candidate for moneys or things of value received or paid out in aid of his election and their compliance with the present requirements of law relating thereto.

"Said committee to have the power to subpoena witnesses on these subjects the same as provided in the resolution of May second, above referred to."

That the said James J. Frawley, Felix J. Sanner, and Samuel J. Ramsperger took an active part in the investigation and examination authorized or claimed to have been authorized by said resolutions, and thereafter and on the 11th day of August, 1913, said joint committee submitted a report to the Legislature wherein the said named senators in substance adjudged the respondent guilty of the charges contained in the articles of impeachment now exhibited against him, as will more fully appear from a copy of said report hereto annexed and made a part of this challenge, marked Exhibit A.

That upon the submission of such report to the Assembly the said articles of impeachment now preferred and exhibited against this respondent were formulated following the findings and conclusions of said committee and grounded thereupon.

And after the finding and filing of such articles of impeachment the said investigating committee continued their examina-

tion and investigation into the conduct and actions of this respondent, in all of which the said Senator James J. Frawley took part.

Wherefore, counsel for the respondent submit that the said Senator James J. Frawley does not stand indifferent as between the people of the State of New York and this respondent, but has taken an active part in investigating charges against him, and in formulating the report thereon, and has in advance passed upon the question of the guilt or innocence of the respondent upon the charges and accusations set forth in said articles of impeachment; and counsel for the respondent respectfully ask this court to determine this challenge in such manner as shall secure to this respondent a tribunal, all of whose members shall be impartial and free from any prejudice or bias against the said respondent.

D-CADY HERRICK
IRVING G. VANN
AUSTEN G. FOX
LOUIS MARSHALL
HARVEY D. HINMAN
Of Counsel for Respondent

EXHIBIT A

STATE OF NEW YORK

REPORT OF THE JOINT LEGISLATIVE INVESTIGATING COMMITTEE

SUBMITTED, AUGUST 11, 1913

To the Senate and Assembly of the State of New York in Extraordinary Session Assembled:

The joint legislative investigating committee heretofore appointed with power, among other things, to investigate into, ascertain and report at this extraordinary session upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements made by and on behalf of any such candidate for moneys or things of value received or paid out in aid of his election and their

compliance with the present requirements of law relative thereto, does hereby report as follows:

That this committee has held public hearings, taken sworn testimony and investigated generally the specific matters above referred to; and this committee is of the opinion that said hearings and the evidence given thereat have disclosed such unlawful conduct by one candidate at the last general election as to warrant and require an immediate and separate report in respect thereto, in order that the Legislature may take such action thereon at this extraordinary session as the public interest and welfare demand.

William Sulzer, a candidate for Governor at the last preceding election and now Governor of this State, in accordance with the requirements of the so-called corrupt practices article of the election law and the statutes in relation to campaign contributions and expenses, filed on November 13, 1912, a statement under oath setting forth in effect that all the money received by him in aid of his election, directly or indirectly, as candidate of the Democratic party for the office of Governor of the State of New York in connection with the general election held in the State of New York on the 5th day of November, 1912, was the sum of $5,460 and no more. The following is the oath made and filed with the Secretary of State by William Sulzer:

STATE OF NEW YORK }
CITY AND COUNTY OF NEW YORK } *ss.:*

Wm. Sulzer, being duly sworn, says that he is the person who signed the foregoing statement; that said statement is in all respects true and that the same is a full and detailed statement of all moneys received, contributed or expended by him directly or indirectly by himself or through any other person in aid of his election.

WM. SULZER

Sworn to before me this 13th
day of November, 1912.

ALFRED J. WOLFF
Commissioner of Deeds, No. 72, New York City

A preliminary investigation of certain of the 68 contributions aggregating said amount of $5,460 and set forth in said statement, disclosed that the checks for some of these conceded contributions

were first endorsed in the name of William Sulzer and thereafter were endorsed by one L. A. Sarecky for deposit in the Mutual Alliance Trust Company at 35 Wall street, New York City. There was also produced before the committee at its first hearing on this subject a check for $2,500 for Jacob H. Schiff's campaign contribution to William Sulzer, signed Kuhn, Loeb & Company, to the order of said Sarecky, likewise deposited by said Sarecky in said account in the Mutual Alliance Trust Company.

With these facts and this evidence before it, this committee, on July 30, 1913, called the said Sarecky to the witness stand, who, after being duly sworn, admitted that for years he had acted as confidential secretary to William Sulzer, but refused to answer any questions relative to the campaign statement of William Sulzer, or to any campaign contributions, or to deposits in the Mutual Alliance Trust Company; and it is and was the opinion of your committee from the answers of said witness and his demeanor on the stand that his refusal to testify was at the instance and direction of Governor Sulzer.

It further appeared at the said first hearing on this subject that a campaign contribution of $500 in aid of the campaign of William Sulzer from Abram I. Elkus, represented by his check to the order of William Sulzer, had been received and personally endorsed by the said Sulzer and deposited to his personal account in the Farmers Loan & Trust Company, in which company the said Sarecky admitted that William Sulzer had for a long time had an account. At a subsequent hearing it appeared that the deposit slip accompanying said check when deposited in the Farmers Loan & Trust Company was also in the handwriting of William Sulzer. Neither the Schiff contribution nor the Elkus contribution was included in the sworn statement of William Sulzer dated and verified November 13, 1912.

Upon these facts the committee proceeded to have a further hearing in the city of New York at which time there was produced a true transcript of the account of said Sarecky in the Mutual Alliance Trust Company, and a true transcript of the account of said Sulzer in the Farmers Loan & Trust Company according to the original books of account of the said trust companies.

By the transcript of the Mutual Alliance Trust Company it was proved that the total amounts deposited during the period of the campaign in the account of L. A. Sarecky and evidently for campaign purposes, instead of being $5,460 was $12,405.93; and William Sulzer not only knew that Sarecky's account contained his campaign contributions, or some of them, but he authorized their deposit therein as is shown by a letter signed by said Sulzer, dated October 22, 1912, and addressed to the Mutual Alliance Trust Company as follows:

"*October 22, 1912*

Mutual Alliance Trust Company:

GENTLEMEN: This is to inform you that I have authorized my private secretary, Mr. L. A. Sarecky, to indorse my name to any checks donated to my campaign fund and to deposit same to his credit.

Very truly yours

WILLIAM SULZER"

The original deposit slips with the Mutual Alliance Trust Company for said period were also produced before your committee and instead of showing that contributions had been received from 68 persons aggregating in amount $5,640, the fact was that there had been deposited 94 checks from various contributors, together with a sum in cash or currency of between $1,500 and $2,000.

At this same hearing there was also produced before your committee a personal check for campaign contribution by William F. McCombs, then chairman of the Democratic National Committee, for $500 to the order of William Sulzer, thereafter deposited by Sarecky in the Mutual Alliance Trust Company and not reported by William Sulzer in his statement sworn to November 13, 1912.

There was further produced at said hearing in New York City a check by Henry Morgenthau, then chairman of the finance committee of the Democratic National Committee, for $1,000 to the order of William Sulzer, which check was endorsed personally by William Sulzer and although a campaign contribution, was deposited by him, accompanied by a deposit slip in his own handwriting, in his personal account in the Farmers Loan and Trust Company.

Thereafter there was produced a full transcript of the Farmers Loan and Trust Company's account of William Sulzer from September 1, 1912, to January 1, 1913, with the original deposit slips,

from which it appeared that the amount of deposits between said dates to the account of William Sulzer was $24,395.31; that on October 8th and 10th, when William Sulzer was in New York City, he deposited in checks and currency in said account the sum of $7,900, of which amount the said Morgenthau $1,000 check was a part; that on October 12, 1912, during the campaign, William Sulzer further deposited currency amounting to $2,500 and a check for $1,000; and further on December 16, 18, and 28, 1912, he deposited $5,100 in currency — all in said Farmers Loan and Trust Company.

Your committee further reports that having received authentic information that William Sulzer had used campaign funds for the purpose of buying securities or speculating on margins in Wall street, some of them being carried on in the name of Frederick L. Colwell, a personal friend, as a dummy for Sulzer. It attempted to have produced the books of account of two brokerage firms in New York City, namely: Messrs. Harris & Fuller and Fuller & Gray; and also subpoenaed the said Frederick L. Colwell to testify.

That thereupon at first the firm of Harris & Fuller, or the members thereof, refused to produce their accounts with William Sulzer, and Melville B. Fuller, of said firm, refused to answer any questions as to said account, and in like manner Frederick L. Colwell refused to answer questions as to any account of stock transactions relative to or connected with William Sulzer. It further appeared from the answers of said witnesses, their demeanor on the witness stand and from authentic information in the possession of the committee, that they so refused to answer questions at the instance and request of Governor Sulzer and that Fuller had had an interview with Governor Sulzer in Albany after being served with the subpoena, at which interview it was demanded by Governor Sulzer and agreed that said Fuller should refuse to give any information respecting said account.

That thereafter the said Fuller was threatened with punishment for contempt by the Legislature, and finally appeared at a subsequent hearing, and produced a transcript of the account of William Sulzer, which account, for the purposes of keeping its existence secret from other customers of the firm was known, numbered and designated as account 63. This account shows that

William Sulzer was carrying on margin in the said office of said brokers:

500 shares of C. C. C. & St. L. (Big Four) stock,
200 shares of American Smelters and
100 shares of Southern Pacific.

And that on January 1, 1912, while the said Sulzer was chairman of the Foreign Affairs Committee in the House of Representatives, and a member of said house, he owed the firm of Harris & Fuller $48,599.38 on said speculative account. It further appears that after his election as Governor the said Sulzer paid by deposits of cash or checks on his debt to said Harris & Fuller the sum of $21,000, and we call attention to the fact that within two weeks after his election, on November 18, 1912, he paid them in currency $10,000, and on December 16, 1912, he paid them in currency $6,000, although none of these sums were drawn from the Farmers Loan & Trust Company. That in the month of June, 1913, Governor Sulzer was being continually requested by Harris & Fuller to make payment on account of his margins, which had become very weak and he was notified either to pay or take up the account and transfer it to some one else, with the result that on July 15, 1913, Lieutenant Commander Louis M. Josephthal paid for the said Sulzer the amount then remaining due of $26,739.21. That said Josephthal is a member of Governor Sulzer's military staff, being the only member of Governor Dix's staff who was retained by Sulzer.

There was further produced before your committee under subpoena a certain account of Frederick L. Colwell, the friend and dummy of William Sulzer above referred to, with the firm of Boyer, Griswold & Company, brokers of New York City, wherefrom it appeared that on the 16th day of October, 1912, during the campaign, the said Colwell bought outright 200 shares of C. C. C. & St. L. stock, commonly known as Big Four, for the sum of $12,025, and that said Colwell paid for said stock on that day with the following funds:

Check of William Sulzer.....	$900 00
Check of Theodore W. Meyers.....	1,000 00
Check of John Lynn.....	500 00
Check of Lyman A. Spalding.....	100 00
Check of Edward F. O'Dwyer.....	100 00
Check of John W. Cox.....	300 00

Check of The Frank V. Strauss Company.....	$1,000 00
Check of John T. Dooling.....	1,000 00
Currency.....	7,125 00
	$12,025 00

The evidence further showed that the check of William Sulzer for $900 was drawn on the Farmers Loan & Trust Company account above referred to, and no one can doubt but that all of these checks were for campaign contributions, especially as Spalding testified that his check was given for that specific purpose, and that it went in with other checks contributed for campaign purposes by members of the Manhattan Club.

The committee had produced before it another account for the purchase of 200 shares of Big Four stock from the firm of Fuller & Gray, paid for by $11,825.00 in currency between the 21st and 31st days of October, 1912, during the campaign, this account being known as number 500, for the purpose of concealing the fact that the account belonged to William Sulzer; and this stock was delivered by devious ways to the dummy, Colwell, who met the messenger by appointment at the Nassau National Bank, in New York City.

This same Colwell, when again subpoenaed for another hearing, after having refused to testify as above stated, failed to appear when his name was called, and is now in contempt of the Legislature as is also the former confidential secretary of William Sulzer, Louis A. Sarecky.

The foregoing is a summary of the salient facts and evidence in relation to campaign contributions and the conversion thereof; and one of the most significant features of this evidence, aside from and in addition to the large checks received for campaign purposes and not accounted for in the sworn statement, is the large amount of currency which William Sulzer had and used, in the purchase or protection of stocks during the three months between the day that he was nominated and the day he took office as Governor, namely:

October 16, 1912, for the purchase of Big Four stock	$7,125 in currency
October 21 to 31, 1912, for the purchase of Big Four stock.	11,825 in currency

October 8, 1912, deposited in the Farmers Loan & Trust Co.....	$1,400 in currency
October 12, 1912, deposited in the Farmers Loan & Trust Co.....	2,500 in currency
December 16, 1912, deposited in the Farmers Loan & Trust Co.....	1,100 in currency
December 18, 1912, deposited in the Farmers Loan & Trust Co.....	1,000 in currency
December 28, 1912, deposited in the Farmers Loan & Trust Co.....	3,000 in currency
November 18, 1912, deposited with Harris & Fuller.....	10,000 in currency
December 16, 1912, deposited with Harris & Fuller.....	6,000 in currency
Total currency between nomination and inauguration	$43,950 in currency

Your committee leaves to the Legislature the inference to be drawn from the possession and use of this currency.

During the time of these hearings and investigations William Sulzer, as Governor, has done everything in his power to withhold the truth and obstruct the production of evidence and the course of justice. At his instance and direction both Sarecky, his secretary, Colwell, his dummy, and Harris & Fuller, his brokers, have refused to testify before the committee. His influence in the promotion of Sarecky to an important and lucrative position in the State Hospital Commission as deportation agent — substituting an inexperienced young stenographer for an experienced physician in that position — could only be a reward for Sarecky's silence in protecting the Governor from damaging disclosures.

Governor Sulzer made a false public statement, when on July 30, 1913, he said that he was away campaigning and that he did not know of the campaign contributions omitted from his sworn statement. The Elkus check was endorsed by Sulzer personally and he acknowledged the letter of Elkus transmitting it as a campaign contribution.

We submit to the Legislature that it was false when William Sulzer swore that he had received only $5,460 of campaign contributions and that he did so with full knowledge that he had received an amount many times that sum and had converted the same to his private uses; that he used contributions given to aid in his election for the purchase of stocks in Wall street which he or his agents still hold; that he has been engaged in stock market speculations at the time that he, as Governor, was earnestly pressing legislation against the New York Stock Exchange which would affect the business and prices of the Exchange; and that there was evidence before his committee to sustain a finding that as Governor he has punished legislators who opposed him by vetoing legislation enacted for the public welfare, and has traded executive approval of bills for support of his direct primary and other measures.

We submit to the Senate and Assembly that the facts above stated are sufficiently serious in character and are so violative of the laws of this State and the rules of fitness for and conduct in high office, that the public interests demand some action in reference thereto whether through the exercise of powers of the Legislature, or by referring the facts and evidence to other duly constituted officers charged with duties in respect thereof.

There is in the possession of this committee further authentic information of other similar evidence in respect to the subject of this report, as strong in quality and in the large amounts involved as that on which sworn testimony has already been given.

This committee, therefore, has not completed its investigation either on this subject or others covered by the resolutions under which it is acting, but it has felt that the revelations set forth in this report and the testimony accompanying it should be brought to the attention of the Legislature at once without awaiting a final report either on this or other subjects.

The questions here involved are vital to clean government. They are above party or partisanship. They are vital to the citizens of the State and call for prompt and well-considered action. They call for an answer from Governor Sulzer, because both his obstructive tactics and his silence warrant the conclusion that the charges can neither be answered nor explained.

We recommend the punishment for contempt of Louis A. Sarecky and Frederick L. Colwell hereinbefore referred to; and we transmit herewith the record of the hearings with the testimony and exhibits.

Albany, N. Y., August 11, 1913.

Respectfully submitted by order of the committee,

THE JOINT LEGISLATIVE INVESTIGATING COMMITTEE,

JAMES J. FRAWLEY
Chairman

EUGENE LAMB RICHARDS
Counsel

MATTHEW T. HORGAN
Secretary

CHALLENGE TO SENATOR FELIX SANNER

STATE OF NEW YORK
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK, BY THE ASSEMBLY THEREOF,
against
WILLIAM SULZER, As Governor

Counsel for the respondent respectfully protest against Senator Felix J. Sanner, one of the senators of the State, being sworn as a member of this Court, and respectfully challenge him for the principal cause that he is not indifferent as between the people of the State and this respondent.

And as the grounds for this challenge, counsel for the respondent respectfully submit the following:

That heretofore, on May 3, 1913, the Legislature of the State of New York during its regular session by concurrent resolution of that date, did authorize the appointment of a joint legislative investigating committee for the following purpose and none other, to wit:

> "To examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, which are supported either wholly or in part by

State moneys, or which report officially to the State; into the functions of any or all State departments concerned in the management, supervision or regulation of any of such departments, the methods of making purchases, fixing salaries, awarding contracts for supplies, buildings, repairs and improvements, the sale of manufactured articles, and the conduct generally of the business of all such institutions and departments, for the purpose of reporting to the next session of the Legislature such laws relating thereto as the committee may deem proper."

That thereupon the president of the Senate and the speaker of the Assembly appointed the said Senator James J. Frawley, Senator Felix J. Sanner, Senator Samuel J. Ramsperger, and Senator Elon R. Brown as the Senate members of such joint committee; that thereafter and at an extraordinary session of the Legislature on June 25, 1913, by a concurrent resolution of the Senate and Assembly, claimed to have been passed and adopted by a majority of the members duly elected to each branch of the Legislature, it was attempted to confer further and additional power upon said legislative committee, and to investigate among other things:

"For the information of the Legislature, the whole subject of any unlawful or improper methods or wrongful or unlawful acts aforesaid, and of receipts and expenditures of candidates for an elective office to be filled by the votes of the electors of the whole State be referred to a certain joint legislative committee of the Senate and Assembly to examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, etc., heretofore appointed under joint resolutions, dated the second day of May, 1913, to ascertain and report to the Legislature at this extraordinary session, or, if not ready, as soon thereafter as possible, whether any unlawful or improper methods have been employed, used or pursued, or wrongful or unlawful acts done by any private person or public officer to influence the votes of legislators on elec-

tion or primary legislation at the last regular or the present extraordinary session of the Legislature; and further to investigate into, ascertain and report upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by or on behalf of any such candidate for moneys or things of value received or paid out in aid of his election and their compliance with the present requirements of law relating thereto.

"Said committee to have the power to subpoena witnesses on these subjects the same as provided in the resolution of May second above referred to."

That the said James J. Frawley, Felix J. Sanner and Samuel J. Ramsperger took an active part in the investigation and examination authorized or claimed to have been authorized by said resolutions, and thereafter and on the 11th day of August, 1913, said joint committee submitted a report to the Legislature wherein the said named senators in substance adjudged the respondent guilty of the charges contained in the articles of impeachment now exhibited against him, as will more fully appear from a copy of said report hereto annexed and made a part of this challenge, marked Exhibit A.

That upon the submission of such report to the Assembly the said articles of impeachment now preferred and exhibited against this respondent were formulated following the findings and conclusions of said committee and grounded thereupon.

And after the finding and filing of such articles of impeachment the said investigating committee continued their examination and investigation into the conduct and actions of this respondent, in all of which the said Senator Felix J. Sanner took part.

Wherefore, counsel for the respondent submit that the said Senator Felix J. Sanner does not stand indifferent as between the people of the State of New York and this respondent, but has taken an active part in investigating charges against him, and in formulating the report thereon, and has in advance passed upon the question of the guilt or innocence of the respondent upon the charges and accusations set forth in said articles of impeachment;

and counsel for the respondent respectfully ask this Court to determine this challenge in such manner as shall secure to this respondent a tribunal, all of whose members shall be impartial and free from any prejudice or bias against the said respondent.

D-CADY HERRICK
IRVING G. VANN
AUSTEN G. FOX
LOUIS MARSHALL
HARVEY D. HINMAN
Of Counsel for Respondent

(Here follows Exhibit A, which is the "Report of the Joint Legislative Investigating Committee," submitted August 11, 1913, to the Senate and Assembly of the State of New York in extraordinary session assembled, and is identical with "Exhibit A" annexed to and made part of the challenge to Senator James J. Frawley, *supra*.)

CHALLENGE TO SENATOR SAMUEL J. RAMSPERGER

STATE OF NEW YORK
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK, BY THE ASSEMBLY THEREOF,
against
WILLIAM SULZER, As Governor

Counsel for the respondent respectfully protest against Senator Samuel J. Ramsperger, one of the senators of the State, being sworn as a member of this Court, and respectfully challenge him for the principal cause that he is not indifferent as between the people of the State and this respondent.

And as the grounds for this challenge, counsel for the respondent respectfully submit the following:

That heretofore on May 3, 1913, the Legislature of the State of New York during its regular session by concurrent resolution of that date, did authorize the appointment of a joint legislative

investigating committee for the following purpose and none other, to wit:

> "To examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, which are supported either wholly or in part by State moneys, or which report officially to the State; into the functions of any or all State departments concerned in the management, supervision or regulation of any of such departments, the methods of making purchases, fixing salaries, awarding contracts for supplies, buildings, repairs and improvements, the sale of manufactured articles and the conduct generally of the business of all such institutions and departments, for the purpose of reporting to the next session of the Legislature such laws relating thereto as the committee may deem proper."

That thereupon the president of the Senate and the speaker of the Assembly appointed the said Senator James J. Frawley, Senator Felix J. Sanner, Senator Samuel J. Ramsperger and Senator Elon R. Brown, as the Senate members of such joint committee; that thereafter and at an extraordinary session of the Legislature on June 25, 1913, by a concurrent resolution of the Senate and Assembly, claimed to have been passed and adopted by a majority of the members duly elected to each branch of the Legislature, it was attempted to confer further and additional power upon said legislative committee, and to investigate among other things:

> "For the information of the Legislature, the whole subject of any unlawful or improper methods or wrongful or unlawful acts aforesaid and of receipts and expenditures of candidates for an elective office to be filled by the votes of the electors of the whole State be referred to a certain joint legislative committee of the Senate and Assembly to examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, etc., heretofore appointed under joint resolutions, dated the second day of May, 1913, to ascertain and report to the Legislature at this extraordinary session, or, if not ready, as

soon thereafter as possible, whether any unlawful or improper methods have been employed, used or pursued, or wrongful or unlawful acts done by any private person or public officer to influence the votes of legislators on election or primary legislation at the last regular or the present extraordinary session of the Legislature; and further to investigate into, ascertain and report upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State and upon all statements filed by or on behalf of any such candidate for moneys or things of value received or paid out in aid of his election and their compliance with the present requirements of law relating thereto.

"Said committee to have the power to subpoena witnesses on these subjects the same as provided in the resolution of May second, above referred to."

That the said James J. Frawley, Felix J. Sanner, and Samuel J. Ramsperger took an active part in the investigation and examination authorized or claimed to have been authorized by said resolutions, and thereafter and on the 11th day of August, 1913, said joint committee submitted a report to the Legislature wherein the said named senators in substance adjudged the respondent guilty of the charges contained in the articles of impeachment now exhibited against him, as will more fully appear from a copy of said report hereto annexed and made a part of this challenge, marked Exhibit A.

That upon the submission of such report to the Assembly the said articles of impeachment now preferred and exhibited against this respondent were formulated following the findings and conclusions of said committee and grounded thereupon.

And after the finding and filing of such articles of impeachment, the said investigating committee continued their examination and investigation into the conduct and actions of this respondent, in all of which the said Senator Samuel J. Ramsperger took part.

Wherefore, counsel for the respondent submit that the said Senator Samuel J. Ramsperger does not stand indifferent as be-

tween the people of the State of New York and this respondent, but has taken an active part in investigating charges against him, and in formulating the report thereon, and has in advance passed upon the question of the guilt or innocence of the respondent upon the charges and accusations set forth in said articles of impeachment; and counsel for the respondent respectfully ask this Court to determine this challenge in such manner as shall secure to this respondent a tribunal, all of whose members shall be impartial and free from any prejudice or bias against the said respondent.

D-Cady Herrick
Irving G. Vann
Austen G. Fox
Louis Marshall
Harvey D. Hinman
Of Counsel for Respondent

(Here follows "Exhibit A," which is the "Report of the Joint Legislative Investigating Committee," submitted August 11, 1913, to the Senate and Assembly of the State of New York in extraordinary session assembled, and is identical with "Exhibit A" annexed to and made part of the challenge to Senator James J. Frawley, supra.)

CHALLENGE TO SENATOR ROBERT F. WAGNER

STATE OF NEW YORK
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS

The People of the State of New York, by the Assembly thereof,
against
William Sulzer, As Governor

Counsel for the respondent respectfully protest against the Honorable Robert F. Wagner, one of the senators of the State, being sworn as a member of this Court, and respectfully challenge him for principal cause that he is not indifferent as between

the people of the State and this respondent, and is interested in the final result of this impeachment.

And as ground for this challenge, counsel for the respondent respectfully submit the following: That the said Robert F. Wagner was heretofore elected and now is temporary president of the Senate and in the event of the conviction of this respondent will succeed to the office, honors, dignities and emoluments of the Lieutenant Governor of the State.

Wherefore, counsel for the respondent submit that the said Senator Robert F. Wagner does not stand indifferent as between the people of the State of New York and this respondent, but is a party interested in the result of this impeachment, and counsel for the respondent respectfully ask this Court to determine this challenge in such manner as will secure for this respondent a tribunal, all of whose members shall be impartial and free from any interest adverse to this respondent in the trial now to be had.

D-CADY HERRICK
IRVING G. VANN
AUSTEN G. FOX
LOUIS MARSHALL
HARVEY D. HINMAN
Of Counsel for Respondent

MONDAY, SEPTEMBER 22, 1913

SENATE CHAMBER

ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 2 p. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.— Now, Mr. Marshall, if you will resume your argument, please.

Mr. Marshall.— May it please the Court: At the time of adjournment on Friday I was engaged in the discussion of that clause of the Constitution which relates to the powers of an extraordinary session of the Legislature, and in the course of that discussion I had just reached that clause in the Constitution of Mississippi which had been modeled upon our constitutional provision and showed that it had been found necessary, in order to enable an extraordinary session of the Legislature to consider the subject of impeachment, to except from the language which had been lifted, as it were, from our Constitution into that of Mississippi, the subject of impeachment.

Since the adjournment I have had occasion to give further study and consideration to that subject and have learned, at least to my satisfaction, how it came that the Constitution of Mississippi was so amended and contained the clause to which I have just referred, and why it was deemed necessary to adopt that phraseology. Although I was aware of the two impeachment cases in which Governor Harrison Reed of Flordia was involved, I had not had access to the full text of the opinions of the judges of the Supreme Court of Florida, to whom had been referred various questions relating to those impeachments. This opportunity has now been afforded. In view of the fact that those proceedings strongly illuminate the subject with which we are now dealing, it will be useful to indicate why the Constitution of Mississippi was amended at it was, and what was in the minds of the members of

the commission of 1872 which framed this provision of the Constitution, that body presumably having before it during its deliberations, the two proceedings against Governor Harrison Reed, one of which occurred in 1868 and the other in 1872.

The first impeachment is dealt with in what is called In the Matter of the Executive Communication of the 9th of November, 1868, and is reported in the 12th of Florida Reports, at page 633.

Judge Werner.—Am I right in assuming that the Constitution of 1874 contained the first provision limiting the powers of the Legislature in extraordinary session?

Mr. Marshall.— In the State of New York. Before that there had been no limitation in our Constitution upon the power of the Legislature when convened in extraordinary session. I had supposed that our Constitution really was the first Constitution which contained any clause which limited the powers of the Legislature in extraordinary session, but I find that the Constitution of Florida had, prior to 1872, in fact previous to 1868, contained such a limitation. That is the subject which I will now take up.

Governor Reed, in accordance with the Constitution as then in force, asked for the opinion of the Supreme Court, which then consisted of three members, as to the interpretation of the provisions of the Florida Constitution bearing on his impeachment. It was shown that an extraordinary session of the Legislature had been convened at the capitol on November 3, 1868, by virtue of a proclamation of the Governor. The provision of the Constitution relating to such session, then in force, read as follows:

> "The Governor may on extraordinary occasions convene the Legislature by proclamation, and shall state to both houses, when organized, the purposes for which they have been convened, and the Legislature then shall transact no legislative business except that for which they are especially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in session, except by the unanimous consent of both houses."

The Constitution also provided that "the legislative authority of this state shall be vested in a Senate and Assembly, which

shall be designated as the Legislature of the State of Florida, and the sessions thereof shall be held at the seat of government of the state." And still another section provided that " a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members in such manner and under such penalties as each house may prescribe."

It was shown that the Senate of Florida consisted of twenty-four members; that at the time when the extraordinary session convened the seats of four of the senators had been vacated and declared vacant; that the Assembly voted to impeach the Governor, but that at the time when it assumed to present the articles of impeachment to the Senate there were but eight senators present, a quorum being twelve.

Two questions were presented for decision, first, whether there had been convened under the proclamation of the Governor, in extraordinary session, a Legislature of the state, consisting of a Senate and Assembly, vested with the legislative authority of the state and competent to transact legislative business, and second, whether a Legislature, consisting of a Senate and Assembly, duly organized and vested with the legislative authority of the state, convened in extraordinary session under the proclamation of the Governor, and under the Constitution, competent to transact specified legislative business only, could proceed with the impeachment of the Governor in the absence of a recommendation.

It was shown that the Governor had not in his proclamation called the session for the purpose of dealing with his impeachment, and he had not called to the attention of the Legislature, while in session, any other legislative business, save that for which it was especially convened by his proclamation.

The court was unanimously of the opinion that, inasmuch as no quorum of the Senate was in attendance on the presentation of the articles of impeachment, the extraordinary session of the Legislature had not been constitutionally organized, and could not, therefore, act on any subject.

The subject of impeachment therefore could not be dealt with at the extraordinary session because it had not been convened as a Senate, as an Assembly and as a Legislature. This was

manifestly an indication that the subject of impeachment could only be dealt with as a subject of legislation and only when both houses were in session, both having a quorum. Hence it was decided that the proceedings relative to the calling of an extraordinary session were null and void; functus officio as it were, and that there was no Legislature because the Senate was without a quorum.

In view of this decision which is fortified by authority, the court did not find it necessary to consider the question as to whether or not the Governor could be impeached at an extraordinary session under any circumstances. Chief Judge Randall, however, concluded his opinion by saying:

> "We are, therefore, of the opinion that even upon the assumption that the proceeding of impeachment is not properly legislative business and that it may be presented at a called session, without the actual express consent of both houses, there has not been an effective impeachment and suspension from the performance of official duties."

It is to be observed that the Constitution of Florida merely prohibited the Legislature from transacting "legislative business" other than that for which it was convened, at an extraordinary session. The limitation on the action of the Legislature was, therefore, narrow, and not broad and comprehensive, as that of our Constitution.

This was decided in 1868. The subject of impeachment was there considered; the subject of the power to impeach at an extraordinary session was involved. Our constitutional commission met in 1872 and that year framed this provision, presumably having before it the Florida Constitution, since that was one of the few contemporary Constitutions which contained provisions relating to extraordinary sessions. It is inconceivable that the commission was not aware of the case, which was of public notoriety, in which the right of impeachment at an extraordinary session of the Legislature was before the Supreme Court of Florida for consideration and therefore when the commission adopted the phraseology it did, it must be deemed to have declined, advisedly, to confer the power of impeachment upon the Legislature while sitting at an extraordinary session.

The second impeachment of Governor Reed is only historically interesting, as throwing a sidelight upon this case, though not a very important one. That is reported under the title: "In the Matter of the Executive Communication filed on the 17th day of April, 1872, in 12 Florida Reports, p. 289." This was also a proceeding which took place just prior to the meeting of our constitutional commission of 1872. There, Governor Reed, who seems to have been a political storm center, again asked the Supreme Court for its opinion as to his official status, the court consisting of the same members as those who had acted on the prior occasion. It then appeared that at the regular session of the Florida Legislature held in 1872, the Assembly, in due form, impeached the Governor, and presented the articles of impeachment to the Senate. That, it will be noted, was at a regular session. The Constitution at that time declared that any officer, when impeached by the Assembly, should be deemed under arrest and disqualified from performing the official duties of his office, but any officer so impeached might demand his trial by the Senate within one year from the date of his impeachment. It was admitted that under the terms of this Constitution the impeachment necessarily disqualified the Governor from performing the duties of his office, and the only question presented was as to whether or not he had been acquitted by the Senate, so that he was entitled to resume the performance of his official duties.

The facts bearing on this point were, that at the time fixed for the trial of the Governor he interposed an answer to the articles of impeachment, to which there was a replication. A resolution was then offered that the court adjourn, in accordance with a concurrent resolution of the Assembly and Senate for their adjournment on that day. This was not adopted. The Governor then filed a protest against further delay, and especially against delay or continuance until an impossible day or time, within which his office would have expired. After that he moved that the court require the managers to proceed with the evidence, or that he be acquitted and discharged. This motion was not acted upon. A motion was then offered by a senator that the court adjourn. The record of the Senate showed that this order was adopted, but it was nevertheless followed by an offer of a motion by a senator as a

substitute for the previous one to adjourn, that the court should sit from day to day from ten o'clock each day, for the trial of the respondent. The record did not show whether or not this was adopted. At all events, it was followed by a motion to adjourn, and an adjournment was taken in general terms, specifying no time; and on the same day the Assembly, on motion, adjourned sine die for the session, and until the period when under the Constitution the next session of the Senate began.

It appeared, therefore, that the court, after failing to act on the motion to acquit and discharge the prisoner, simply adjourned and that the Senate on the same day adjourned for the session.

The question, therefore, which it was necessary for the court to determine, and the only one over which it had jurisdiction was whether or not this action of the Senate operated as a termination of the impeachment proceedings and as an acquittal of the respondent. It was decided that the Senate, being a court, and having rendered no judgment, dismissing the proceedings or directing the acquittal of the prisoner, he was still under impeachment, even though the result of such action was to deprive him of the office to which he had been elected, without trial.

Chief Judge Randall dissented from this conclusion.

It is thus evident that the second impeachment of Governor Reed has no bearing upon the question we are now considering, except historically, and by way of suggestion of the possibilities which might ensue from the adoption of the contention of the impeachment managers. Thus, for instance, should they attempt to amend the articles of impeachment, and submit new articles of impeachment, to which it would be necessary to interpose an answer, it is possible that delays might occur which would extend the trial during the entire term of the office of the Governor, and under our Constitution as it has been interpreted, he would during that entire period be disabled from performing the duties of his office. The impeachment proceedings of 1868, however, afford historical evidence of what must have been in the minds of the framers of our constitutional provision, and what must have been in the minds of the framers of the Mississippi Constitution, which led the latter to make special provision for impeachment at an extraordinary session of the Legislature.

In this connection it is also useful to point to two provisions of the New York Constitution, in which it was found necessary to make explicit exception with respect to impeachments, just as the Constitution of Mississippi did in the clause which we are now considering, indicating that such exception was deemed necessary to prevent the application of the general provisions of the Constitution to cases of impeachment.

In article 1, section 6 of the Bill of Rights, it is declared:

> "No person shall be held to answer for a capital or other infamous crime (except in cases of impeachment, etc.) unless on presentation or indictment by a grand jury."

Care was taken in that clause to see to it that there should be an exception made in case of impeachment. Out of abundance of caution, in spite of the fact that there was contained in the Constitution a provision which related specially to the subject of impeachment, and which specified the manner in which impeachments were to be tried, it was considered necessary to make an explicit exception in respect to impeachments in the clause just quoted.

Is it not significant that, although section 13 of article 6 of our present Constitution, and section 1, article 6 of the Constitution of 1846, contained full provisions on the special subject of impeachments, yet, side by side with them there was contained in the Bill of Rights this exception with regard to the method of trial or the presentation of a charge in the case of impeachment?

Again in article 4, section 5 of the Constitution, relating to the powers of the executive, it is provided:

> "The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offences except treason and cases of impeachment."

Here again, notwithstanding the specific language of article 6, section 13 with regard to impeachment, it was deemed necessary to except impeachments from the provisions of the Constitution relating to reprieves, pardons and commutations.

When, therefore, in article 4, section 4, which immediately precedes that which relates to pardons, we find that, with regard

to extraordinary sessions of the Legislature, it is declared that " no subject shall be acted upon except such as the Governor may recommend for consideration," the omission of any exception such as that found in the Constitution of Mississippi with regard to impeachment, such as is inserted in the Bill of Rights and in the section in regard to pardons which immediately follows the section relating to extraordinary sessions, must it not have been the undoubted intention of the framers of the Constitution, that the subject of impeachment was included in the universal phrase, the categorical negative, contained in the section now under consideration? The framers of the Constitution of 1894 could not have looked at section 4 of article 4, which was amended by the commission of 1872, and which the Legislature passed upon at two consecutive sessions before it was submitted to a vote of the people, without at the same time having their eyes directed to the word " impeachment " on the very same page. Hence the omission of words of exception from section 4 of article 4 and their insertion in section 5 of article 4 speaks volumes as to the intention of the framers of the Constitution, especially when one considers the care exercised by the commission of 1872 and by the constitutional convention of 1894.

In this connection, although it perhaps is a little out of the regular order, I venture to refer to a suggestion made to me by one of my associates with regard to the language of section 4 of article 4, " no subject shall be acted upon," namely, that if this body were now to resolve itself into a constitutional convention, and were called upon to frame a clause which would define the powers of the Legislature at an extraordinary session, if it intended to select a form of expression which would comprehend everything and omit nothing, including the subject of impeachment, it would find it impossible to find any words in the English language which would accomplish that result so effectually as the language contained in the present Constitution, and I might add that if it were intended to except " impeachment " from the effect of that language there is not a member of this Court sitting in such a constitutional convention, who would not deem it imperative to express such exception in precise and unambiguous language which would plainly and explicitly declare such intention.

I will now resume a consideration of the cases bearing on the

interpretation of various constitutional provisions relating to extraordinary sessions which the courts have been called upon to determine in various decisions. On Friday I was about to refer to the case of People v. Curry, 62 Pac. Rep. 516, s. c. 130 Cal. 82. There a question arose as to whether the Legislature could, at an extraordinary session, without the sanction of the Governor's proclamation, propose an amendment to the Constitution. It was held that even though the proposal of an amendment to the Constitution is made by the Legislature as an ordinary enactment of the law, it nevertheless could not, under the provision which limited its activity at an extraordinary session, propose such an amendment. Mr. Justice Van Dyke said:

> "By the Constitution the sessions of the Legislature shall commence on the first Monday after the first day of January next succeeding the election of its members, and shall be biennial, 'unless the Governor shall in the interim, convene the Legislature by proclamation' (article 4, section 2). The Constitution, under the article in reference to the executive department, in defining the duties of a Governor, provides that 'he may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it; and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto' (article 5, section 9).
>
> "The attorney general contends that proposing constitutional amendments is not 'to legislate on any subjects other than those specified in the proclamation,' and therefore does not fall within this provision of the Constitution. It may be admitted that proposing constitutional amendments is not legislation in the sense of passing statutory laws, but it is nevertheless performing a legislative function. It is one of the modes pointed out to initiate the enactment of constitutional law. The performance of such a duty is neither executive nor judicial, but purely legislative. No one would contend that the Senate and Assembly could propose constitu-

tional amendments, except at the session of the Legislature and while it is in session, and not before or afterwards; that is, both houses in session, which constitute the Legislature. . . .

"The Governor takes no part in the adoption of freeholders' charters, any more than in proposing constitutional amendments; yet the adoption of a city charter in the mode provided is legislation, although not in the same manner as passing bills. It creates, or participates in creating, a municipal government, which can only be done by legislative power. It will hardly be contended that the action of the two houses of the Legislature in approving or adopting a freeholders' charter can be done at an extra session, when that subject is not specified in the Governor's proclamation. People v. Blanding, 63 Cal. 333, does not sustain the contention of the appellant. That was a case of the confirmation by the Senate of an appointee of the Governor; and it is said that the provision in the Constitution in reference to legislation other than that specified in the proclamation does not apply in such a case, that being the independent action of the Senate, and not in the nature of legislation at all. It frequently occurs that the Senate of the United States is convened, without calling together Congress, for the purpose of confirming presidential appointments. Particularly is this the case on the coming in of a new administration. The other cases referred to by the attorney general, such as Hatch v. Stoneman, 66 Cal. 633, 6 Pac. Rep. 734, and Mullen v. State, 14 Cal. 578, 46 Pac. Rep. 670, 34 L. R. A. 262, simply hold that the proposal of amendments to the Constitution is not made by the Legislature as in the ordinary enactment of a law.

"The evident purpose of the restriction placed upon the action of the Legislature when called together in extraordinary session by proclamation was to regulate the duration of such session, and thus diminish expenses, and the court should not, by a strained or strict construction, defeat these purposes. We are therefore of the opinion, for the

reasons stated, that the proposed constitutional amendment proposed at the extra session of the Legislature of 1900 is invalid, and that the defendant, as Secretary of State, is justified in certifying the amendment proposed at the regular session of 1899 in lieu thereof."

While in People v. Blanding, 63 Cal. 333, to which reference has just been made, it was held that the prohibition against legislation did not cover the act of confirmation by the Senate of an appointee of the Governor, the Constitution of New York is so framed that unquestionably such action would come within the prohibition of our Constitution, which, as has been repeatedly pointed out, is not confined to legislation, but to action on any subject.

In Wells v. Missouri Pacific R. R. Co., 110 Mo. 286, s. c. 19 S. W. Rep. 531, 15 L. R. A. 847, at an extra session of the Legislature a bill was passed for the prevention of accidents to railroad employees. It was not a subject which had been recommended for action to the Legislature. The Governor subsequently approved the bill. It was nevertheless held that it was unconstitutional, on the ground that its subsequent approval was not a valid substitute for his designation of the subject of such legislation in his proclamation calling the session. Mr. Justice Barclay, after stating the facts with regard to the passage of the act then under consideration, said:

"Is it, therefore, to be pronounced void? That depends in the legal energy to be ascribed to those parts of the Constitution first above quoted. In them, as in some other portions of that document, the people have seen fit, for satisfactory reasons, to place limitations upon the full use of legislative power. They have commanded, in the most solemn manner, an observance of certain forms in the process of legislation, because (we may assume) they were led by experience to believe those forms conducive to better results than had been otherwise attained. It is not for us to question the reasons of that policy, or to construe the life out of their deliberate act. When they have said, as in the language before us, that 'the General Assembly shall have

no power . . . in extra sessions . . . to act upon subjects other than those specially designated,' etc., it is our duty to give effect to that statement. To hold such language is merely directory would amount, in substance, to amending the instrument so as to import that the assembly should have no such power unless it assumed that power. Such a reading, we conceive, would reduce the command to a dead letter, and virtually eliminate it. It is a reading we do not feel at liberty to adopt, however great the respect we entertain for the Legislature.

"The power of construing the Constitution must necessarily be lodged in some department of government to insure that practical sanction of its mandates which is essential to preserve their vitality and force. This delicate and sacred trust is devolved upon the judiciary as a manifestation of the political principle that ours is a government of laws, rather than of men. In exercising that power the court should take a large and comprehensive view of constitutional language, mindful that 'every scripture is to be interpreted by the same spirit which gave it forth,' and with a deep desire to enforce its full and exact meaning. Thus viewing the very definite provision before us, we cannot regard it otherwise than as mandatory. When the people have declared a certain form indispensable to the proper expression of their will, it is no part of our function to adjudge that form unnecessary or immaterial. On the contrary, our bounden duty is to enforce that declaration. It follows that the 'Act' in question cannot be sustained as a constitutional exertion of the lawmaking power. That position being reached, it is immaterial that the Governor, by his formal signature, in due course, approved the bill after its passage by the General Assembly. By the terms of the Constitution the legislative power to act in the premises depended on the Governor's taking the initiative by a proclamation or a message. His subsequent approval cannot be accepted as a substitute for those earlier steps which the fundamental law prescribes. Davidson v. Moorman (1871), 2 Heisk. 575; St. Louis v. Withaus (1887), 90 Mo. 646, 6 West. Rep. 229."

To the same effect are Manor Casino v. State, 34 S. W. Rep. (Tex.) 769; Re Governor's Proclamations, 35 Pac. Rep. (Col.) 530; Ex parte Caldwell, 138 Fed. Rep. 492; Neilsen v. C. B. & Q. R. R. Co., 187 Fed. Rep. 394.

People ex rel Carter v. Rice, 135 N. Y. 473, related to the validity of the apportionment act of 1892, adopted at an extraordinary session of the Legislature called by Governor Hill, who recommended the Legislature to pass such an act. The Constitution provided for the enumeration of the inhabitants decennially and for an alteration of the Senate districts and apportionment of members of Assembly at "the first session after the return of every enumeration." A question arose as to whether or not an extraordinary session was to be deemed the "first session" of the Legislature, within the meaning of this constitutional provision. In the course of his opinion Judge Peckham said:

> "The Constitution provides for the assembling of the Legislature on the first Tuesday in January in each year. When it adjourns sine die, has not the session of the Legislature ended? The term of office of its members may not have ended, but the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid act unless the Governor, under the special power given him by the Constitution, should convene it. When thus convened the Legislature is in session, and it is clearly not the same session which was ended by a prior adjournment thereof, without day. . . . If the Governor should call such a session and not recommend this subject for consideration, it might then be a question which of the two constitutional provisions should prevail, and which provided for the passage of the apportionment act at the first session, or the one which provided that at an extraordinary session the Legislature should consider no other subject than such as should be recommended to it by the Governor. If the former provision should be held to prevail, the act could be passed, and if the latter, it could not. In such case the extraordinary session would not be the first session of the Legislature within the meaning of the Constitution. Admitting that unless the Governor recommended the consideration

of the subject to the Legislature at the extraordinary session called by him, an apportionment act could not then be passed, it by no means follows that the Legislature could not pass the act at such extraordinary session, provided the subject were recommended to its consideration by the Governor. In the one case the extraordinary session is not the first session after the return of the enumeration within the meaning of the Constitution, and in the other case it is."

It is significant that the Constitution of 1894, in dealing with the subject of enumeration and reapportionment, both in section 4 and in section 5 of article 3, provided for the alteration of Senate districts and the apportionment of members of Assembly by the Legislature "at the first regular session after the return of every enumeration." This is a plain manifestation of the intention, that the powers of the Legislature at an extraordinary session should be circumscribed, so that even the important political function of apportionment should be exercised at a regular session only, and not at an extraordinary session of the Legislature. Thus even the Governor is limited in his designation of subjects which may be acted on at an extraordinary session of the Legislature.

So that the effect of the work done by the constitutional convention of 1894 has been to limit further the powers of the Legislature at an extraordinary session, the attention of the convention having been called to the situation which arose in consequence of the fact that Governor Hill called an extraordinary session for the purpose of at that time taking up the subject of the apportionment of the State after the enumeration which had just preceded it.

As further bearing on the question as to what may be done at an extraordinary session of the Legislature, attention is called to article 6, section 11, of the Constitution, which provides:

"Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices

> of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. . . . "

Would it be contended for an instant that, in the absence of recommendation by the Governor, judges of the Court of Appeals or justices of the Supreme Court could be removed by concurrent resolution at an extraordinary session of the Legislature, or at a self-convened session?

The practical interpretation of this provision of the Constitution indicates that this has been the accepted view taken of the subject. Governor Higgins found it necessary to recommend to the Legislature of 1905 the consideration of the charges against Mr. Justice Hooker and at the present extraordinary session of the Legislature of 1913 Governor Sulzer found it necessary to recommend action by the Legislature at that session upon the charges which had been presented against Mr. Justice Cohalan.

As further bearing upon this subject I shall now call your attention to a practical interpretation, as it were, of the Constitution with regard to impeachment proceedings against the Governor, which is to be found in the debates of the constitutional convention of 1846.

It there appears that on the 14th of July, 1846, the sixth section of the article on the executive came up for consideration. This section as submitted by the committee on the executive reads as follows:

> "In case of the impeachment of the Governor or his removal from office, death, inability from mental or physical disease, resignation, absence from the State, the powers and duties shall devolve upon the Lieutenant Governor for the residue of the term or until the Governor, absent or impeached, shall return or the disability shall cease. . . ."

In relation to this proposal, Mr. Nichols said that the Governor, in a fit of mental alienation, in a spring or summer might, in a very philanthropic mood, might pardon all the convicts in the prisons and, if his insanity was to be determined only by the

Legislature (as was suggested) he might, when bereft of his reason, do this and much more mischief during the six months which would intervene before the meeting of the Legislature.

Then Mr. Stow suggested this clause:

> "The Legislature may declare the inability of the Governor or the person administering the duties of the office of governor by a vote of four-fifths of all the members elected to each house and for this purpose the Chief Justice of the Supreme Court may convene the Legislature."

Later Mr. Stow renewed his proposition, modified so as to give two-thirds of the Legislature power to decide on the question of inability when the Governor should be considered incompetent, and giving the speaker of the Assembly power to convene the Legislature for that purpose. Mr. Stow said he never could consent to leave the word "inability" there without providing some tribunal for ascertaining it. It was such a question as this that shook the British throne to its center, because they did not provide means to decide when the king was disabled. The safest tribunal he could devise was the Legislature, by a two-thirds vote. He was loath to take up time by a single remark, but he could not consent to involve the country in danger of revolution because it might take a little time to make provision for this contingency. The amendment was rejected.

So even at that time, the desirability and possible necessity of making some provision for dealing with the Governor if his mental or physical condition became such as to require consideration, was not overlooked. It was, however, concluded that it was not advisable to provide for even such a contingency and that it was better to wait until the next session of the Legislature should convene before taking action even in so extreme a case.

The practical interpretation given to the provision of the Constitution now under discussion indicates that, ever since 1875, it has been the uniform practice of the various Governors of this State, who had occasion to call extraordinary sessions, specially to recommend for action by the Legislature, not only subjects for legislation, but also all other subjects as to which action was desired.

Such interpretation is a potent factor even in the ascertainment of the meaning of a clause of the Constitution. People ex rel. Einsfeld v. Murray, 149 N. Y. 376; People v. Home Insurance Co., 92 N. Y. 337.

In 1888, Governor Hill recommended that the Legislature take action with regard to the employment of convict labor in penal institutions of the State. The question was raised whether, under the terms of this recommendation, the Legislature had the power to consider the employment of convict labor other than that of convicts in State prisons. Whereupon Governor Hill presented a further recommendation, that the question of the employment of convict labor be considered not only in connection with State prisons, but also in jails, penitentiaries and other similar institutions.

In 1898, Governor Black recommended the passage of a State election law, and inasmuch as, under that law, it becomes his duty to appoint a State Superintendent of Elections, the Governor specifically recommended action with regard to the appointment and confirmation of such State superintendent.

In 1905, Governor Higgins recommended an examination by the Legislature into the charges presented against Mr. Justice Hooker.

In 1908, Governor Hughes recommended to the Legislature, then in extraordinary session, the advisability of taking action in connection with the ceremonies for the interment of the remains of George Clinton, which were removed from the Congressional cemetery in Washington, to Kingston.

In 1913, the Legislature, upon the recommendation of Governor Sulzer, took action with regard to the accusations made against Mr. Justice Cohalan.

He, as other Governors had done before him, submitted to the Senate while sitting in extraordinary session, the names of various nominees for public office, for confirmation.

Whenever an extraordinary session has been held, not even an appropriation bill to cover the expenses of the session has been attempted to be passed except on the specific recommendation of the Governor.

There is not to be found in the history of any of the states an

instance of the institution of impeachment proceedings at an extraordinary session of the Legislature, other than those taken against Governor Reed of Florida, which I have fully explained. It has been recently claimed that the impeachment of Governor Butler, which occurred in Nebraska in 1865, took place at an extraordinary session, but in an article by Albert Watkins, the historian of the Nebraska State Historical Society, which recently appeared in the New York Times, it is shown that this was not the fact, but that the impeachment took place at a regular session of the Legislature.

It is likewise true that there never has been an impeachment when the Senate and Assembly in this State were not actually in session, nor is there a precedent in England when there was an attempt to impeach when both houses were not actually in session. The necessity therefor is admirably illustrated by the first impeachment of Governor Reed, which I have discussed at length.

But it is argued that, when the Assembly exercises the power of impeachment, it acts judicially. While in one sense it may be said that, by voting an impeachment, it is setting the judicial machinery in motion, in that articles of impeachment must precede the trial of an impeachment; yet, as has been seen from the authorities already considered, an impeachment is merely the equivalent of an indictment, and the Assembly, when it makes its accusation in the form of an impeachment, is performing no other or different function than those exercised by a grand jury when it finds an indictment. When a grand jury finds an indictment, it does not act judicially, any more than, in those jurisdictions where informations have taken the place of indictments, the filing of an information by a district or state attorney can be said to be a judicial act.

In United States v. Belbin, 46 Fed. Rep. 381, Judge Hughes said:

> "The function of a grand jury is not to try persons accused of crime, but merely to examine whether and what crimes have been committed, to designate the persons at whom the evidence points as criminal, and, by indictment, to charge such persons before the court and county as answerable for the crimes which have been committed. Originally grand

> jurors were chosen for the purpose of giving testimony to their fellow-jurors, as to the crimes committed within the county. . . . The grand jury does not try; it merely accuses with a view to trial."

As said by Blackstone, "The Commons accuse, the House of Lords judges."

The Assembly, with respect to an impeachment, and the grand jury, with respect to an indictment, perform the function of accusers, and their act is administrative and not judicial. It does not constitute a judgment. It does not require the accused to be heard. It can proceed without notice to the accused. It is only a step in the process of conferring upon the tribunal which is to try the indictment or the impeachment, jurisdiction of the subject matter.

The very oath administered to the members of this Court indicates that the Assembly cannot possibly be considered as acting otherwise than as accuser, as a party, not as a judge. The solemn oath administered here at the opening of this trial to every member impressively declares:

> "I do solemnly swear to truly and impartially try and determine the impeachment of the Assembly of New York against William Sulzer, Governor of said State, according to the evidence, so help me God."

It is the Assembly which appears against the Governor. It is the accuser. It is the party which is represented here as the accuser, and to say that it is acting judicially seems to be entirely at odds with the very conception of a judicial act.

In Sinking-Fund Cases, 99 U. S. 700–61, Mr. Justice Field said:

> "Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such an act is to that extent a judicial one, and not the proper exercise of legislative functions."

In People v. Murphy, 65 App. Div. 126, it was said that by "judicial act" is meant the power to hear and determine controversies between adverse parties, or questions in litigation.

In Supervisors of Onondaga County v. Briggs, 2 Denio 26, 32, it was said to be the performance of a duty which has been confided to judicial officers to be exercised in a judicial way.

A judicial act must be an act performed by a court touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers. State v. Tippecanoe County, 45 Ind. 501, 506; Schoultz v. McPheeters, 79 Ind. 373, 377.

Or, as it was expressed in Rhode Island v. Massachusetts, 12 Pet. 657, 718, "what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

The New York Code of Criminal Procedure, section 354, defines an indictment as an accusation in writing, presented by a grand jury to a competent court, charging a person with crime. People v. Dumar, 106 N. Y. 502, 506; People v. Flaherty, 79 Hun 48, 50.

The finding of an indictment or the voting of an impeachment, viewed in the light of these authorities, does not therefore constitute a judicial act, in any sense of the term.

But even if, by a stretch of the imagination, an indictment or an impeachment could be said to be a judicial act, it is difficult to appreciate the materiality of such a conclusion to the interpretation of the constitutional provision now under consideration. It does not create any exception to the limitation which the Constitution imposes upon the Legislature or upon the Assembly. It does not limit the restriction imposed upon them, with respect to action on subjects proper to be considered by them. It does not permit them to exercise judicial powers. It it can be conceived that the three great powers of government could at any time be exercised by the Legislature, or any branch of it, the language of the Constitution applies equally to legislative, judicial and executive action. It must be conceded that it applies to the appointing power, or to the power of confirming appointments to public office, and with that concession it is impossible to say that this constitutional provision was intended to be confined in its operation to subjects of legislation, and that there was no prohibition against

dealing with other subjects at an extraordinary session of the Legislature, when the Governor did not recommend such action.

The limitation upon the exercise of power at extraordinary sessions of either the Legislature or the Senate is not confined to the exercise of legislative power alone, for the Senate can under no circumstances exercise legislative power at an extraordinary session when it sits alone, by itself, without the Assembly. If, therefore, the limitation upon the power to act as applied to the Senate is not confined to legislation, how can it be so confined when applied to the Assembly when it is convened together with the Senate at an extraordinary session of the Legislature?

It clearly follows that the contention of the impeachment managers, that the limitation on the power of extraordinary sessions is a limitation upon action "along legislative lines," is fallacious.

The term "Legislature" as employed in our system of government, like the word "Parliament," implies a bicameral or, speaking biologically, a bicellular structure. The Senate and the Assembly, the House of Lords and the House of Commons are the constituent parts of a constitutional unit. Though the two houses of which our Legislature is composed rarely meet jointly, the only time when they do not sit together is when the Senate alone is convened to consider appointments proposed by the Governor. The very fact that provision is made for an independent session of the Senate only, and none which enables the Assembly to be convened independently, demonstrates that silence under such circumstances means negation; that expressio unius est exclusio alterius; that the Assembly when called to take part in an extraordinary session of the Legislature, of which it forms a component part, meets as a part or branch of the Legislature in connection with the Senate, and not otherwise, and cannot, therefore, initiate action on any subject at such a session.

The very fact that neither house shall without the consent of the other adjourn for more than two days (art. 3, sec. 11), indicates that, with the exception of the single instance when the Senate may meet alone when called in extraordinary session, the Assembly and the Senate must act together.

As a grand jury cannot sit except in connection with a court, so the Assembly cannot sit to discharge like duties, except in connection with the Senate, and when both are in session at the same time as branches of the Legislature. If the Assembly should meet spontaneously and find articles of impeachment, what could it do with them unless the Senate were in session?

That is shown by the decision in the case of Governor Reed. The Assembly was absolutely powerless, although it voted articles of impeachment, to have anything done with them or to make the action effective because the Senate was not in session with a quorum.

The theory of the Constitution is, that the Assembly can be in session only when the Senate is, and only as a part of the Legislature. The Senate is expressly authorized to sit alone, and at a time when the Assembly is not in session, but, as we have shown, only when called in extraordinary session by the Governor. The fact that the like power was not conferred upon the Assembly is irrefragable evidence that it was not intended that the Assembly should possess such power for any purpose.

Those are precedents which show that it has been considered in various bodies, that even the Senate, sitting as a court of impeachment, cannot act while the House is not in session.

In 3 Hinds Precedents of the House of Representatives, section 2006, it is stated that it was decided by the United States Senate, sitting as a court for the impeachment of William W. Belknap, the late Secretary of War, that the impeachment trial could proceed only when Congress was in session. On June 19, 1876, the counsel for the respondent asked for a postponement of the trial until some time in the following November. Thereupon a question arose as to whether or not the trial might proceed when the House of Representatives was not in session, and Senator Ingalls, of Kansas, asked for an opinion from the managers of the House of Representatives. It appeared that they were not agreed on the subject. Subsequently while an order was pending providing that the trial should proceed on July 6th, Senator Morton, of Indiana, proposed to add thereto as an amendment the following: "Provided that impeachment can only proceed in the presence of the House of Representatives." This mo-

tion was subsequently withdrawn by Senator Morton, whereupon Senator Conkling, of New York, offered the proviso in the form: "Provided that impeachment can only proceed while Congress is in session." That proviso was agreed to and was thereafter acted upon.

In Fowler v. Pierce, 2 Cal. 172, it was recognized as being necessary for the House to remain in session while the Senate sat for the trial of an impeachment.

The case of State ex rel. Adams v. Hillyer, 2 Kan. 11, which may be cited on this point by our opponents, has no bearing here. There it appeared that, on February 14, 1862, the House of Representatives impeached the respondent. The Senate was immediately notified and articles of impeachment were adopted and presented, and pleadings were interposed. On February 27, 1862, a resolution was adopted by the House requesting the Senate to postpone the trial to such time as the managers should deem necessary, and thereafter, on motion of the managers, the trial was postponed until the first Monday in June. After this adjournment, and in March, 1862, a joint resolution was passed adjourning both houses sine die. On June 2, 1862, the Court of Impeachment proceeded to trial, and the question was then raised as to whether the Senate had the power to sit for the trial of an impeachment when the House was not in session, and whether the adjournment of the Senate to the first Monday in June was without the consent of the House and, therefore, void.

It was held that the laws of Kansas expressly empowered the Senate, when sitting as a court for the trial of impeachments, to hold sessions after the adjournment of the Legislature. Hence the court said that, whatever might have been the rule at the common law, in the absence of a constitutional prohibition the court could proceed to try the impeachment even though the House was not present.

It was further held that there was no inhibition in the Constitution as to one branch of the Legislature meeting when the other was not in session. There was a fixed time when both houses should meet and a limitation of the power of one house to adjourn for a longer period than two days without the consent of the other, and in case of disagreement the Governor might ad-

journ them. But this was held not to be applicable to the proceedings of the Senate while trying an impeachment, because then it was acting entirely in a judicial capacity; its action was independent of the House. There was no reason why the House should be present or in session, and there being no constitutional inhibition, there was no reason why the Senate with the consent of the House might not adjourn to any period during its term of office not beyond the regulation meeting of the Legislature, whether the House was in session or not. If at such adjourned session its acts were confined to duties which were entirely independent of the House or any action it might take, those acts were valid and conclusive.

It was further held that the passage of the resolution by the House on February 26th, asking the Senate to set the trial for the first Monday in June, and the adjournment of the Senate sitting as a court until that time, could be viewed in no other light than as the consent of the House, previously given, to such an adjournment, and that when the Legislature adjourned sine die, it was evident that each branch of the Legislature considered the resolution with reference to the previous adjournment of the Senate sitting as a court of impeachment, as qualifying the resolution for the adjournment sine die.

The President.— Mr. Marshall, if I recollect correctly, the Assembly was not in session during the proceedings in Saratoga at which Judge Barnard was tried.

Mr. Marshall.— I think your Honor is correct. That was one of the subjects discussed before Congress in the Belknap case.

The President.— I did not mention it by way of argument, but to see if my recollection is correct.

Mr. Marshall.— Your recollection is entirely correct, your Honor. But as I have stated, that is of no consequence here, because there the Assembly in regular session impeached and then presented the matter to the Senate while it was in regular session, and then the senators, or a major part of them, and a major part of the judges of the Court of Appeals, resolved themselves into a

court of impeachment and proceeded with the trial though the Assembly was not in session during the progress of the trial.

It will doubtless be argued that, under our interpretation, the Governor could not be impeached except at a regular session of the Legislature, since it would be unnatural for him to recommend to the Legislature, at an extraordinary session, the consideration of the subject of his impeachment. This, it is claimed, constitutes a reductio ad absurdum of our contention.

That, however, is a complete begging of the question. The mere fact that the framers of the Constitution have not provided for the contingency of the impeachment of the Governor at an extraordinary session does not deprive the clearly conceived limitations upon the powers of an extraordinary session of their undoubted significance or render them ineffectual in whole or in part.

In People ex rel. Bolton v. Albertson, 55 N. Y. 50, 55, Judge Allen said:

> "The restraints of the Constitution upon the several departments, among which the various powers of government are distributed, cannot be lessened or diminished by inference and implication; and usurpation of power, or the exercise of power in disregard of the express provision or plain intent of the instrument, as necessarily implied from all its terms, cannot be sustained under the pretence of a liberal or enlightened interpretation, or in deference to the judgment of the Legislature, or some supposed necessity, the result of a changed condition of affairs. (1 Kent's Com. 162; Barto v. Himrod, 4 Seld. 483; Taylor v. Porter, 4 Hill 144; Warner v. People, 2 Den. 272; People v. N. Y. C. R. R. Co., 24 N. Y. 485, Schenectady Observatory v. Allen, 42 id. 404.")

As to every officer in the State who is subject to impeachment, other than the Governor, the language of the Constitution can be given full force and effect, according to our interpretation; whereas, under that construction which the impeachment managers seek to impart to it, this language is deprived of all efficacy, so far as it concerns the impeachment of all of such officers. and renders the recommendations of the Governor with respect thereto mere idle ceremony, without significance or importance.

While it is true that, in the case of the Governor, there is no likelihood that he would recommend his own impeachment, yet the argumentum ab inconvenienti which is sought to be based on that circumstance is entitled to but little moment. As said by Pomeroy in his admirable work on constitutional law, "though often resorted to, it is but little used." The regular sessions of the Legislature are, as to duration, entirely within the control of the Legislature. Ordinarily they continue until June of each year. There would, therefore, be a period of not to exceed seven months during which the power to impeach the Governor would be suspended. It is most unlikely that the acts on which such impeachment may be based would arise immediately after adjournment. On the doctrine of averages, if such acts ever occurred, there would be a period of not to exceed three months between the time of their discovery and the meeting of the regular session of the Legislature. In the present case the time which will elapse between the date of the impeachment and the convening of the legislative session of 1914, is but four and one-half months. But even if it should happen that seven months would elapse before impeachment proceedings could be instituted, that would not justify the stretching of the Constitution to such an extent as is proposed in the present instance, and the doing of violence to the fair intendment of its language.

We have heard it stated that shocking conditions might result if this power of impeachment could not be exerted at an extraordinary session or at a self-convened session of the Assembly. Really the argument is that that power must exist at a self-convened session of the Assembly in order that these terrible consequences may be averted, because it rarely occurs that an extraordinary session of the Legislature is convened by the Governor. Only in recent years have our Governors called together the Legislature in extraordinary session with any degree of frequency.

It was contended by one of the deputy attorney generals in his argument before Mr. Justice Hasbrouck, that if this power of impeachment at extraordinary sessions or at a self-convened session did not exist, the Governor, on the very day after the regular session of the Legislature adjourned, could commit murder, or burn down the capitol, and he could not be impeached.

Though he could be indicted and sent to prison, it was argued that from his cell he could sign the pardon that would set him free. This is not only a highly fanciful situation, but it also involves an erroneous view of the law.

Certainly if the Governor committed a crime such as burglary, or any of the other shocking offenses which have been instanced, he would not be above the law. He would be subject to its penalties like any other man. He would be incarcerated, and therefore the Lieutenant Governor under the interpretation given to section 1 of article 4 of the Constitution by Justice Hasbrouck, would exercise the functions of Acting Governor, and the State would be exempt from the calamity which has been pictured.

It is also absolutely wrong to say that in such a case the Governor could pardon himself. It is very doubtful whether the Governor could in any case, or under any circumstances, pardon himself. The Acting Governor alone could exercise the pardoning power, or the power to grant commutations or reprieves after the conviction of the Governor or while the latter is deprived of the power to exercise the functions of his office. Before conviction the Governor could not pardon himself. The power to pardon conferred by the Constitution upon the Governor expressly refers to the exercise of power "after conviction." The moment he is convicted of any crime, under section 510 of the Penal Code, he automatically forfeits his office and could not by any possibility pardon himself. Therefore these calamitous possibilities which have been painted in such somber hues, are purely imaginary, and are, as is much of the argument of our opponents, in total disregard of the language of the Constitution and of the law.

The Governor, as has been shown, may in the exercise of his unlimited discretion refuse to call an extraordinary session of the Legislature, even when a conceded necessity therefor exists and the machinery of legislation must in such a case rest in idleness until the regular session begins. Would not such delay be infinitely more injurious to the State than that involved in the postponement until the regular session of action with respect to the impeachment of the Governor? Why, then, should so much stress be laid on the few months which may elapse before, in a case of rare occurrence, impeachment proceedings may be started?

Throughout our law there is recognized the desirability of enabling those in authority as well as the public to undergo the process of what is well characterized as "cooling time," so as to permit sober second thought to gain its soothing sway, and to avoid what the great Chief Justice described in Fletcher v. Peck, 6 Cranch 137, as "the violent acts which might grow out of the feelings of the moment," and we might add those which are artificially stimulated to compass the destruction of a political opponent.

The argumentum ab inconvenienti is one which is frequently fallacious, and is often more honored in the breach than in the observance. It has perhaps never been better criticised than it was in the leading case of Newell v. People, 7 N. Y. 9, where Chief Judge Ruggles, at page 109, said:

> "And I enter upon the examination thoroughly imbued with the principle that the task of determining that a law is void by reason of its repugnancy to the Constitution is at all times one of extreme delicacy; that it ought seldom, if ever, to be done in a doubtful case; that it is not on slight implication or vague conjecture that the Legislature is to be pronounced to have transcended its powers (Fletcher v. Peck, 6 Cranch 128); that it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that we can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment; that in construing the language of a Constitution we have nothing to do with arguments ab inconvenienti, for the purpose of enlarging or contracting its import, the only sound principle being to declare ita lex scripta est, to follow and obey (People v. Merrill, 21 Wend. 584); that there is no safe rule for construing the extent or the limitation of powers in a Constitution other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

This principle was applied in Settle v. Van Evrea, 49 N. Y. 280, where the question arose as to whether or not Commissioners

of Appeals were subject to all the provisions affecting judges of the Court of Appeals and other courts, the commissioners having been appointed for the purpose of disposing of certain cases pending in the Court of Appeals on a day specified. It was held that they were not debarred from acting as referees, although judges of the Court of Appeals were so debarred, simply because the commissioners were not named in the clause of the Constitution which prohibited judges of the Court of Appeals from acting as referees. In the course of his opinion Judge Allen used language which it would be well to dwell upon in the present instance, since it meets the argument of which so much has been made, and indicates that the only safe rule of constitutional interpretation is to deal with the Constitution as it is written and to leave it to the people to correct any defects or to supply any omissions. He said:

> "If to meet exigencies and to prevent mischiefs it is allowable, sometimes, to depart from the strict letter of a law and imply an intent not already expressed in the construction of ordinary statutes, which may be framed in haste and with none of the formalities that attended the preparation of a state Constitution, it would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms merely because a restricted and more literal interpretation might be inconvenient and impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> "That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves. The terms of the instrument being clear and free from doubt and having a well understood meaning and application, the better way is to stand upon the maxim ita lex scripta est, and leave any supposed defect or omission to be remedied by the people or by legislation."

In People ex rel. Gilbert v. Wemple, 125 N. Y. 485, this principle was followed. There article 6, section 13, of the Constitu-

tion, relating to term of Court of Appeals judges and Supreme Court justices, was the subject of consideration. It read:

> "The official terms of the said justices and judges who shall be elected after the adoption of this article shall be fourteen years from and including the first day of January next after their election. But no person shall hold the office of justice or judge for any court longer than until and including the last day of December next after he shall be seventy years of age. The compensation of every judge of the Court of Appeals, and of every justice of the Supreme Court, whose term of office shall be abridged pursuant to this provision, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected."

The relator was elected a Supreme Court justice in November, 1865, for a term of eight years, commencing January 1, 1866. In November, 1873, he was reelected for a term ending December, 1887. But in 1882 he became seventy years old and accordingly his term ended on December 31, 1882, after he had served seventeen years as a Supreme Court justice.

The question presented was whether the ten years' service referred to in the Constitution was to be ten years of the term abridged. The Attorney General so contended.

Judge Peckham, however, said:

> "If the term expire by reason of the running of the full term of fourteen years before the judge or justice reaches the age of seventy and he thereupon goes out of office, the provision of the Constitution does not meet his case. His term has not been abridged, although he may have been twenty, thirty, or even more years on the bench, and he has already received compensation for the full term for which he was elected. This only proves that the constitutional provision fails to meet a deserving case. . . . That one fact is not enough to cause us to impart words into the Constitution which are not there, for the purpose of altering the meaning of that instrument as it actually reads. It seems to me that even greater care and caution should be used in adding or

striking out words from a provision in our organic law on the ground that it is necessary in order to obtain the true meaning of such provisions, than if such provisions were contained in a statute because the fundamental law of the State is presumed to be and indeed is prepared with the very greatest deliberation and adopted only after every opportunity has been had by different Legislatures and by the people at large. To construe the provision as the appellant claims it should be construed, is to add words which are not there now and which when then added alter materially the meaning of the provision."

In this connection it is well to ponder the oft-quoted words of Chief Justice Bronson in Oakley v. Aspinwall, 3 N. Y. 368, and which about a year ago I had occasion to quote in another argument before a part of this tribunal. They are, however, so timely and pertinent that they well merit repetition:

"It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument to supply its defects. If the Legislature or the courts may take that office upon themselves; or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the Government. Written constitutions will be worse than useless. Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power — some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not

work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary in enlarging the powers of the Government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the Government are just what those in authority please to call them."

It will also be asserted by the impeachment managers, that the proposition which I have discussed at such length is technical in its nature; that the accused should not be permitted to avoid a hearing upon the charges that have been made against him, that he should meet those charges by evidence, and not by resort to constitutional or legal objections — to technicalities.

This is not a novel position from the standpoint of history. It is as old as tyranny, as ancient as lawlessness. There are times when all laws — even the Decalogue — are regarded as technical. Those who controlled the machinery of the Star Chamber in the days of the Tudors; those who issued lettres de cachet in the reign of Louis XV; Robespierre and Marat, when during the Reign of Terror they plied the guillotine; the autocrat of all the Russias, when he has summarily consigned the flower of his people to the dungeon and to Siberian exile; the mobs which in our own land have resorted to lynching — all have been actuated by a common abhorrence of legal procedure according to established principles, and have viewed the restraints of the written law and of elemental justice as technicalities. And we have now in our day come to the pass when an appeal to the supreme law — the Constitution — which enshrines the self-imposed restraints of a free people, is likewise treated as a technicality, whenever it is believed that it may wrest from immolation the victim of partisan fury, or from confiscation the property of those against whom popular hatred has been aroused.

That would be a sad day in our judicial history when reliance upon the Constitution and the law of the land were to be regarded

as technical, or were to be contemned and deemed unworthy. So long as our people may proudly boast that this is a government of laws and not of men, so long will its liberties be preserved and its institutions perpetuated. But whenever the time shall come when the ignorance of the mob, its passions and its prejudices, or when considerations of mere political expediency, may prevail against the word of the organic law, when the time-honored concepts of " due process of law " and " the law of the land," shall be treated as mere jests, and become the objects of derision and obloquy, when the usurpation by one branch of the government of the powers which belong to another, may be regarded with equanimity, then the hour of disintegration will be at hand, and it will only require one endowed with the necessary audacity, " the man on horseback," to ride rough-shod over the ruins of the Constitution, and that system of government which has made of us a people happy, law-abiding and free, will give way to the hysterical caprices of tyranny and despotism.

We are confident that this tribunal will not shrink from the duty of applying the Constitution regardless of the outcries of those who, for ulterior reasons, are prepared to strike it down if it stands in the way of the accomplishment of their selfish purposes. It is one of the glories of our Court of Appeals, that it has hitherto fearlessly closed its ears to the discordant ravings of those who have from time to time demanded that it do violence to the Constitution and the law, in order that one whom they have prejudged to destruction might not escape their vengeance. It has never been terrorized or coerced by threats or cajoled by flattery or influenced by ridicule, or by the fear of unpopularity, into doing an act of positive injustice, and the sneer which regards the taking of shelter under the Constitution, as a technicality, has never led it to withdraw its protection from him who sought that citadel, or to weaken the steadfastness of its purpose in the enforcement of the law.

With all solemnity we express the confidence that this tribunal will not be swayed from a proper and due regard for the mandate of the Constitution, by the unworthy suggestion that to do so is to permit a technicality to triumph. To dismiss the articles of impeachment which have been presented to this tribunal for lack of

jurisdiction, would not be a triumph of technicality. It would be a vindication of that sacred instrument to which we all owe fealty, and upon the security of which, as the foundation of our political existence, depends the welfare of our beloved Commonwealth.

APPENDIX A

(Accompanying Mr. Marshall's argument)

ALABAMA (1901).

Art. 4, sec. 76.—Legislative Department.

"When the Legislature shall be convened in special session there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, except by a vote of two-thirds of each house. Special sessions shall be limited to thirty days."

ARIZONA (1910).

Art. 4, subd. 2, sec. 3.

" . . . The Governor may call a special session whenever in his judgment it is advisable. In calling such special session, the Governor shall specify the subjects to be considered at such session, and at such session no laws shall be enacted except such as relate to the subjects mentioned in such call."

ARKANSAS (1874).

Art. 6, sec. 19. Executive Departments.

"The Governor may by proclamation, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that shall have become since their last adjournment, dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened and no other business than that set forth therein shall be transacted until the same shall have been disposed of; after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

CALIFORNIA (1879).

Art. 5, sec. 9.

"He (Governor) may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto."

COLORADO.

Art. 4, sec. 9.

"The Governor may, on extraordinary occasions, convene the general assembly by proclamation, stating therein the purpose for which it is assembled; but at such special session no business shall be transacted other than that named in the proclamation; he may by proclamation convene the Senate in extraordinary session for the transaction of executive business."

CONNECTICUT.

Art. 3, sec. 2.

"There shall be one stated session of the General Assembly, to be holden in each year, alternately at Hartford and New Haven, on the first Wednesday of May and at such other times as the General Assembly shall judge necessary; the first to be holden at Hartford; but the person administering the office of Governor, may on special emergencies convene the General Assembly at either of said places at any other time, and in case of danger from the prevalence of contagious diseases, in either of said places, or other circumstances, the person administering the office of Governor, may by proclamation convene said Assembly at any other place in their state."

DELAWARE (1897).

Art. 3, sec. 16.

"He (Governor) may on extraordinary occasions convene the General Assembly by proclamation; or in case of disagreement between the two houses, with respect to the time of adjournment, adjourn them to such time as he shall think

proper, not exceeding three months. He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."

FLORIDA (1885).

Art. 4, sec. 8.

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to be convened, and the Legislature when organized shall transact no legislative business other than that for which it is specially convened, or such other legislative business as the Governor may call to its attention while in session, except by a two-thirds vote of each house."

GEORGIA (1877).

Art. 5, sec. 1, par. 13.

" . . . He (Governor) shall have power to convoke the General Assembly on extraordinary occasions, but no law shall be enacted at called sessions of the General Assembly except such as shall relate to the object stated in his proclamation convening them."

IDAHO (1889).

Art. 4, sec. 9.

"The Governor may on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the Senate in extraordinary session for the transaction of executive business."

ILLINOIS (1870).

Art. 5, sec. 8.

"The Governor may, on extraordinary occasions, convene the General Assembly, by proclamation, stating therein the purpose for which they are convened, and the General Assembly shall enter upon no business except that for which they are convened."

INDIANA (1851).

Art. 4, sec. 9.

"... But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time, by proclamation, call a special session."

IOWA (1857).

Art. 4, sec. 11.

"He (Governor) may, on extraordinary occasions, convene the General Assembly, by proclamation, and shall state to both houses when assembled, the purpose for which they shall have been convened."

KANSAS (1859).

Art. 1, sec. 5.

"He (Governor) may, on extraordinary occasions, convene the Legislature by proclamation, and shall at the commencement of every session, communicate in writing such information as he may possess, in reference to the condition of the state, and recommend such measures as he may deem expedient."

KENTUCKY (1890).

Sec. 80.

"He (Governor) may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place of (if) that should have become dangerous from an enemy or from contagious diseases. ... When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no others shall be considered."

LOUISIANA (1898).

Art. 75.

"He (Governor) shall take care that the laws are faithfully executed, and he may on extraordinary occasions, convene the General Assembly at the seat of government, or, if that should have become dangerous from an enemy or from an epidemic, at a different place. The power to legislate shall be limited to the objects specially enumerated in the proclamation convening such extraordinary session; therein

the Governor shall also limit the time such session may continue; provided it shall not exceed thirty days. Any legislative action had after the time so limited, or as to objects not enumerated in said proclamation shall be null and void."

MARYLAND (1867).

Art. 2, sec. 16.

"The Governor shall convene the Legislature or the Senate alone, on extraordinary sessions; and whenever the presence of an enemy or from any other cause the seat of government shall become an unsafe place for the meeting of the Legislature, he may direct their sessions to be held at some other convenient place."

MAINE (1819).

Art. 5, sec. 13.

"He (Governor) may on extraordinary occasions convene the Legislature; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the day of the next annual meeting; and if since the last adjournment, the place where the Legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the state."

MASSACHUSETTS.

Chap. 2, sec. 1, art. 4.

"The Governor, with advice of counsel, shall have full power and authority during the session of the general court (Legislature) to adjourn or prorogue the same to any time the two houses shall desire, and to dissolve the same on the day next preceding the last Wednesday in May; and, in recess of the said court, to prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the commonwealth shall require the same; and in case of any infectious distemper prevailing in the place where the said court is next at any time to convene, or any other cause happening whereby danger may arise to the health or lives of the members from

their attendance, he may direct the session to be held at some other, the most convenient place within the state."

MICHIGAN (1850).

Art. 5, sec. 7.

"He (Governor) may convene the Legislature on extraordinary occasions."

MINNESOTA (1857).

Art. 5, sec. 4.

" . . . He (Governor) may on extraordinary occasions convene both houses of the Legislature."

MISSISSIPPI (1890).

Art. 5, sec. 121.

"The Governor shall have power to convene the Legislature in extraordinary session whenever in his judgment the public interest requires it. Should the Governor deem it necessary to convene the Legislature, he shall do so by public proclamation, in which he shall state the subject and matters to be considered by the Legislature when so convened, and the Legislature when so convened as aforesaid, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the Governor, nor, by which the session is called, except impeachments and examination into the accounts of state officers. The Legislature when so convened may also act on and consider such other matters as the Governor may in writing submit to them while in session. . . ."

MISSOURI (1865).

Art. 5, sec. 9.

"The Governor shall, from time to time, give to the General Assembly information relative to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary occasions he may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary.

MONTANA (1889).

Art. 7, sec. 2.

"He (Governor) may on extraordinary occasions convene the Legislature by proclamation, stating the purposes for which it is convened, but when so convened it shall have no power to legislate on any subject other than those specified in the proclamation or which may be recommended by the Governor, but may provide for the expenses of the sessions and matters incidental thereto."

NEBRASKA (1875).

Art. W, sec. 8.

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together."

As amended to 1910, art. 5, sec. 9.

NEVADA (1864).

"The Governor may, on extraordinary occasions, convene the Legislature by proclamation and shall state to both houses when organized, the purpose for which they have been convened and the Legislature shall transact no legislative business except that for which they were especially convened, or such other legislative business as the Governor may bring to the attention of the Legislature while in session."

NEW HAMPSHIRE (1902).

Part second, art. 49.

"The Governor with advice of counsel, shall have full power and authority, in recess of the general court, to prorogue the same from time to time, not exceeding ninety days in any one recess of said court, and during the sessions of said court to adjourn or prorogue it to any time the two houses may desire; and to call it together sooner than the time to which it may be adjourned or prorogued; if the welfare of the state should require the same."

NEW JERSEY (1897).

Art. W, sec. 6.

" . . . He (Governor) shall have power to convene the Legislature, or the Senate alone, whenever in his opinion public necessity requires it. . . ."

NEW MEXICO (1910).

Sec. 32. *Special Sessions.*

"Special sessions of the Legislature may be called by the Governor, but no business shall be transacted except such as relates to the business specified in the proclamation."

NORTH CAROLINA.

Art. 3, sec. 9.

"The Governor shall have power on extraordinary occasions, by and with the advice of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened."

NORTH DAKOTA.

Art. 3, sec. 75.

" . . . He (Governor) shall have power to convene the Legislative Assembly on extraordinary occasions. . . ."

Art. 2, sec. 56.

"No regular session of the Legislative Assembly shall exceed sixty days except in the case of impeachment, but the first session of the Legislative Assembly may continue for a period of one hundred and twenty days."

OHIO (1910).

Art. 2, sec. 9.

"He (Governor) may on extraordinary occasions, convene the General Assembly by proclamation, and shall state to them, when assembled, the purposes for which they shall have been convened."

OKLAHOMA (1907).

Art. 6, sec. —.

"The Governor shall have power to convene the Legislature or the Senate only, on extraordinary occasions. At

extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration."

OREGON (1892).

Art. 5, sec. 12.

"He (Governor) may on extraordinary occasions convene the Legislative Assembly by proclamation, and shall state to both houses when assembled, the purpose for which they shall have been convened."

PENNSYLVANIA.

Art. 4, sec. 12.

"He (Governor) may on extraordinary occasions convene the General Assembly, and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."

Art. 3, sec. 25.

"When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session."

SOUTH DAKOTA (1889).

Art. 4, sec. 4.

". . . He (Governor) shall have power to convene the Legislature on extraordinary occasions. . . ." (No limitation on power).

RHODE ISLAND (1842).

Art. 7, sec. 7.

"He (Governor) may on extraordinary occasions, convene the General Assembly at any town or city in this state, at any time not provided by law. . . ." (No restriction on powers.)

SOUTH CAROLINA (1875).

Art. 4, sec. 16.

"He (Governor) may on extraordinary occasions convene the General Assembly in extra session. . . ." (No limitation on powers.)

TENNESSEE (1870).

"He (Governor) may, on extraordinary occasions, convene the General Assembly by proclamation in which he shall state specifically the purposes for which they are to convene, but they shall enter on no legislative business except that for which they were specifically called together."

TEXAS (1876).

Art. 4, sec. 8.

"The Governor may on extraordinary occasions, convene the Legislature at the seat of government, or at a different place in case that place should be in possession of the public enemy or in case of the prevalence of disease thereat. His proclamation should state specifically the purpose for which the Legislature is convened."

UTAH (1895).

Art. 7, sec. 6.

"On extraordinary occasions the Governor may convene the Legislature by proclamation, in which shall be stated the purpose for which the Legislature is to be convened, and it shall transact no legislative business except that for which it was especially convened, or such other legislative business as the Governor may call to its attention while in session."

VERMONT.

Chap. 2, sec. 11.

" . . . and they (Governor and Lieutenant Governor) shall have power to call together the General Assembly when necessary, before the day to which they shall stand adjourned."

VIRGINIA (1902).

Art. 5, sec. 77.

" . . . and (Governor) the General Assembly on application of two-thirds of the members of both houses thereof or when, in his opinion, the interests of the state require it."

WASHINGTON (1899).

Art. 3, sec. 7.

"He (Governor) may on extraordinary occasions, convene the Legislature by proclamation in which shall be stated the purposes for which the Legislature is convened."

WEST VIRGINIA (1872).

Art. 7, sec. 7.

"The Governor may on extraordinary occasions, convene at his own instance, the Legislature; but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together."

WISCONSIN.

Art. 4, sec. 11 of Amendments 1881.

"The Legislature shall meet at the seat of government at such times as shall be provided by law once in two years and no oftener, unless convened by Governor in special session and whenever so convened, no business shall be transacted, except as shall be necessary to accomplish the special purposes for which it was convened."

WYOMING (1889).

Art. 4, sec. 4.

" . . . He (Governor) shall have power to convene the Legislature on extraordinary occasions. . . ."

The President.— Do you wish to reply?

Mr. Parker.— May it please the Court: We may congratulate ourselves upon the pleasure which has been ours of listening to a very interesting and learned address. But at the outset of the brief period that I expect to claim your attention I wish to say that the gentleman is entirely mistaken in the foundation for his peroration, which is, as he states it, that the counsel representing the managers propose to attack the position taken by the counsel for the respondent on the ground that the question presented is a technicality. We have made no such statement. We shall make no charge against them on the question of proprieties. Whether this demurrer should have been interposed, whether this motion should have been made, rested with them as lawyers, and we do

not challenge their right to make it, but we challenge its correctness. Nor shall we spend any time in considering that portion of his most eloquent address in which he refers to that time in the future when his imagination could discover a demagogue leading the mob in an attack upon the judiciary of this State. The judiciary of this State is too firmly rooted in the esteem, the respect, the confidence and the affection of the people and of the bar of this State ever to make that possible. The propriety of that portion of his address we shall not consider. But it need not be doubted that while the judiciary is recruited from the best members of the profession as it has been in the past, and as, God willing, it shall be in the years to come, no member of the profession of this State, no member of the bench of this State, need fear the coming of that hour which has been so graphically imagined here.

But to pass more directly to the points involved. After all, the argument of the learned counsel, as I understand it, in its last analysis, comes to this: that the Assembly had not the power of impeachment because the Legislature of which it constitutes one house was in extraordinary session. If it be true that the Constitution forbids the Assembly when both branches are together in extraordinary session to impeach any official of this State, we should not be here urging this High Court that the Assembly, in taking the action which it did, was acting within the power which had been conferred upon it by the people of the State of New York, through the Constitution, its charter, for the protection of the liberties of the people.

If I understand the argument which has been addressed to you, it is either based upon a misapprehension of the nature of the impeachment proceedings themselves, or it is based upon a confusion arising between the judicial power of the Assembly to impeach and the legislative power to enact legislation.

First, let us come to the grant of power, for it is to that grant of power that this High Court must look first to ascertain the extent of the power conferred upon the Assembly in such cases. How does it read? "The Assembly shall have the power of impeachment." How? By a vote of a majority of the members elected. Is there any limitation suggested in that grant of power?

It is as broad as human language can make it. Add to it anything you may think of that could possibly be added to it, and you will realize that you cannot strengthen it one iota. As a grant of power, it is absolute and complete, when we consider the history of impeachment proceedings back of the time when it was first incorporated into our Constitution. Is there anywhere any suggestion of time or place or occasion when the Assembly should act? Not at all. Is there anywhere else in this Constitution any provision relating to the subject of impeachment that suggests a limitation upon the power, upon the time, upon the occasion when action should take place? Is there to be found in the debates which have taken place upon the adoption of the first Constitution and in the adoption of the several Constitutions thereafter, any suggestion that there should be a time, ever, during the year, when the balance of powers which our scheme of government provides for should not be perfect, one feature of that balance being the power of the Assembly to impeach those officials of the State who have been guilty of misconduct, either in office or outside of office, who are, by reason of misconduct, unfit longer to hold the office? Can you conceive for a moment that when the power was granted it was the intention to limit the exercise of that power to those days or weeks or months when the Legislature should be in regular session? There is no provision in this Constitution that the Assembly should consider the matter at all at regular session. It has been done, and because it has been done it has not been challenged. It is now done for the first time at an extraordinary session, and hence the challenge upon which ingenious legal minds have been at work for a long time to see if they could not construct an argument which could convince a High Court of Impeachment that when this grant of power was given to the Assembly of this State it was intended, although not expressed, that the power, after all, could be exercised only during the few months when the Legislature shall be in session, originally, perhaps, but a few weeks, and now but a few months, and that for the rest of the year the corrupt official might do what he chose, and the people of this State would be powerless to remove him from his office.

My learned friend challenges the position which we have taken and which we take now although not necessary for our argument, but it is a part of it. He challenged the position which we take and which was asserted in the opinion of Mr. Justice Hasbrouck, that the Assembly may be self-convened.

We take that position, your Honors, and, briefly, let me present our view with reference to it.

Is there any better settled proposition than that, given a grant of power there goes with it and as an incident to it all the lesser powers necessary to make the greater grant effectual? Is it not a part of the scheme and the spirit of the constitution-making of the United States, whether in the State or the Federal Government? That such was the well-settled doctrine was well known, historically and legally, at the moment of the first incorporation into our Constitution of impeachment provisions. Does it undertake to do more? Does it undertake to prescribe when the Assembly shall meet and under what circumstances it shall meet? Not at all.

It gives the grant and, having given the grant, there is carried with it, as an absolute necessity, all the underlying and the necessary steps and the power to execute all the underlying and necessary procedure to give it force and effect.

If it be conceived, for instance, that the time should come in the history of this State, when a Governor should be guilty of treason, would there be any question in your minds of the power or of the duty of the Speaker of the Assembly, the Legislature having adjourned, to invite the Assembly to the Capitol at Albany to consider impeachment in such case? And can you question that when gathered here in the city of Albany, all the members of the Assembly being present, it would be within their power to save the State from the great injury which might be wrought to it by the impeachment of the offender?

By way of illustration let us assume another case. Assume, if you please, the existence of a State Highway Commission composed of three members, having the power of making contracts for the construction and repair of roads throughout the State. And further that these officials, one of whom being an elected officer of the State and with the power to dominate another mem-

ber of the board, should enter into a conspiracy with certain contractors for the letting of contracts for the construction and repair of roads at a sum exceeding by 25 or 40 or 50 per cent the actual cost to the contractor. And furthermore, that contracts on such a basis were awarded involving many millions of dollars of the money of the people of the State. And still further that at least six months would intervene before the next regular annual session of the Legislature. And assume that the Legislature should be convened under such circumstances with the view of protecting the people of the State by the impeachment of the elected State officer.

Is there anyone who doubts that the High Court of Impeachment can be instituted only at a session, general or special, of the that it was the duty of the Assembly under those circumstances to protect the people of the State, and that the people were not so impotent under this provision of the Constitution but that there was help and relief?

The first and conclusive answer to the claim that an impeachment can be instituted only at a session, general or special, of the Legislature, is that the Legislature has no power of impeachment at any session whatever; and this is made by a clear and absolute provision of the Constitution itself, that the Assembly, not the Legislature, shall have the power of impeachment.

Next consider for a moment the consequences of any other course. There are only two provisions for sessions of the Legislature: first, the general session on the first Wednesday in January of each year; and second, the provision that the Governor may convene the Legislature in extraordinary session, on which occasion no subject shall be acted upon except such as may be recommended by the Governor for consideration.

Suppose now that upon adjournment of the general session of the Legislature the Governor should become at once totally incompetent or that he should have committed treason against the State or pursued any other course subversive of State Government. Is it to be supposed that a person capable of such conduct would convene the Assembly for the purpose of recommending his own impeachment; that he would or ever might do such a thing? It is contrary to the experience of mankind and to the plainest dictates of common sense.

It was not intended that the administration of the State government should ever depend upon any such contingency as that. If so, then the State might be at any time subject not only to having its affairs administered by a person guilty of corrupt conduct in office and of serious crimes, but it must suffer from the close of one session of the Legislature until the beginning of the next, or for substantially one-half of the Governor's term.

As I understood from the argument of my learned friend, he insisted that it is impossible for the Assembly to be convened alone and for it to convene itself, not because there is any provision in the Constitution preventing it, but because it is necessary that both houses should be in session, or, in other words, that the whole Legislature must be in session, and he refers in his brief to the case in the United States Senate involving the impeachment of Secretary Belknap, and he quotes that as authority.

It is exactly true, as he states in his brief, that in that case the Senate did say, by resolution, that the matter should not proceed in the Senate while the House was not in session; but, in the report which was made by the counsel for the managers, this appears:

> "The plan of the managers on the part of the House has been to induce the Senate as a Court of Impeachment to allow Congress to adjourn and then sit as a court to carry on the case; but there are two reasons against that which render it conclusive that the Senate will not do so. The first is, that many senators doubt the power of the Senate to sit as a Court of Impeachment after the adjournment of Congress; the secondary and really practical answer is, that it will be found impossible to keep a quorum of the court together after the adjournment of Congress."

Still another suggestion was made, which was that there could be no report to the Senate, assuming the Assembly should be self-convened. But it is not necessary to make a report to the Senate. Although that was done, sections 118 and 119 provide that the impeachment may be presented to the President of the Senate and it is made the duty of the President of the Senate to summon the

High Court of Impeachment so that it is not necessary at all that the Senate should be in session.

Our contention is that the Assembly had the power to impeach; could self-convene itself and impeach; that it was not necessary that the Senate should be present or that the Legislature should be in session at all; that in any great emergency which may arise, it will be done; and that the Court of Impeachment should not at all, unless the situation be presented where it is compelled to, interfere with what is perfectly plain. There may come a time when the necessities of this State will demand that the Assembly convene itself, but while that is all true, that course is not involved here.

Our position is that we have the Assembly in session in connection with the Senate. The question which is to be presented is whether under the circumstances which brought them together, there is any restraint placed upon the Assembly by article 4, section 4 of the Constitution.

But, first, I want you to go with me back to the beginning of the impeachment procedure in this State, to find out what was the purpose in view.

I had occasion to say Friday that we had borrowed our procedure from England, with some modifications. Those modifications I think are worth examining in this connection in order to see precisely what the Constitution of this State undertakes to do. There, as here, the lower house impeached. There the upper house is the Court of Impeachment. Here the upper house, with the Court of Appeals, is the Court of Impeachment. There every citizen of the kingdom is impeachable in Parliament, whether he is an official or not; and the extent of the punishment which is to be meted out to him rests in the discretion of that High Court of Impeachment. Here, no citizen is impeachable because he is a citizen. None are impeachable here but the officials; only certain officials may be impeached and, when impeached, there is no discretion save one left to the High Court of Impeachment. It cannot *punish* them in the sense in which they may be punished and are punished in England. The right to *punish* them is reserved, under the Constitution, to the ordinary procedure of indictment, trial and imprisonment.

All that a court of impeachment can do is to remove from office the official after his unfitness longer to hold office has been demonstrated, and to add to it a disqualification from holding office in the future. The distinction is marked, as it seems to me. Our purpose is to protect the State. The punishment of the individual is left to the ordinary procedure of the courts. If he has committed crimes for which he may be impeached, he cannot be punished for them by this High Court of Impeachment, but this Court is here to protect the people of the State against an unfit, an unworthy, an untrustworthy official whose tenure of office is a menace to the State.

Starting with that proposition, then, we come now to the procedure, and what is it? Take the ordinary session of the Legislature; it must convene on the first Wednesday in January, by command of the Constitution. An extraordinary session of the Legislature comes into existence by command of the same Constitution when the Governor so wills it, and specifies the cause for bringing the extraordinary session. When the Legislature meets here it consists of two bodies, the Senate and Assembly, each independent of the other. Each one may initiate bills. Each one may pass statutes affecting any subject which may be covered by statutes, upon any subject not prohibited by the Constitution. Either house may reject the action of the other house, and when finally they agree upon a bill, so that it has passed both houses, there has resulted, so far as the legislative department of the government is concerned, a bill passed by both houses, and that legislation, while it may be vetoed by the Governor, may, notwithstanding his veto, become the law of the State, provided a two-thirds vote is cast in its favor.

This represents the legislative work. Each house is independent of the other; each determines the qualifications of its members; each has the power to remove a member, though he has received a certificate from the Secretary of State that he is entitled to the seat; each selects its own officers, and in those respects, and in all respects, they act independently. But what they do together in the way of passing legislation, is the act of the Legislature as a whole. The Senate has other independent functions. It may confirm nominations sent to it for confirmation by

the Governor, or reject them. That is independent work, and not a part of the legislative work. So, too, the Assembly has other independent functions. It not only selects its own officers, appoints its own committees, but can institute impeachment proceedings.

Through all the cases to which my friend has referred impeachment is treated always as a judicial proceeding and a judicial act on the part of the Assembly representing the people of the State of New York. After they have instituted these proceedings, the High Court of Impeachment comes into existence by the provisions of the Constitution. Into that Court go all the senators of the State of New York, not as the Senate, but because the Court of Impeachment is by the Constitution made to consist of the senators of the State of New York and the judges of the Court of Appeals, or a majority of each. Their salaries are fixed at $1,500 a year as senators, and yet when they come into this Court of Impeachment, they are permitted by the Constitution to have $10 a day in addition for the judicial work which they have undertaken.

How can there be any question, unless it is to be found in the mandate of the Constitution, as to the Assembly's right to act at an extraordinary session of the Legislature? There is no difference in principle. There is no reason why, in extraordinary session of the Legislature, the Assembly should not impeach just as well as at the regular session. There is no provision of the Constitution which in terms provides that it may impeach in either the regular or the extraordinary session. It is sufficient, so far as the Constitution is concerned, that it grants to it the power to impeach. That power being granted, the Assembly may exercise it when and where it chooses, unless it be true that section 4 of article 4 of the Constitution prohibits it.

But how can that be urged? Article 4 provides that

> "The Governor shall have power to convene the Legislature or the Senate only, on extraordinary occasions. At extraordinary sessions, no subject shall be acted upon, except such as the Governor may recommend for consideration."

What is it that the Governor has power to convene? The Legislature. What is it then, that the next clause restrains? The

Legislature. For at extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration. But what are the subjects? Necessarily, legislative subjects. It must be so, because the Legislature can consider only legislative subjects. The Assembly may consider those things which belong to it alone. The Senate may consider the confirmation of appointees of the Governor and the particular things which the Senate may do alone. But as to all legislative matters, in order that it may constitute legislation, it is necessary that the Legislature, that is, both branches, shall concur. The position of this provision of the Constitution, two articles away from the one which confers the grant of power, one being section 13 of article 6, and the other section 4 of article 4, shows that it could not have been the purpose in the minds of the framers to cut down the power of impeachment. If that had been the purpose, it is perfectly clear that it would have been provided in the great grant of power, that the Assembly shall have power to impeach by a majority vote of the members elected, except that it shall act only at a regular session. That is a provision that would have been put in had the purpose been to limit impeachment to a regular session.

Now, you must necessarily reach the conclusion that the purpose in using this language was not to prevent action by impeachment at any extraordinary session. Why must you reach it? You must reach it because the great grant of power had been given in another article, and so they were treating of an entirely different subject, and the logical and ordinary rules of construction require these two clauses to be so construed that it shall be held that this restriction was upon the Legislature itself, and only the Legislature, and had to do only with legislative duties. The history of that subject is disclosed in the debates in the constitutional convention. The purpose of it was to enable the Governor, on extraordinary occasions, to convene the Legislature for the purpose of passing some act or acts which he deemed of great interest to the State, of such vital interest that the Legislature ought to be brought together. And yet it was deemed best that the Legislature should not on such occasions take up other subjects of legislation, so that it might not continue in session much longer than the Governor deemed for the benefit of the public.

So it was provided in the Constitution that this Legislature which the Governor was given the power to convene in extraordinary session, and which he could do only on extraordinary occasions, should not have the power to act upon any other subject. What is the Legislature? It is not the Assembly; it is not the Senate; it is both together, and when the Legislature was enjoined from considering any other subjects it was not the purpose to enjoin the Assembly from performing its duties, not the purpose to enjoin the Senate from confirming any appointments of the Governor that might happen to remain over, or any appointment that might be tendered to it. The language then should be so construed, your Honors, that it shall be given effect according to the purpose which the framers of the Constitution had in mind, that it shall work out their scheme, which was to prevent the Legislature from considering subjects of legislation other than those which the Governor should present to it, and not so as to prevent the Assembly from performing the function which had been committed to it as an Assembly, to wit, the power of impeachment. That power should be in possession now, and hereafter, to be exercised in extraordinary session. It will not do for us to assume here in the disposition of this question, that the time ever will come when there will be a Governor who would convene the Legislature in extraordinary session, and would recommend the Assembly that in the public interest they proceed to impeach him. And there should be no decision of this important question by this High Court, except along the line of the natural and reasonable construction which these two provisions of the Constitution require. They can stand together, side by side, the one giving the grant of the power of impeachment to the Assembly, which should continue 365 days in the year; the other giving the Governor power to assemble the Legislature in session for the purpose of considering legislation; or the Senate which he may assemble only for the purpose of considering appointments. Those two provisions should stand and should be enforced side by side. That is the natural and ordinary meaning of those two provisions. The construction which all our experience with the subject of impeachment and of legislation requires us to put upon these two provisions standing together is that the Governor may, whenever

he deems the occasion one of such moment as to be within the spirit of the Constitution, summon the Legislature together to act upon it, and when he does, it shall act upon no other legislative subject; but that these two absolutely independent houses, each having powers of its own independent of the other, shall be free then and always to perform their separate duties; such, for instance, as impeachment by the Assembly.

Let me suggest to this Court that the argument of my learned friend comes in the end to this: That nothing can be done by the Assembly which the Governor has not recommended; that it is absolutely impotent to do anything, to elect a speaker, if the speaker at the regular session has died meantime; or if someone has resigned from the Legislature and left the chairmanship of committees vacant, that this Assembly would be absolutely impotent to fill the vacancies and so put itself into working condition.

Such a construction as that would be strained and unnatural, for this article 4, section 4, does not deal with impeachment; it deals with legislation. The subject is legislation; the bringing together of the legislators is for legislative purposes only and the provisions that at extraordinary sessions no subject be acted upon except such as the Governor may recommend means that no legislative subject shall be acted upon by the Legislature, considered as an entirety, not that the separate houses may not perform the functions which otherwise belong to them, and which other provisions of the Constitution have joined upon them.

Mr. Brackett.— With the permission of the Court: My associates have thought that I should suggest some additional points that have come under my preparation. We are keeping ourselves very well within the time which counsel of the other side have consumed.

The President.— Very well; you will have full opportunity to address the Court.

Mr. Brackett.— With the permission of the Court: The defendant stands properly impeached by the Assembly. There is

no limitation in the Constitution as to the exercise of this power of impeachment, nor is there any direction of procedure in such cases. It is urged that impeachment may not be had at an extraordinary session of the Legislature. There are at least two complete answers to this contention. In the first place, these articles of impeachment were not adopted at an extraordinary session or any session of the Legislature. They were adopted at a meeting of the Assembly that happened to be held during a time when there was an extraordinary session of the Legislature, as it could have been held at any time, whether the Legislature was in session or not. Second, the Assembly may adopt impeachment proceedings at an extraordinary session of the Legislature. There is no limitation in the Constitution against it doing so. Under the Constitution (I now quote):

> "The legislative powers of the State shall be vested in the Senate and Assembly."

I call your attention to the fact that the *legislative* powers of the State are vested in the Senate and Assembly; and the Legislature is directed to assemble on the first Wednesday in January of each year. In addition to this, the regular session, when both houses are required to come together, without notice of any kind, the Governor "shall have power to convene the Legislature or the Senate only on extraordinary occasions. At extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration."

There is no authority anywhere for the Governor to convene the Assembly alone, and it stands here, if the Presiding Judge and members of the Court please, that, upon the contention of the learned counsel for the defendant, there is absolutely no time on earth when there can be any impeachment at any moment during the year. The Legislature being in session does not mean that the Assembly is in session, as a separate body. It is here as a constituent part of the Legislature, and if the contention is true that the counsel for the defendant here presses, although there is conferred in the most general terms the power of impeachment, broad as the encasing air, there is no time that it can be exercised, because there is no way in the wide world under the

shining sun, that the Assembly can get itself together. But, on the present occasion we need not be much troubled with the question as to how the Assembly may convene for the purpose of impeachment. It did get together. The members were together. While it is conceivable that a Governor may be of so high a mind and so conscious of his own rectitude and so sure of his position, and so certain that he has done nothing worthy of impeachment or criticism, that he may issue a call convening the Assembly and recommend the consideration of the subject of his own impeachment, and then join battle in an orderly way as to whether he is guilty of anything impeachable, perhaps that is too much to require, or hope for, from one of our poor humanity, perhaps too much to expect that the average man or the average Governor would do so. It is rather, probably, to be expected that he distinctly will not do so, but will shield himself behind what is a technicality, that he cannot be impeached in the manner and at the time that the proceedings were instituted, if at a special session.

I cannot at this moment, with the permission of the Court, fail to recall the remark of Charles Sumner, upon the trial of President Johnson. Charles Sumner, who had stood for years as the incarnate political conscience of Massachusetts, when all the questions with respect to form and procedure and technical objections had been made, he burst out with the one question that should be considered here, as he said it should be considered there, "Great God, is there any question possible except is this man guilty?" But it is well within the power and the right of the defendant to invoke any and every technicality, and therefore we have a right to expect that the Governor would not convene the Legislature in special session, and would not recommend for consideration the matter of his impeachment; and he has claimed to this time that he cannot be impeached, that he was not properly impeached, and he cannot be here convicted because he did not recommend to the Legislature in special session the matter of his own impeachment.

One proper way of determining the intention of the Constitution, or of a constitutional provision, is to trace the several contentions with respect to it to their consequences, to their ultimate

consequences. It is right to consider the evil which would result from either alternative presented in the discussion, that of the learned counsel on the side of the defendant and that which is maintained on behalf of the managers. This principle is thoroughly settled, and those members of the Court who are all the time hearing discussed and examining legal questions, recognize it as a thoroughly settled proposition. The doctrine is fully elaborated in an opinion by Judge Haight in the 188th New York, and while, in that case, it shows that it was a dissenting opinion, it still is true that the doctrine that he enunciated there is well settled, and has met the approval of the courts over and over again. Another proposition upon which we may plant our feet with great surety is that it will not be assumed that, in the adoption of the Constitution, the people intended to reach either anarchy or disorder or public mischief of any kind. The direct contrary was intended to be attained — order and such provisions and restrictions as would surely make for order. I use the language here of People v. The Board, 155 N. Y.

Let us see, then, in the light of these principles of legal hermeneutics, what would be the consequence of the inability of the Assembly to convene under certain circumstances. I doubt whether I can add anything to what has been already so ably said by Judge Parker, but I approach it from perhaps a little different angle of vision, and in a court composed of so many members as this, perhaps it is not improper that such different angles should be presented.

Assume that soon after the adjournment of the regular session a Governor should so far demean himself as to commit a series of acts flagrantly and admittedly violative of his duty — I do not need to suppose any particular offense; I want to bring to the attention of the Court the proposition that a Governor has so far demeaned himself that he has flagrantly and admittedly violated the duties of his office, and has violated the Constitution. You may call it that he has issued pardons to every criminal in the penal institutions of the State, that he has ordered out the militia, and has taken into custody the person of every member of the Court of Appeals, including the Presiding Judge, whose person is at this moment as thoroughly sacred in the minds of

the people of this State as any man ever in our history. I do not need to specify the crime — any of these things. Assume that he takes the militia and marches them into war on our neighbor, Massachusetts — whatever it may be, so it is admittedly and flagrantly a violation of the Constitution, committed on the first day of April, 1913 — would the people of the State be compelled to sit helplessly by during the months until the first Wednesday in January following, until the Legislature could get together in regular session under the direction of the Constitution, before staying his wicked acts? Oh, but my friend says in his argument, it does not amount to much, it is only a few months anyway. Can any sane man who has any knowledge of State affairs, and who loves the orderly administration of the State government, consider for a single moment, with complacency, a claim of that kind? Is it true that if a wild man is in any office seven or eight months of the year, particularly in the office of Governor, it is not of consequence whether he is stayed during that length of time or not? Does it comport with the genius of our institutions? Is it true that there is meant to be a single moment of time, let alone eight months of time, when any official of the State is not deemed to be somewhere controlled and checked by some other department of the State? And this when the Legislature, in its passage of the laws, is controlled and checked and its every act is subject to scrutiny and liable to be declared void by the high court over which your Honor presides; when, in terms, the court over which your Honor presides is liable, in case it runs to any wrong which reaches the dignity of an impeachable offense, to have charges preferred against its members by the nearest representatives of the people in the State, the Assembly; when the Executive is liable, and the Lieutenant Governor is liable, to impeachment at any moment. Every State officer is liable to removal by the Governor. There is not a moment of time, and, your Honor, with all the tremendous learning which you have with respect to our laws and our system, with your tremendous knowledge of the structure and the genius of our institutions, I do not believe you can find, anywhere, any moment of time when the system contemplates that any public official shall stand unrestrained a single moment of his official life.

I think it was Trajan who said that unrestrained power makes a wild beast of any man, no matter how benevolent his previous intentions, and it was with that in mind that the wise fathers who formulated the constitutional system under which, with some changes, we have lived in contentment and peace and under which we have lain down and slept the sound sleep of free men for a century and a quarter — it was with that in mind that the checks and the balances of the Constitution were devised, that one department should control and balance another, that there should be no single public official or servant who should not be subject to surveillance and subject to reproof and subject to removal at any moment of time; it was with that in mind that they formulated the magnificent document which we call the Constitution.

Let each one reason it out for himself. It is enough to say that the Chief Executive of the State could do acts that might endanger the vital interests of the State and might bankrupt and ruin it. Such a juncture would, in the absence of constitutional direction or intention, require that the Assembly should come together upon any call. I do not limit it that it should be upon the call of the speaker. I do not limit it that it must be upon the call of the clerk. The Assembly with its solemn power of impeachment may get together upon any call and in any place and in any way. It has that right and it would be its most sacred duty to exercise that right in case there existed the situation I have suggested to you.

Do the members of this Court recall (and I am sure that those members whose habit is to consider legal and constitutional questions and study legal and constitutional history, to whom justice is a habit, do recall) the time when the clerk of the House of Representatives of the United States declined to call the roll of that body, so as to enable it to organize, and John Adams, who had been President of the United States but who in his work in the House was doing greater public service than in all his long and useful life, announced that, if the clerk would not call the roll, he himself would call it? The people of the United States applauded and approved and said Amen to his declaration and the House organized.

In the very room where I now stand, where this Court sits,

Charles T. Saxton, a member of the Senate, the leader of the majority, the Lieutenant Governor being of an opposite political faith, when some question was pending and the Lieutenant Governor directed the clerk not to call the roll and he would not, the question could not be put and an absolute standstill was at hand — Charles T. Saxton, rising in his place, called the roll himself; and the action thus taken was upheld by the Senate, as it was upheld by the overwhelming sentiment of the people of the State.

The question how to get the Assembly together, however, if its assemblage is necessary at all, and for the purposes of this argument I concede it is necessary to get together, is not here. Its members were together. They were on the other side of this building in the hall provided by the State for their accommodation. They were together.

I shall not stop for the argument — there is much of argument that the proposition at which my friend found time to turn and jest is correct — that if, under the juncture I have mentioned, 76 members of the Legislature should sign articles of impeachment or resolutions of impeachment, much of argument could be had that those powers necessarily exercised would be valid, because a vote does not mean an assemblage called together and a viva voce expression. Lexicographers define an expression as any expression of will; and the expression of will is as thoroughly defined by a roll call on the articles of impeachment by a majority as would the getting together and a viva voce vote; but I will pass that because it is not necessary here to claim that that could be done or that we press that proposition.

We may pass by the manner in which the Assembly shall convene, for it was convened. The members were physically together, and we come to the only question that needs to be considered in this connection, whether, being thus together, not being in session, but being thus together, it may institute proceedings to impeach the Governor, such impeachment proceedings not having been in terms included in the subjects enumerated by the Governor in calling the extraordinary session together.

The language vesting the power of legislation in the Senate and Assembly is general and comprehensive, whereas the Federal

Constitution is a grant of certain specified powers, reserving all others not named to the people themselves. By this grant in the Constitution in this State all legislative power not reserved is vested in the Senate and in the Assembly. But, in addition to this legislative power, the Assembly is vested by the Constitution with the power of impeachment, and this is not a legislative power. It is a judicial power. My friend, if he did not challenge that, slurred it over with the evident intention on his part of rather leaving it a doubtful proposition.

In the case of People ex rel. McDonald v. Keeler, which your Honor will recall, was a case in which a habeas corpus brought up the body of McDonald, who was committed for contempt by the order of the Assembly, and he came to the Court of Appeals, and among other things — because it is a very long opinion I shall read only an extract, written by that master of the law, Charles A. Rapallo — in speaking of the division of the powers of the Legislature, he says:

> "But notwithstanding this general division of powers, legislative in the Legislature, the judicial in the judiciary and the executive in the executive, certain powers in their nature judicial are by the express terms of the Constitution vested in the Legislature."

The power of impeachment is vested in the Assembly. Now, without exactly saying as an affirmative fact that the power of impeachment is judicial, by necessary inference, from the language that he used, he does say that it is so.

The Assembly having in addition to this legislative power — the legislative which rests in the two houses — has this power of impeachment which rests in the Assembly alone, the Assembly having no separate power of legislation whatever. And the Assembly having impeached, the Senate, not in any legislative capacity — and that differentiation distinguishes the California case and the Florida case that my friend has cited — the Assembly having impeached, the Senate not in any legislative capacity, not exercising its power of legislation, but by virtue of a grant separate from that legislative power, sits with the Court of Appeals in a strictly judicial capacity as a Court of Impeach-

ment, not as a Senate at all, a court the members of which are required to take an oath other than, and additional to, the one taken as judge of the Court of Appeals and senators, that they will truly and impartially try the impeachment.

The learned counsel who preceded me has adverted to the fact that the senator members of this Court receive compensation more than the $1,500 which is given to them as legislators, which demonstrates, if anything further is necessary to demonstrate, that the members of the Senate do not sit in any legislative capacity, the members of the Court of Appeals do not sit as judges of the Court of Appeals, but all together they sit in a Court of Impeachment in a strictly judicial capacity. Impeachment by the Assembly then, not being a legislative act, and its trial by the Court of Appeals and the Senate not being a legislative act, but both being judicial, this inhibition of article 4, section 4, " at extraordinary sessions," etc., does not apply to, nor prevent, impeachment proceedings being initiated by the Assembly at the time of an extraordinary session of the Legislature called by the Governor even if such call was for specified purposes and did not include impeachment.

This provision of the Constitution is in the section defining the duties and powers of the Governor. It is entirely different and apart from the grant of legislative power. Article 6 is the judicial article of the Constitution; article 3, the legislative. But this grant is in article 4, section 4, and, after prescribing that the Governor shall be Commander in Chief of the military and naval forces of the State, it says:

> " He shall have power to convene the Legislature or the Senate only on extraordinary occasions; and at extraordinary occasions no subject shall be acted upon except such as the Governor may recommend for consideration."

Unless the limitation is found in this language it is found nowhere. There is elsewhere in the whole Constitution no word that can be held to limit anything concerning the general grant of the power of impeachment to the Assembly. No subject shall be acted upon except such as the Governor may recommend for consideration. Recommend to whom? Of necessity to the bodies

whom he may thus call together under the provisions of the first of the two sentences; that is, the Legislature or the Senate only. The Assembly is not mentioned as one that may be convened in extraordinary session except as a part of the Legislature. Recommend then to whom? Recommend to the Legislature, if that is the body that has been called together, or to the Senate, if it has been called together alone. Acted upon by whom? Of necessity the same bodies mentioned in the antecedent sentence, the Legislature if both bodies are assembled, or the Senate if convened alone. No other result can be reached from any analysis of the provision contained in the two sentences under scrutiny.

Of course, your Honors sitting in the Court are familiar with the rule that a relative word relates to the next antecedent. That is a rule of construction. That is a rule that we studied from the time we first commenced to study grammar.

This language of the Constitution imperatively demands construction. It does not literally mean that no member can act upon, for example, his own affairs while attending an extraordinary session. It must be construed to mean that it is a public business that cannot be acted upon. It is then necessary to inquire what public business may not be acted upon. Answering this, it will not do to say that no public business, because there is certain public business that may surely without challenge be done at extraordinary sessions, and business that is not recommended by the Governor.

Let us suppose, to illustrate that, the Legislature being convened in extraordinary session, the Assembly finds that it has been deprived by death or resignation of its speaker, its clerk or any officer whom it is empowered to elect. I do not now speak of any officer within the power of appointment of the speaker, like a chairman of a committee. I am speaking and speaking only of these officers of the Assembly which the body itself is required to elect.

Does my friend gravely contend that the Assembly, being together, and finding that its speaker is dead or has resigned, cannot, without the gracious favor of the Governor, contained in a message to it, elect his successor or the successor of the clerk? If he does —

Mr. Marshall.— (Interrupting) I do not.

Mr. Brackett.— I am glad he does not, because I have a couple of cases on the subject.

Mr. Marshall.— It is simply a matter of the organization of the house.

Mr. Brackett.— I am coming to procedure and organization presently, my brother.

The President.— Continue your address.

Mr. Brackett.— Precisely such an occasion arose when Mr. Speaker Henry J. Raymond was so sick that he was unable to come to an extraordinary session of the Assembly, the Assembly being called together for the specific purpose, as I recall, of passing the appropriation bills, but it does not matter what, because the election of speaker, or the successor of the speaker, was not mentioned in the call. Thereupon the Assembly, deeming it unnecessary to inquire of any human being whether they could elect a successor to Mr. Speaker Henry J. Raymond, elected Mr. Varnum as the speaker pro tempore for the purpose of presiding over the Assembly until Mr. Speaker Raymond should be present.

In the year 1905, in this very room, when the Legislature was called together by Governor Higgins for the single and sole purpose of considering the matter of the investigation into the acts of Justice Hooker, at that session the first thing done was that James S. Whipple, the clerk of the Senate, resigned. Thereupon Lafayette B. Gleason was elected to the position of clerk, and that without recommendation on the part of the Governor at all.

Other illustrations will occur to anybody at all familiar with legislative life.

If the Assembly desired to change its standing committees at such special session, there can be no doubt that it could do so without any recommendation from the Governor. If it desired to create a new standing committee or in any way amend its rules it could do the same. To sum it up, there are many things that the Assembly can do alone that do not involve legislation that must be passed on by both houses, which it can do at any time

that it is together, without any recommendation from the Governor, and in spite of any recommendation from the Governor.

There is, then, some public business that the Assembly, as an Assembly, in its own proper body may do during an extraordinary session, without a recommendation from the Governor. And this illustrates and enforces and clinches the proposition which I made before that it is necessary to construe this language of the Constitution.

And where, in such construction, is the dividing line between what it may do and what it may not do? It is necessary for us to fix that line somewhere. It is not fixed by the language of the Constitution itself. It must be done by construction, and there is no other line of demarcation known to man, and the ingenuity of all this great Court can find no other line than the one drawn between legislative business, as such, and the business strictly of the Assembly, as a separate body; and every one of us can search in vain for any other logical or natural line of demarcation, between what may and what may not be done by the Assembly, without recommendation by the Governor.

Whatever shall be said as to whether impeachment by the Assembly is a judicial or political act, no one can ever claim it is a legislative one. Lexicographers' definitions as to what are legislative acts are entirely conclusive on the subject. Not being a legislative act it is not prohibited at any time the Assembly takes up the subject.

It is the right of the Governor to specify what legislation shall be considered at an extraordinary session. The Constitution so prescribes. The Legislature at its regular session must complete such general legislation as it cares to initiate. Thereafter, the Governor alone shall prescribe what legislation shall be considered at any extraordinary session, but this limitation is only as to legislation. The word "subject" in this limitation, section 4, article 4 — the thing that may not be acted upon unless — means "subject of legislation," and can mean nothing else; and, so meaning, there is no constitutional restriction upon impeachment proceedings at a special session, if they are needed in the protection of the State or its dignity.

The article in which this clause is placed, as I said before, is

the one granting powers to the Governor. The language and its context make this a natural and logical rendering of the provision, and it is complete justification for instituting and completing impeachment proceedings, if the facts called to the attention of the Assembly are deemed to require such action.

In the recent application made by some one on behalf of the Governor — although afterwards disavowed by him — which involved the power of this defendant to issue a pardon after articles of impeachment had been delivered to the Senate, Judge Hasbrouck, who as a practitioner at the bar had large experience in the public service, having been an assemblyman, and later First Deputy Attorney General, held that the Assembly had the power of impeachment at all times; that it was not shorn of such power because the Governor had called an extraordinary session of the Legislature; that from the time the articles were signed, the official functions of the defendant were suspended and devolved upon the Lieutenant Governor, and that, after the presentment of such articles, the defendant could not issue a pardon or do any other act as Governor. This opinion of the justice is powerful and convincing.

There is another ground which was elaborated by the learned Attorney General of the State, and which requires but a single step further in order completely and entirely to justify the power of impeachment at a special session of the Legislature, and that is this:

The Governor in calling the Legislature together, used this language — I will not say this was in the proclamation or the message, because it is not of consequence; it is in one —

> "Let me, therefore, renew my former recommendations, reiterate all that I have previously said, and again sincerely and earnestly urge the Legislature to pass a direct primary bill that shall provide," etc.

The opinion of the Attorney General was rendered to the effect that the question of amending the election law having been submitted to the Legislature, that, therefore, it was competent for the Assembly and the Senate to add to the powers of a joint committee, theretofore in existence, by giving it power to

investigate frauds upon the election law committed at the last election.

This construction is upheld by the language of the court in People v. Keeler, referred to before, where Judge Rapallo says:

> "In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation and the remedy required."

So, when the gubernatorial recommendation mentioned the amendment of the election law as a thing to be considered at the extraordinary session, it gave to that body the right to legislate on the subject. To legislate intelligently and effectually the two houses had the right, and very likely it was their duty, to investigate. To investigate, a committee was the only practicable means. When, therefore, the Legislature invested the Frawley committee, already being in existence for some purpose, with the power to investigate as to the election law, it was proceeding strictly within the lines of the message calling the Legislature together.

The case of the People v. Keeler, already cited, holds in the broadest terms the right of a legislative committee to investigate for legislative purposes, and in pursuing such purpose, to compel the attendance of witnesses and to punish for contempt. The Supreme Court recognized the same power if the resolution for the investigation avowed a purpose to impeach a secretary. It was the case of Kilbourn against Thompson, an action for false imprisonment, Thompson, the sergeant at arms, having arrested Kilbourn for contempt. The court held they had a right to investigate if the preamble of the resolution avowed that the purpose was the impeachment of a secretary. To the same effect is the case of the People v. Sharp and the case of People v. Milliken.

Having the power to legislate in the way of amendment to the election law, and having thus the power to investigate for the purpose of enabling it to legislate intelligently in the course of its investigation, the joint committee uncovers a series of crimes committed by the Executive while a candidate and Governor-elect, the most unique in detail ever spread upon record.

Having properly discovered these crimes by this investigation authorized at the extraordinary session, it was the plain duty, as it was the right, of the Assembly at once to institute impeachment proceedings against the guilty official. If impeachment proceedings are not legislative in their character, then they are not prohibited at the extraordinary session.

If, by any circuity of reasoning they are held legislative proceedings, then they are strictly within the gubernatorial power of recommendation to the Legislature before quoted, as devising methods effectually to prevent fraud on the election law.

I want to submit, not as a matter of merriment, but in all sincerity, and in all solemnity, that there has been no proceeding taken in this State in a quarter of a century or more that will more tend to prevent fraud upon the election laws than this impeachment being prosecuted here today.

It is argued further by the learned counsel that it must be shown that notice was sent to every member of the Assembly that the impeachment of the Governor was to be considered before the proceedings were taken up in that body, in order to be regularly here, and that the question may be here examined. I deny the claim.

Aside from the question of the jurisdiction of the Assembly, the resolution of impeachment and the circumstances under which it was adopted may not be inquired into here. The resolution is here. The adoption in the Assembly is attested by the journal of that body. Its receipt by the Senate, as well as the receipt of the articles of impeachment adopted by the Assembly, are attested by the Senate Journal.

The journals are final and conclusive evidence of the facts stated. The Court cannot go back of them to examine into the circumstances nor the motive of the adoption of either of them. The proceedings are duly proven by the respective journals, the last word on the subject that may be considered. The certificate of the presiding officer of the Assembly, that the resolution of impeachment was duly passed, and that the articles of impeachment were duly adopted, on file with the clerk of the Senate here, are before this Court and proper in form; and they are conclusive evidence of the adoption of the articles and of the

resolution, and this Court may not go behind such certificate if it is regular in form; and it is regular in form.

If there were any defects in the certificate to the articles, or to the resolution of impeachment, then it would be permissible for the Court to go to the Journal of the Assembly, but inasmuch as that journal shows the proper adoption of the resolution of impeachment, and also the adoption of the articles of impeachment, precisely as does the certificate, the same result obtains.

The ultimate to which this Court can go is to the Assembly Journal, which is conclusive. That was held in People against Commissioners, in 34 N. Y., and Rumsey against Railroad, in 130 N. Y.

There has been much said on the part of the defendant as to the jurisdiction of the Assembly to adopt either impeachment or the articles thereof at an extraordinary session of the Legislature, but we have before seen the grant of jurisdiction in the broadest terms, and jurisdiction being granted by the language that the Assembly shall have the power to impeach by a vote of the majority of all the members elected, jurisdiction of treating the subject matter of impeachment is then plenary. It is granted in the utmost to the Assembly. It there rests and unless this jurisdiction is limited by some other provision of the Constitution, the discussion is over.

Given this fact of jurisdiction of the subject matter, there being no question of the jurisdiction of the defendant's person, unless there is elsewhere in the instrument some limitation in the Constitution itself, some limitation of rules of procedure (and aside from jurisdiction all else is procedure), the power of impeachment is unlimited, to be exercised by the Assembly in its own way. The way that the body shall get together, the place where, or the time when, the notice that is required to be given of the meeting, if any, the rules under which it shall work — all these things are procedure, pure and simple, and nothing else.

And of all these the Assembly is the sole and only judge, for by article 3, section 10, "each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members; shall choose its own officers."

Can this Court go into the procedure or the motives by which or for which the articles were adopted? The Supreme Court is given jurisdiction by section 1 of the same article, in no broader terms than is this power of impeachment given to the Assembly. "The Supreme Court is continued with general jurisdiction in law and in equity."

Suppose there had been no rules of procedure prescribed by the Legislature, or authority to the court to prescribe rules of procedure, and there had been no Code of Civil Procedure or of Criminal Procedure, would it still be said that the Supreme Court would not have power to go ahead under this general grant and organize itself in its own way, and exercise its jurisdiction?

The power to impeach in the Assembly is just as broad as the grant of general jurisdiction, both in law and in equity, given to the Supreme Court.

There have been provided for the Assembly neither statute directions nor rules, as to its procedure in the adoption of the resolution of impeachment, nor the proceedings prior thereto. It may and must proceed in its own way under this broad grant of power. Its certificate is here that it has proceeded, and that the result is the resolution of impeachment and the articles. As we have seen, this certificate is the best and highest evidence of the result of the Assembly's work, back of which we cannot go.

When it comes, then, that there is here presented a challenge of the jurisdiction of the Assembly to adopt a resolution, or articles of impeachment, at an extraordinary session of the Legislature, that challenge is met by profert of the grant of power in the Constitution; and nothing that can be said outside of the Constitution can lessen the completeness of the answer to such challenge of power.

Having the power, the Assembly has acted by some method of procedure. Here is its certified result. Its jurisdiction is successfully defended by reading its grant of power; its procedure, or the result of its procedure, we may not challenge.

In the presentation of an argument in the proceeding before Mr. Justice Hasbrouck, to which I have before adverted, the very learned, venerable Judge and General Benjamin F. Tracy conceded and not only conceded, but claimed and argued, that the

Assembly has this power of impeachment, but to be exercised only at a regular session.

The argument concedes too much. If the Assembly has the power of impeachment one moment of time in all the year, it has it and may exercise it at any moment in all the year, unless there is somewhere else in the Constitution a limitation. The fact that the Governor has called an extraordinary session of the Legislature, or of the Senate, does not and cannot take this jurisdiction away. There is no preference in the Constitution of one time over another. Unless the Constitution itself forbids the exercise of such power of impeachment during some particular portion of the time, unless it has formulated some rules of procedure, or authorized some person or body, other than the Assembly, to do so, then it rests that at any time and at all times, under such rules of procedure as it sees fit to use, the Assembly may proceed to the exercise of its unlimited power of impeachment granted by section 13 of article 6, the jurisdiction to impeach being always in the Assembly, whether it be in general session or extraordinary session.

That being so, every member of the Legislature is in law bound to know that the subject might come up at any time when the members of the Legislature were together.

In extraordinary sessions, to the subjects recommended by the Governor, the law adds always, in effect, the subject of the impeachment of any officer. The law adds them because by the Constitution the power to impeach is always there, at regular and at extraordinary sessions, and is liable to be exercised at any time when the Assembly is convened.

If this be so, no notice was required to be given to any member that the subject of impeachment would be taken up, any more than notice is required that some particular matter of legislation will be taken up at any regular session.

In the case in California, from which my friend read at such length, it was held, in a long opinion, that the authority to pass a constitutional amendment at a special session was a legislative act, and therefore could not be done at a special session without the recommendation of the Governor. Of course it is a legislative act.

You who are members of the Senate know that there is no step in the progress of a joint resolution proposing to amend the Constitution that is not also taken in the passage of a bill. There is no step taken in the passage of a bill that is not taken in the passage of a constitutional amendment. It is strictly and entirely a legislative act in the power granted by the Constitution, and that differentiates the case in 130 California from the case at bar; and it makes the 63d, I think it is, of California, the strongest precedent on the subject. With respect to the Florida case, all I need to say, is that the single question decided, and your Honors may search the opinion from beginning to end, is that when a quorum of the Senate was not present, the articles of impeachment could not be presented. The impeachment was declared illegal for that single and sole reason, simply that, when eight members of the Senate were present, not being a majority of the complete number required by the Constitution, that those eight members could not receive the articles of impeachment, and for that reason they never had been properly preferred.

That does not exist here for two reasons. First a majority of the Senate were here when the articles were received and the journal so says; and that is conclusive on the subject. But the complete and perfect further answer is that, in this case, the articles of impeachment do not have to be presented to the Senate at all.

Under the statute, the articles of impeachment when adopted by the Assembly are delivered to the President of the Senate, and that answers the very learned inquiry upon which my friend planted himself with such comfort to himself, that there was no way that the Senate could get together to receive the articles in case they were adopted by the Assembly. He asked, conceding the proposition that the Assembly did have the power to get together and adopt the articles, what good would it do, because they would not be presented to the Senate.

The Assembly, being in session, adopting the articles, can send to the President of the Senate, wherever he may be, and present the articles to him under that provision of the statute which says they shall be delivered, not to the Senate, but to the President of

the Senate; and thereupon it becomes the duty of the President of the Senate, not having any relation at all to the body itself, whenever and wherever the articles were presented to him, the statute puts upon him the duty of giving notice to the members of the Court and calling together, not the Senate at all — because if the Senate had not been in session a minute of time since it adjourned at the close of the regular meeting the situation would be the same — not the Senate, but the members of the Court of Impeachment for the purpose of trying the articles thus adopted.

Mr. Parker.— If the Presiding Judge of the Court please, we would like to know, if we can, how much longer the counsel for the respondent will take on their side, in reply, on account of our witnesses.

The President.— Who is to reply?

Mr. Marshall. — I shall take only a few minutes for reply.

Mr. Parker.— Would counsel mind stating whether they propose to present any other point for discussion?

Mr. Marshall.— In connection with this proposition?

Mr. Parker.— In any other point.

Mr. Marshall.— You mean on the question we now have before us?

Mr. Parker.— No, aside from this question.

Mr. Marshall.— I recognize no other question than that of jurisdiction. That is all we now have before us. That is the only matter that I can contemplate as being within the realm of discussion.

Mr. Parker.—Assuming it to be possible that the decision might be against you.

Mr. Marshall.— I cannot assume that.

The President.— The best way is to proceed in the regular order. Who replies for the respondent?

Mr. Marshall.— May it please the Court: I shall make only a few discursive remarks in reply to some of the arguments presented by our opponents.

It is claimed that the Legislature has absolute power. Now, that certainly cannot be true. There are limitations and restrictions in the Constitution upon the power of the Legislature. The legislative power is vested in the Senate and Assembly, but that power can be exercised only when the Legislature, the two houses, come together, and subject to the numerous limitations and conditions which are contained in the Constitution. It can legislate at an extraordinary session only when the Governor recommends legislation on designated subjects, and then only on the subjects designated. So that the contention of our friend is too broad and loses sight entirely of the express terms of the Constitution.

It is further argued that the Constitution provides that the Assembly shall have the power of impeachment, and that is asserted to be a broad plenary power. The difficulty with this argument is that it overlooks the fact that the clause quoted is one clause out of many which relate to the subject, and we must read together all those clauses.

The Assembly has the power of impeachment, but the Assembly has only that power of impeachment provided it complies with the other provisions of the Constitution. The Constitution should be read as though in one clause it provided that the Assembly has the power at any regular session to impeach, but that at extraordinary sessions the subject of impeachment shall not be acted upon except when it is called to the attention of the Assembly by the Governor with a recommendation by him that action be taken.

Very frankly Senator Brackett says, and I honor him for his frankness, that the true logic of our opponents' position is, that the Assembly, having the power to impeach, can convene itself for the purpose of exercising that power. If the Assembly has the power of convening itself, then that Pandora box of evils, which I have tried to describe in my argument, is opened. Because, in such a case where is the limit to be fixed? What will be the consequence of a recognition of the proposition that a self-convened Assembly may perform so tremendous an act as that of

impeachment, without any regulation of any kind, without notice, without regard as to how the assemblymen are to be brought together, or who is to bring them together? All such action would be in contravention of the history of parliamentary bodies and their uniform practice since parliamentary bodies began.

I again call attention to the provision of the Alabama Constitution which sought to deal with this very subject and which made adequate provision for just such a contingency as that which is here presented. The absence of a similar provision in our Constitution is the strongest possible argument in favor of our contention.

Judge Parker says that when there is a grant of power there go with it all the lesser powers to make the greater power effectual, and he argues therefrom that the power of impeachment, having been conferred, may be exercised at any time and in any place by the Assembly. The difficulty with the argument is that it overlooks the qualification which has been imposed upon its underlying proposition almost since the first formulation of that principle, namely, that if a power is granted and a specific method is provided for the exercise of that power, or limitations are placed upon the exercise of that power, those limitations and methods of exercising it are exclusive and the implication of any powers different from those expressed, is not warranted because expressed powers necessarily must control. There can be no implication as against an expressed provision.

Judge Parker also gave a long illustration to prove how important it is that this power of impeachment shall be exercisable at all times, at any hour. He showed that $50,000,000 had been devoted by the State to the highway fund, and he asserted that it would be possible for contractors in conjunction with public officials to loot the State and rob it of that fund; and that therefore the right of the Assembly to impeach at a self-convened session should exist, in order to prevent such a catastrophe. Has the possibility occurred to my friend that the power of impeachment might be exercised by a self-convened Assembly for the very purpose of enabling these looters, fraudulent contractors and dishonest officials to carry out their original purposes by impeaching an honest Governor who stands as an obstacle

in their path, in order that they may without hindrance plunge their hands deep into the public treasury? It has been charged that there has been an impeachment of that kind in this State, for the very purpose of aiding in the consumation of such a purpose.

It is said, suppose the Governor is guilty of treason between two legislative sessions, what can be done then? The answer is a very simple one. If he should lead the militia of this State against Massachusetts, as has been suggested; if he should try to seize the Supreme Court of the State — those would be treasonable acts — all that any citizen would have to do would be to go to the district attorney of Albany county, calling his attention to section 2380 of the Penal Code, and the offending Governor would be at once placed where he belongs. He would be indicted, prosecuted, and proceeded against under the Penal Law of the State.

Mr. Brackett.— May I have permission to ask a single question?

The President.— You will have to ask that privilege of your opponent.

Mr. Brackett.— With the consent of counsel.

Mr. Marshall.— I will permit any question counsel desires.

Mr. Brackett.— Suppose he pleaded guilty to a charge and then pardoned himself. What happens?

Mr. Marshall.— He could not pardon himself.

Mr. Brackett.— Why not?

Mr. Marshall.— Having pleaded guilty to the charge, he would thereupon stand convicted, and conviction, ipso facto, removes him from office. Besides, if the counsel is familiar with the Constitution, he would know — I have read it to him this afternoon, but perhaps he did not listen to my argument — that there cannot be a pardon for treason.

Mr. Brackett.— A lesser crime than treason.

Mr. Marshall.— You are answered, aren't you?

Mr. Brackett.— No.

Mr. Marshall.— Nor could he pardon himself for any crime, as I have already shown by reference to the constitutional provisions defining the pardoning power.

Opposing counsel further say that this constitutional provision declaring that no subject may be acted upon except such as is recommended by the Governor, refers to legislative acts. I would like to know where my friends get that idea. When the Constitution declares that no subject shall be acted upon that, according to my understanding, includes legislative, judicial, executive acts, acts of every character. If my friends were correct, how in the world would they phrase such a provision if they desired to exclude anything besides legislative acts? How could the Constitution have been framed to have excluded impeachment if it was necessary to do that in order to cover that as one of the subjects which could not be acted upon? Because they say it must be shown affirmatively what subjects shall not be acted upon. According to their contention, our Constitution would soon grow into the dimensions of a Throop code. It would be converted into a catalog of the various subjects which are or are not to be considered at an extraordinary session. It would then read that at an extraordinary session no subject shall be acted upon, including matters of legislation, appointments, elections, impeachments, and judicial action of every kind. That cannot be such a constitution as my friends would phrase. I do not believe that if they were members of a constitutional convention, they would do otherwise than to use the very words now contained in our Constitution, namely, "no subject shall be acted upon," since they include all the subjects to which we have referred.

Now, they say, what is the reason for this provision as I have construed it? The reason is very clear, as the authorities show. An impeachment is a lengthy proceeding. The preliminaries to impeachment should be carefully considered. Thought takes time. The purpose of the Constitution makers was that the State should not be distracted by having special sessions of long duration, which would involve great expense to the State, and would be apt to arouse bitterness and conflict among our citizens. Therefore. it was very wisely considered that it is only under the most exceptional circumstances that an extraordinary session should be called, and the sole judge as to the desirability or

propriety of such a session is the Governor. That power rests in him alone. But my friends say that that power also rests in the Assembly because in a case of impeachment its members may call themselves together at any time. There is no warrant in the Constitution for such a contention. They say the Legislature is to be called together. That means both houses. But what about the Senate being called alone? What subjects can it act upon? It certainly cannot deal with legislative subjects. It necessarily is confined to dealing with matters of appointment, if it is called alone in extraordinary session. That is a perfect demonstration of the fact that the provision of the Constitution that we are now dealing with it not limited to legislative subjects, but it a broad limitation of power which deals not only with matters of legislation but with all subjects which can come before the Legislature or either of its houses. In dealing with this subject, I desire to add to my argument this statement:

The established rule of construction, that where the means by which a power granted shall be exercised are specified, no other or different means for the exercise of such power can be applied, even though considered more convenient or effective, than the means given, if given effect, necessarily confines the sessions of Senate and Assembly to the times enumerated in the Constitution.

It may be argued, however, that the Assembly and the Senate when proceeding upon an impeachment before trial do not act as the Legislature for the reason that a legislative function is not being performed.

Assuming that an impeachment is a judicial and not a legislative act, the contention that the Assembly and Senate are not the Legislature when proceeding upon an impeachment is equivalent to saying that when the Senate and Assembly are exercising a judicial function, or a function not legislative, they are no longer to be called by the term or name "The Legislature," but are then bodies of a new and distinct character. In other words, at times the Senate and Assembly are not "the Legislature."

This confusion of terms has arisen because the name which the framers of the Constitution applied to the two houses is descriptive of one class of functions exercised by them. The term "Legislature" is a convenient and arbitrary name applied to

the Senate and Assembly, the same as the name "Parliament" is applied to the king, the House of Lords and the House of Commons, or the name "Congress" to the Senate and House of Representatives.

The Senate and Assembly, at all times, are the Legislature of the State of New York and each house is a part of the Legislature of the State without regard to the functions being performed. So that in this case the very learned argument of Judge Parker would fall to the ground if it happened that in our Constitution the Legislature were termed the Congress or were termed Parliament or were given some other name than the Legislature. This word "Legislature" is merely an arbitrary name given to the two houses and is not intended to confound the meaning of this provision in section 4 of article 4 of the Constitution which deals with the powers which may be exercised at an extraordinary session.

Our opponents also say that if our contention is correct, the Assembly could not at an extraordinary session elect a new speaker or a new clerk if those chosen at the regular session should die, nor appoint new committees. That of course is not a fair statement of our position. We have never made any such claim and never would indulge in such a contention. When the Legislature is in session the Assembly has the right to elect its own officers, whether it be convened in extraordinary session or at a regular session. The several houses must have officers. The provision of the Constitution does not deal with the mere internal government of these houses with regard to the manner in which they shall respectively proceed. Nobody would claim that. Therefore all the learning which my friends have presented to establish what we have not denied is entirely unnecessary because we concede their proposition.

They say the Assembly may come together at any time and impeach, and that all it has to do is to present the articles of impeachment to the President of the Senate. I do not read the Constitution the way my friends read it when they say that the articles can be delivered to the President at any time. The President of the Senate is such when the Senate is in session and then only. Those words are not used as descriptio personae, as referring to the particular individual who happens to hold that office at a

given time; my friend certainly would not so contend. Of course articles of impeachment could not be presented to the President of the Senate on 14th street in the city of New York or at the Throne Room at Delmonico's in that city and make of that an impeachment.

Mr. Brackett.— Or at the Republican Club, either.

The President.— Gentlemen, I do not find a direct provision in the Constitution —

Mr. Brackett.— It is in the Code.

The President.— There is no provision that I find in the Constitution.

Mr. Marshall.— I agree with you.

The President.— There is no use in discussing the question when there is no such provision in the Constitution.

Mr. Marshall.— It means that they must be presented to the Senate. That is the contention which I make. They cannot be presented to an individual. Section 13 of article 6 uses the phrase "after articles of impeachment . . . shall have been preferred to the Senate."

The counsel has also said that we cannot attack the manner in which this impeachment was voted; we cannot go into the question whether notice was given to the members of the Assembly of the meeting. Why, his answer is, the journal shows that a vote of a majority of the Assembly was given in favor of this impeachment, and the journal is conclusive and we cannot go back of the journal. Does my friend mean to say that the journal of the Assembly is one thing when it relates to legislative matters and another thing when it relates to matters of impeachment? Does he mean to argue that this is not an Assembly and it does not act in a legislative capacity when it impeaches and yet the journal which is the journal of a legislative body, is conclusive upon this so-called judicial act? I think he is getting confused in his conceptions as to the nature of this body. My contention is that this is the body called the Assembly, a

part of the Legislature, and possibly journals may be conclusive in regard to those matters, possibly they may not; certainly if it is merely a judicial act, speaking again technically, since that is the way he uses the phrase, our contention then is that we are entitled to prove that no notice was given.

But if his contention is correct, that the journal is conclusive, then he must recognize this as being a legislative act under all circumstances and under all conditions.

He has also cited the opinion of Judge Rapallo in People v. Keeler, 99 New York 463. I do not read the opinion as constituting a declaration on the part of that great jurist that the exercise of the power of impeachment is a judicial act. I scarcely think that even Senator Brackett himself wishes to have it considered that he himself believes it to be a judicial act. I say advisedly, however, after a thorough investigation of this subject, that if the words quoted were intended as a statement that impeachment is a judicial act, the remark which after all was merely obiter, is incorrect. For once Jove nodded. But I repeat what I have already said several times, it makes no difference for present purposes whether impeachment be regarded as a judicial act, an executive act or a legislative act. It is in any event "action" on a "subject" and therefore comes within the purview of the clauses of the Constitution relating to extraordinary sessions.

Senator Murtaugh.— Mr. President, may I ask the counsel a question?

The President.— Yes, certainly. Return here, if you please, Mr. Marshall.

Senator Murtaugh.— You contend that the Governor could be indicted for a crime only during the months when the Legislature is in session. Would not that destroy the theory upon which the Court of Impeachment is created, namely, that high State officials should be tried by officers of similar rank, that the average jury would be impressed by the fact that they were trying a Governor? Did not the Constitution create the Court of Impeachment for that very purpose?

Mr. Marshall.— My answer to that, Senator, is that so far as our penal law is concerned, it is no respecter of persons. Any member of the State government who violates the penal law is subject to indictment and the provision of the Constitution which relates to impeachment expressly provides that the fact of impeachment need not in any way prevent a subsequent indictment or the trial of an indictment for an offence which is made the subject of an impeachment. So it seems to me that the question that you have asked does not meet the situation, because our contention is that there is no harm that can come in such a case as you have instanced, there being a remedy, an effective remedy and one which protects the State against any possible havoc or inconvenience. However, even if there were no remedy in that regard, the mere matter of inconvenience is not of great importance, because of the provision of the Constitution which indicates that an impeachment can take place only in the manner and subject to the conditions and limitations fixed and described in the Constitution.

Senator McClelland.— Mr. President, may I have the privilege of asking my friend a question?

The President.— Senator McClelland, certainly.

Senator McClelland.—You spoke of the Code in answer to Senator Brackett's suggestion with reference to Judge Parker's suggestion with reference to a Governor who should be guilty of treasonable conduct during a recess of the Legislature or when the session had terminated, and that the district attorney could be applied to for the purpose of proceeding against the Governor, and thus meeting the necessities of an action of that kind. Did you contemplate in that view the fact that under the Constitution the Governor has the right to suspend the district attorney?

Mr. Marshall.— I did; I have also contemplated the fact that where the district attorney has been suspended, there is the attorney general, who has all the powers of the district attorney and who may appear before a grand jury and direct its action. There is thus another officer who should be considered. There is just one remark that I wish to add: It was argued and decided the other day in connection with the determination of the

challenges which had been interposed to certain members of this Court, that there was no right to challenge any officer except the Lieutenant Governor in case of the impeachment of the Governor or of the Lieutenant Governor, the only provision contained in the Constitution, which permitted the exclusion of any officer who otherwise would be a member of this High Court of Impeachment, referring to two specified contingencies only. It would seem to follow from that ruling that if the express limitation of the power to challenge or to exclude from participation in the decision of the Court of one individual only, is exclusive, that the provision of our Constitution with regard to what may be done at extraordinary sessions, which is subject to no exception whatsoever, which is general in its language, which is all-embracing in its scope, ought to be given the same exclusive effect, upon the very principle on which the first decision rendered by this tribunal was based.

Mr. Parker.— I would like to call the attention of the Court to People v. Morton, 156 New York, upon this question we are now discussing.

The President.— Where the Court of Appeals held that a writ of mandamus or certiorari or some writ of that character would not lie to the Governor.

Mr. Parker.—And would not lie to the Governor because the court had not power to enforce it and with regard to this proposition that it was not yet settled that the power exists in this country to attack the Chief Executive of the State in the courts for any criminal offence from murder down.

Mr. Marshall.— I certainly assert that that power exists.

Mr. Parker.— Well, you can not prove it.

The President.— My brethren, of course you will readily appreciate that the point which has been discussed before us is of the utmost importance. It goes to the very foundation of this proceeding. If decided in one way the proceeding must necessarily stop. Therefore it is that this should be decided by the whole of this Court, and the presiding member of the Court does not feel inclined to use the power granted under the rules to decide it in the first instance, though he has no hesitation, if the

members want it, in stating or expressing his opinion, as he has no wish to evade any responsibility. You have the power to clear the court for private consultation under the rule, and even if it is not cleared any member has the right to debate this question.

Judge Collin.— Mr. Presiding Judge, I move that the court room be cleared and that this Court enter into private consultation.

The President.— All in favor please say aye. Contrary minded no. The motion is carried.

Mr. Herrick.— Will we be excused from attendance until tomorrow? It is twenty minutes of six now, the adjournment hour.

The President.— Yes, counsel may go until tomorrow.

The Crier.—All witnesses are discharged until tomorrow morning at ten o'clock.

The President.— All the journalists and counsel will leave the room, all except the members and the officers of the Court will leave.

PRIVATE SESSION

The President.— Gentlemen, the order of exclusion apparently has been enforced. If any member of the Court knows of any violation of it, that anyone is improperly present, if they will call the attention of the Presiding Officer to it he will see that he is excluded. That being done, what is your pleasure now?

Judge Werner.— I move that we proceed to a roll call which will probably bring on any discussion there may be as the votes are called for.

Senator Sullivan.— I second the motion.

Senator Thompson.— Mr. President, preliminary to that I move that the objection be overruled.

Judge Werner.— The objection to the jurisdiction, you mean?

Senator Thompson.— Be overruled.

The President.— I think that is in order because there must be something on which to call the roll.

Senator Wagner.— Mr. President, may I suggest that the President put the pending question to the Court, and then upon that we have a roll call.

The President.— The question is, Shall the objection to the jurisdiction of the Court to proceed on the articles of impeachment presented to it because the Assembly was in extraordinary session and the Governor had not recommended any action on the subject matter, be sustained or not? I put it, Shall it be overruled or not? Of course, voting in the affirmative holds that the objection is bad practically; a vote in the negative holds that the objection is good. Do you all understand the position?

Senator Carswell.— Mr. Presiding Judge, may I suggest that the question that is before the Court is the motion of counsel, being a motion to dismiss?

The President.— Practically yes.

Senator Carswell.— May not the question be put on that motion?

The President.— It is only put in a different form. If that objection is sustained, this proceeding ends.

Senator Carswell.— But the point, Mr. President, that I wish to make is that the proper procedure would require that the question put be, Shall the motion be granted?

The President.— Well, if you prefer it, put it that way.

Senator Thompson.— Mr. President, I accept that amendment to my motion.

The President.— Very good. Then, put it. You will have to reverse the vote on that; that is to say, those that hold that that objection is good, will vote in the affirmative for the dismissal of the proceeding; those who hold the opinion that it is bad will vote no. And I would say that any gentleman here, until the final determination is announced, will have the right to change

his vote; you are not concluded by your present vote. Call the roll, Mr. Clerk.

(The clerk called the roll and the members of the Court voted as follows:)

Senator Argetsinger.— No.

Judge Bartlett.— Mr. President, this, as I understand it, is a private consultation of the Court.

The President.— Yes.

Judge Bartlett.— And in voting either at this time or some other, the voting being tentative as I understand it, I would like to give the reasons for my vote. I vote no.

The President.— Well, you can give the reasons now. The Presiding Officer thought that this would be the best occasion where any gentleman who wished to say anything about his position, for him to take advantage of it now and say it. Judge Bartlett, do you wish to say anything further?

Judge Bartlett.— No.

Senator Blauvelt.— Mr. President, may I ask if this is only a tentative vote, if a formal vote will be taken when the Court is in open session, or is this in the nature of an expression to the President of the Court?

The President.— Possibly not. It may be taken here, either place, but this is of course a tentative vote unless the gentlemen wish to make it final. Of course this is not exactly like an ordinary parliamentary assembly. This is more like a court, and until the final decision is announced the right to change a vote exists.

Senator Blauvelt.— No.

Senator Boylan.— No.

Senator Bussey.— No.

Senator Carswell.— No.

Judge Chase.— I vote no. I do not care to go into detail in expressing my opinion for the moment. But when the roll call

is completed if I am not satisfied with what has been said already and want to add to what has been said, I want to reserve that privilege.

Senator Coats.— No.

Judge Collin.— I vote no, and I understand that the privilege accorded to Judge Chase is open to everyone.

The President.— Certainly to every member.

Judge Cuddeback.— No.

Judge Cullen.— I vote no. And I might as well take this opportunity of expressing the reasons for my vote. First I might say of a question that has been raised, that, though not the decisive one before us, has a material bearing on it. It is urged by the learned counsel for the managers that the Assembly has the inherent right to meet at any time and present articles of impeachment. From that doctrine I dissent in toto. It is the Assembly that has the right given it by the Constitution to impeach, but the Assembly does not consist of the individual members of its body except when they are duly assembled. That is plain elementary parliamentary law. It is also the common law applying to all bodies. The individual action even of a majority does not constitute the action of the body, whatever it may be, unless all parties have had an opportunity to attend and be heard. Any other rule it seems to me would cause or might cause inextricable confusion in the management of public affairs. As an individual, an assemblyman, or senator, or a member of any parliamentary body has no authority. It is the House when convened. The Constitution is silent as to what are the powers of the two houses of the Legislature except in two or three particulars. The rest of their powers they possess either under well-recognized parliamentary law that we inherit from England or by virtue of a statute upon the subject — the legislative act which is a reproduction of the old revised statutes. That power is given to punish for contempt. Either house may assert its dignity, and protect itself, but that is given only to the house. If we assume that any member of the Assembly, or the speaker, may convene that body for the purpose of impeachment, the body so meeting would have no power to protect itself.

It would be a scene of disorder, and before there had been any election of a speaker, one member might convene it at one spot and one at another. It would lead to anarchy, and the extreme cases that has been suggested, that a Governor might commit treason, while theoretically possible to imagine, is quite improbable, and I think little weight should be given to it. Extreme cases do not control the construction of statutes or constitutions.

Each house is the judge of the qualifications and election of its own members. The Federal Congress does not meet until a year after its election. If a petition claimed to be signed by the majority of the House of Representatives were presented, what right would the Senate have to determine whether they were duly elected representatives or not? I shall not pursue that discussion further because it is not controlling of the question before us, though it has a material bearing. Because if the counsel are right in that position, that upon its own motion the Assembly may convene itself for the purpose of impeachment, then of course it is unnecessary to discuss the second question because then, by convening or calling an extraordinary session of the Legislature, the Governor could not in any way diminish or impair the general powers of the Assembly.

The Constitution gives the Assembly power to impeach. It was in regular session. I say regular session; I mean it was regularly convened in response to a call by the Governor. Now, having the power of impeachment, it could exercise that at any time unless we find another provision in the Constitution which restricts it or forbids it. That provision is claimed to be found in the fourth section of the fourth article of the Constitution, in which it is said:

> "At extraordinary sessions, no subject shall be acted upon except such as the Governor may recommend for consideration."

Does that apply to this power of impeachment? It is urged that this is not an ordinary legislative power except in the sense that anything that is done by the Legislature is legislative. The counsel for the respondent contend that this includes all business that may be transacted by either house of any character, and reliance strongly is made by him on the differences between the phraseology of a similar provision as adopted by the

constitutional convention of 1868 and as it appears in the present Constitution, which was the result of a report of a commission appointed by Governor Hoffman.

There would be force in that argument if there were not other facts that really abrogate the force of the argument and tend to establish a contrary proposition. As you may remember, the only article recommended or adopted by the constitutional convention of 1868, which was approved by the people, was the judiciary article. By looking at the journal of this commission, we find how the question came up. As originally reported, there was no provision of that kind.

Mr. Van Buren moved to amend the fourth section as adopted by inserting after the words " extraordinary occasions " the words following: "At such extraordinary sessions no business shall be transacted except such as the Governor may recommend for consideration."

That was the provision that now appears in the Constitution. You see, there is no indication in this record, which was the only one accessible, that there was any intentional deviation or change from the language of the Constitution — adopted by the constitutional convention of 1868. In fact, from this it would seem that in the first instance it was not thought well or essential perhaps to add such a provision at all. So much for that. But it appears by referring to the Senate documents for 1873 that when the report of this commission was submitted to the Legislature it added thereto the reports of special committees to the constitutional commission in reference to the change that it recommended. Article 4 relates to the Governor and Lieutenant Governor, their powers and duties. Now, omitting matters that are not relevant to the question before us, we come to this:

> " That in limiting the action of the Legislature at extraordinary sessions the commissioners believe that on such occasions it was unwise to engage in general legislation and therefore proposed to confine the Legislature to the subjects recommended by the Governor."

There it would appear that as far as the commission was concerned, the intention was to prevent legislation. Of course the effect of that constitutional provision depends upon the action

of the Legislature and the vote of the people, and the construction put upon that by the commission which recommended it is not conclusive, but it is cogent and at least disposes of any argument that may be made on account of the adoption of a different phraseology in this section as now enacted from that which was adopted by the convention of 1868. And when you look further there was no reason that we can see why it should have been intended to limit the power of the Assembly as to impeachment. The evil, or what was regarded as the evil, was the disposition to enter into general legislation. That appears from this report and anyone familiar with the discussions must be aware of it, and it is perfectly apparent that the provision "any business" cannot be stretched to the utmost limit. For instance, the power that is given by the statute if a member of either house commits an offence, that power must exist, whether the Governor calls attention to it or not. I am not speaking now merely of their own interior regulations but as far as their actions, their power to punish for contempt anyone who interferes with their deliberations, or who refuses to attend to their subpoena and a number of things. I think that when it was said that the Governor shall submit such business for consideration, it meant such business as was the Governor's business, not that of the Legislature or of the Assembly alone.

I, therefore, am of the opinion that this does not come within the limitation of the Constitution at all. We must give a reasonable construction of it, and so construed the limitatoin relates to what the Legislature as a body can do and not to the power vested in one branch of the Legislature.

I vote no.

Senator Cullen.— No.

Senator Emerson.— No.

Senator Frawley.— No.

Senator Godfrey.— No.

Senator Griffin.— No.

Senator Heacock.— No.

Senator Healy.— No.

Senator Heffernan.— No.

Senator Herrick.— No.

Senator Hewitt.— No.

Judge Hiscock.— No.

Judge Hogan.— No.

Senator McClelland.— No.

Senator McKnight.— No.

Senator Malone.— No.

Judge Miller.— No.

Senator Murtaugh.— No.

Senator O'Keefe.— No.

Senator Ormrod.— No.

Senator Palmer.— No.

Senator Patten.— No.

Senator Peckham.— No.

Senator Pollock.— No.

Senator Ramsperger.— No.

Senator Sage.— No.

Senator Sanner.— No.

Senator Seeley.— No.

Senator Simpson.— No.

Senator Stivers.— No.

Senator Sullivan — No.

Senator Thomas.— No.

Senator Thompson.— No.

Senator Torborg.— No.

Senator Velte.— No.

Senator Wagner.— No.

Senator Wende.— Mr. Presiding Judge, as I read the Constitution, the Assembly at some time had an absolute right of framing these articles of impeachment. That right existed up to the time that they took an adjournment sine die; and when they adopted the resolutions adjourning sine die they foreclosed their right to any question of impeachment or to act upon anything else. If they were to be called together in extraordinary session, they could act upon only such subjects as the Governor would present. I therefore vote aye.

Senator White.— No.

Judge Werner.— No.

Senator Whitney.— No.

Senator Wilson.— No.

The President.— Now, does not some other member of the Court wish to give his reasons for his vote?

Senator Thompson.— I desire to concur in the opinion of the Chief Judge of the Court, except in this: I think that the Legislature would have the right to provide for the assemblage of the Assembly at a time when they were neither in general nor extraordinary session.

The President.— I am not inclined to take issue with that now. Suffice it to say, that if that power exists, it never has been exercised, because there is no statute authorizing it.

Senator Thompson.— Then I concur with the Chief Justice entirely.

Senator Foley.— I just want to bring to the attention of the Court a point made by Mr. Marshall for the respondent, that with regard to the section for the reapportionment of the State into Senate districts, that the apportionment must be held at the first regular session after the enumeration of citizens or inhabitants.

Mr. Marshall commented on the fact that that indicated a limitation on the right of the Legislature even at an extraordinary session to legislate upon the question of apportionment, and it also indicated a limitation upon the right of the Governor to recommend such legislation. I think it was at the session of 1909 that the Legislature enacted a reapportionment of the State, and your Honors, and especially the Presiding Justice, in the Reynolds case in the 202d Court of Appeals reports, held that the word "regular" was a limitation with regard to the time rather than a prohibition against legislation of any kind. That would indicate a desire to depart from the strict wording of the Constitution, and that it would still be possible, as in this case, to go without the strict language of the Constitution and to read into it implied powers.

Judge Bartlett.— I move, unless there is some objection, that the vote already taken stand as the vote, and that the President decide the motion accordingly.

The President.— I think it but fair to call the roll once more, as it was stated expressly that the first roll call was only to be a tentative vote.

Noes.— Senator Argetsinger, Judge Bartlett, Senators Blauvelt, Boylan, Bussey, Carswell, Judge Chase, Senator Coats, Judges Collin, Cuddeback, Cullen, Senators Cullen, Duhamel, Emerson, Foley, Frawley, Godfrey, Griffin, Heacock, Healy, Heffernan, Herrick, Hewitt, Judges Hiscock, Hogan, Senators McClelland, McKnight, Malone, Judge Miller, Senators Murtaugh, O'Keefe, Ormrod, Palmer, Patten, Peckham, Pollock, Ramsperger, Sage, Sanner, Seeley, Simpson, Stivers, Sullivan, Thompson, Torborg, Velte, Wagner, Judge Werner, Senators White, Whitney, Wilson.— 51.

Aye.— Senator Wende.— 1.

The President.— Now, gentlemen, it seems to the Presiding Officer that it would be wiser to announce now to the public this decision rather than have it held until tomorrow, and in the

meantime have people speculating on what this Court has decided, one way or the other.

Judge Bartlett.— I modify my motion accordingly.

The President.— So, if it meets your approval, I suggest we go into open session again, if anyone will make that motion, and then the Presiding Judge will announce the decision of the Court.

Judge Hiscock.— I move we go into open session, and the Presiding Officer announce the decision of the Court.

The President.— All in favor of the motion please say aye; opposed, no. (The motion was unanimously carried.)

The executive session was thereupon closed, and the Court resumed the public hearing.

PUBLIC HEARING RESUMED

The President.— This being an open session, the Presiding Officer announces that the motion of respondent's counsel to dismiss the proceedings is denied.

Thereupon the Court adjourned until Tuesday, September 23, 1913, at 10 a. m.

TUESDAY, SEPTEMBER 23, 1913

SENATE CHAMBER

ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 o'clock a. m.

The roll call showing a quorum to be present, Court was duly opened.

The President. — The motion of the respondent to dismiss the articles of impeachment on the ground that the Assembly had no right to prefer them at an extraordinary session having been overruled, it now becomes incumbent on the respondent to make answer.

Mr. Herrick.— Bowing, of course, as we must, to the ruling of the Court, Mr. President and members of the Court, we now appear generally for the respondent, the same counsel appearing as did appear specially. And in that connection permit me, Mr. Presiding Judge and members of the Court, to say that when these articles were first presented, the Governor was advised that inasmuch as there was some doubt as to the legality of the impeachment, that it was his duty not to surrender the functions of his office until that question had been determined. After the decision of Mr. Justice Hasbrouck he ceased to perform any executive functions, and it is unnecessary for me to say perhaps that he will not perform any in the future until the termination of this trial.

I now, in pleading, as we are permitted to do under the Code of Procedure, offer certain objections to the sufficiency of articles first, second and sixth of the articles of impeachment. May the clerk read them?

Mr. Kresel.— May I have one copy?

Mr. Herrick.— The clerk will let you have one of his copies. I think for the purposes of this discussion my associates think that they ought to be read.

The President.— They should be read?

Mr. Herrick.— Yes.

The President.— The clerk asks you if you prefer to read them yourself?

Mr. Herrick.— Very well.

The President.— If you are familiar with them, or would you rather have the clerk read them?

Mr. Herrick.— They are typewritten. Will you read them, Mr. Marshall?

Mr. Marshall (Reading).— The above-named respondent, William Sulzer, in response to the first article of impeachment preferred against him says:

That this Court ought not to take cognizance of said article, and this respondent objects to the sufficiency thereof, because it appears upon the face of such article that the matters and things therein alleged and set forth are matters and things that occurred and took place, if they ever did occur or take place, prior to the 1st day of January, 1913, before this respondent became and was Governor of the State of New York, and, therefore, did not constitute wilful and corrupt misconduct in office; and this respondent objects to and denies the sufficiency of the matters and things set forth in said first article of impeachment to constitute a cause or causes for impeachment of this respondent, and asks that said article be quashed and set aside, and that this Court refuse to take further cognizance of said article.

And this respondent in response to the second article of impeachment preferred against him, says:

That this Court ought not to take cognizance of said article, and this respondent objects to the sufficiency thereof, because it appears upon the face of such article that the matters and things therein alleged and set forth are matters and things that occurred and took place, if they ever did occur or take place, prior to the 1st day of January, 1913, before this respondent became and was Governor of the State of New York, and, therefore, did not constitute wilful and corrupt misconduct in office; and this respond-

ent objects to and denies the sufficiency of the matters and things set forth in said second article of impeachment to constitute a cause or causes for impeachment of this respondent, and asks that said article be quashed and set aside, and that this Court refuse to take further cognizance of said article.

And this respondent in response to the sixth article of impeachment preferred against him, says:

That this Court ought not to take cognizance of said article, and this respondent objects to the sufficiency thereof, because it appears upon the face of such article, that the matters and things therein alleged and set forth are matters and things that occurred and took place, if they ever did occur or take place, prior to the 1st day of January, 1913, before this respondent became and was Governor of the State of New York, and, therefore, did not constitute wilful and corrupt misconduct in office; and this respondent objects to and denies the sufficiency of the matters and things set forth in said sixth article of impeachment to constitute a cause or causes for impeachment of this respondent and asks that said article be quashed and set aside, and that this Court refuse to take further cognizance of said article.

And this respondent in further response to the first article of impeachment against him says that this Court ought not to take cognizance of the said article, and this respondent objects to the sufficiency thereof, for this, that at the time of making and filing the statement therein referred to there was nothing in the laws or statutes of this State that required this respondent as a candidate for the office of Governor of the State of New York, to make and file any statement in which should be set forth the contribution or moneys received by him while such candidate.

And this respondent in further response to the second article of impeachment against him says that this Court ought not to take cognizance of the said article, and this respondent objects to the sufficiency thereof because at the time of making the statement and affidavit or oath referred to in said article, there was nothing in the laws or statutes of this State that required him to make oath or affidavit to any statement setting forth contributions made to or receipts of money or property received by him; and that the statement to which the affidavit was attached as set forth in said

second article was not a statement required by law to be made by this respondent.

Mr. Herrick.— Judge Vann, one of our associate counsel, came here, as some of the members of the Court know, after a very severe illness caused by ptomaine poisoning. He should not have been here. He insisted upon coming. We have received a letter from his physician stating that he is still worse than when here, and that he has forbidden his attendance for some days to come. Judge Vann had prepared an argument upon this branch of the case, which I will ask to have read at the conclusion of my oral argument.

Mr. President and gentlemen of the Court: The text of my argument is that ours is a government of laws and not of men. The Assembly in preferring articles of impeachment, and the Court for the trial of impeachments so preferred, are both governed by the laws of the State, and the law of the State is, that public officials can be impeached only "for wilful and corrupt misconduct in office."

In asking that these articles be dismissed we are not endeavoring to shield William Sulzer from answering the matters therein set forth. Sooner or later he must do so, either here or at the bar of public opinion, and when that time comes, whether it be here or elsewhere, we have no apprehension but that those answers will be full and sufficient.

While we are concerned for Mr. Sulzer, we have a graver and higher duty to perform than merely to prevent his being compelled to give an explanation of the charges contained in these several articles. We are concerned for the proper administration of the law. We are concerned for the Governor of the State, and all other executive officers who are subject to impeachment, for the precedent now to be set by you will not only control all future proceedings in this State, but will be vastly influential in controlling and directing similar proceedings in every state of the Union.

This is the highest and greatest tribunal of justice in this State. From the beginning of our government, State and National, our highest courts have stood second only to the Supreme Court of the United States. We have been proud of their standing, and we

are anxious that in the proceedings now to be had, and the decision to be made, that that high standing shall be maintained, and justice administered according to the law of the land, and not in furtherance of passion, prejudice or political animosity; and that this Court will demonstrate that this is still a State where government by law, and not by men, is enforced and maintained.

The power of impeachment, unless carefully guarded, is an exceedingly dangerous power. Jefferson said of it:

> "I see nothing in the mode of proceeding by impeachment but the most formidable weapon for the purposes of a dominant faction that ever was contrived. It would be the most effectual one of getting rid of any man whom they consider as dangerous to their views. . . . I know of no solid purpose of punishment which the courts of law are not equal to, and history shows that in England, impeachment has been an engine more of passion than justice."

Hamilton, speaking upon the same subject, said:

> "A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them for this reason will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

"The delicacy and magnitude of a trust, which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders, or the tools of the most cunning or the most numerous faction; and on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny. . . .

"The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most conspicuous and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons." (The Federalist, No. 65, pp. 490–91; 492–93.)

Surely all these reasons advanced by Hamilton as to the nature of a court that should try impeachments, apply also to the necessity of there being some law determining what public officials can be impeached for.

It is claimed, as we understand, that, inasmuch as the Constitution merely provides that the Assembly shall have the power of impeachment, and then provides for a Court to try such impeachments, without stating for what causes impeachments will lie, that there is no limit to the causes for which the Assembly may impeach, and no limit to the jurisdiction of this Court in determining the causes for impeachment.

Note: The language of the Constitution is "The Assembly shall have the power of impeachment." There is no limit as to the persons who may be impeached, and it might as well be claimed that this conferred the power to impeach private citizens and disqualify them from holding office, as well as public officials, as to claim that it confers the power to impeach for any cause that the Assembly or this Court deems sufficient.

In other words, that there is no law governing this tribunal as to what is an impeachable offense, except its own determination. That it is a law unto itself.

If that be the law, if the Assembly can impeach for any cause that it sees fit, for acts done by an official during his term of office, as well as for acts done by him when a private citizen before he had become a public official, thereby suspending him indefinitely from discharging the duties of his office, then the door is opened wide to an unscrupulous majority to impeach an official whose conduct in office has been upright and honest, who has stood in the way of graft and corruption, but who, perchance, before coming into office has been guilty of some indiscretion, or worse. To impeach, in fact, not for official misconduct, but because of his refusal to abuse the powers of his office.

If you are simply called upon to determine as to whether such accused official has in fact committed the acts alleged in the articles of impeachment, then the executive department of the government is at the mercy, not of the legislative department of the government, but of a single branch of it.

On the other hand, if you are to determine as to whether the act if committed is an impeachable offense, we respectfully submit that there must be some law governing your action by which it may be determined whether in truth and in fact an impeachable offense has been committed.

The power of impeachment, spoken of by Hamilton as an "awful" power, if it has no limits, and the Assembly can impeach, and the Court for the Trial of Impeachments can convict, whenever it is deemed desirable to remove a public official, is indeed an awful power, which in times of public excitement may be misused for partisan or personal purposes. The power of impeachment without any limitations may be used to remove a political adversary for differences of political opinions, and in my own time I have witnessed such public political feeling that honest men believed that they would be doing their country a service in removing from public office those officials holding political views adverse to their own, because of their assumed danger to the best interests of the country. If there is no limit, then that power can be exercised for the purpose of removing the highest, most energetic and honest public officials, for the purpose of protecting other officials who are guilty of dishonest practices in

public office, or from pursuing and exposing influential and powerful men who are not holding public office but who are directing public affairs.

Some limit must be fixed to this great power, otherwise, in the last analysis of executive government in this State, we will have a government of men and not of laws. That there is a limitation upon the exercise of this great power, I think I shall be able to demonstrate to your satisfaction.

While there is nothing in the Constitution providing for what causes the Court for the Trial of Impeachments may remove an official from office, yet this Court, like every other court, is governed by the law — it is not a law unto itself — and when that law is not specifically set forth in the Constitution we must look elsewhere for it.

This is a Court exercising judicial functions, and no other, and the judicial function is to interpret, pronounce and enforce the law. It is the legislative function to make the law.

Is this Court to determine for what a public official can be impeached? Is it to define offenses for which an official can be removed from office, or is it to determine from the evidence whether the respondent has wilfully committed offenses defined by law, either statute or common, as impeachable offenses?

If it is to do the first, it is exercising legislative power; if the last, judicial power. It cannot exercise both. It cannot both create offenses or causes of impeachment, and then determine whether the acts of the respondent constituted the impeachable offenses thus created. Chief Judge Cullen in a dissenting opinion — and dissenting opinions very frequently set forth the law — in People v. Ahearn (196 N. Y. 253), said:

> "For the courts to declare a disqualification not enacted by the Legislature or by the Constitution, is, to use the language of Lord Chatham, not to declare the law, but to make the law."

So for this Court to declare for what acts a public official may be impeached is not to declare the law but to make it.

Chief Justice Marshall in the case of Osborn v. United States (22 U. S. 865), said:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the cause prescribed by law; and, when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; it is always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

What is the law then that is to govern this Court as to whether the matters and things set forth in these articles of impeachment that we have objected to constitute impeachable offenses?

Is it the law that a public official can be impeached and removed from office for acts committed by him before becoming an official?

No cases have been brought to our attention where a public official has been impeached for acts committed by him while a private citizen.

It is true that in former times in England private persons were impeached for public offenses and punished for alleged offenses against the Kingdom, but since the revolution of 1688 no one has been impeached except for misconduct in office or connected with office.

All the learning and research exhibited in the trials of President Johnson, Senator Blount, Judge Barnard, Belknap, Shively and others, shed no light upon this question. In none of those cases was the question raised as to whether public officials could be impeached for acts committed while private citizens.

No case of impeachment in this country has been found where a public official has been impeached for offenses prior to his assumption of office. All are cases of misconduct in office.

In other words, for over two hundred years, including periods of political strife and animosities, when the passions of men ran high, when the pursuit of political adversaries was merciless, no-

where in the English speaking world has an attempt been made to remove a public official from his position, by impeachment, for offenses alleged to have been committed before he became such an official.

This is powerful and persuasive evidence that the power of impeachment for offenses committed at such times does not exist, otherwise, knowing the passions and prejudices of men, we must believe it would have been resorted to.

In determining this question we must take into consideration the purposes to be accomplished by impeachment, and the laws that limit and control the proceedings.

The primary purpose of an impeachment is to remove from office an unfaithful public official.

James Wilson, that great authority upon constitutional law, one of the greatest men in the convention that framed the Constitution of the United States, says:

> "Impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." (James Wilson's Works, vol. 2, p. 46.)

Story, in speaking of the causes of impeachment and the use in the United States Constitution of the words "treason, bribery, and other high crimes and misdemeanors," says:

> "The treason contemplated must be against the United States. In general, those offenses which may be committed equally by a private person as a public officer are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offenses not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding, and neither house can regularly inquire into them, except for the purpose of expelling a member." (Story on Constitution, vol. 1, sec. 801.)

Woodeson declares that impeachments extend to cases in which the ordinary courts have no jurisdiction. He says:

> "It is certain that magistrates, and officers intrusted with the administration of public affairs, may abuse their delegated powers to the extensive detriment of the community,

and at the same time, in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents, and the nature of such offenses, may not unsuitably engage the authority of the highest court, and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, become suitors for penal justice; and they cannot, consistently either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature. On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form." (Woodeson's Lectures, vol. 2, p. 596.)

None of the acts alleged in the first, second and sixth articles of impeachment here presented, are acts of an official, and are all acts cognizable by the ordinary tribunals, where no one may sit in judgment upon him who has been engaged in procuring evidence against him, who has prejudged his case and declared him guilty without a hearing, or who is actuated by political feeling or partisan animosity, and when if the accused is found guilty of the felony charged against him his removal from office follows automatically.

Mr. Pomeroy, one of our greatest writers upon constitutional law, in discussing the grounds of impeachment under the Federal Constitution, says:

"If any fact respecting the Constitution is incontrovertible, it is that the convention which framed, and the people who adopted it, while providing a government sufficiently stable and strong, intended to deprive all officers, from the highest to the lowest, of any opportunity to violate their public duties, to enlarge their authority, and thus to encroach gradually or suddenly upon the liberties of the citizen. To this end elections were made as frequent, and terms of office as short, as was deemed compatible with an uniform course of administration. But lest these political contrivances should not be sufficient, the impeachment clauses were added as a sanction bearing upon official rights and duties alone, by which officers might be completely confined within the scope of the functions committed to them." (Sec. 724.)

And in discussing the phrase in the Federal Constitution of "high crimes and misdemeanors," said:

> "The phrase 'high crimes and misdemeanors' seems to have been left purposely vague; the words point out the general character of the acts as unlawful; the context and the whole design of the impeachment clauses show that these acts were to be official, and the unlawfulness was to consist in a violation of public duty which might or might not have been made an ordinary indictable offense." (Pomeroy's Constitutional Law, sec. 724–25.)

And in determining what are impeachable offenses, Story, by most persuasive reasoning, which has never been successfully refuted, demonstrates that the Court for the Trial of Impeachments is not a law unto itself, but is governed by the law, and in cases of impeachment under the United States Constitution, in the absence of legislation by Congress, holds that resort must be had either to parliamentary practice or to the common law,

> "Or the whole subject must be left to the arbitrary discretion of the Senate for the time being. The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time, or in another person. The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties." (Story on the Constitution, sec. 797.)

And again he says:

> "The doctrine, indeed, would be truly alarming, that the common law did not regulate, interpret and control the powers and duties of the Court of Impeachment. What, otherwise, would become of the rules of evidence, the legal notions of crimes, and the application of principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly, that while every citizen of every state originally composing the Union would be entitled to the common law as his birthright, and

at once his protector and guide, as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. It is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishment, prevail. For impeachments are not framed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of two powerful delinquents, or not easily discerned in the ordinary cause of jurisdiction, by reason of the peculiar quality of the alleged crime. Those who believe that the common law, so far as it is applicable, constitutes a part of the law of the United States in their sovereign character as a nation, not as a source of jurisdiction, but as a guide and check and expositor in the administration of the rights, duties and jurisdiction conferred by the Constitution and laws, will find no difficulty in affirming the same doctrines to be applicable to the Senate as a court of impeachments. Those who denounce the common law as having any application or existence in regard to the national government must be necessarily driven to maintain that the power of impeachment is, until Congress shall legislate, a mere nullity, or that it is despotic, both in its reach and in its proceedings. . . . If the common law has no existence as to the Union as a rule or guide, the whole proceedings are completely at the arbitrary pleasure of the Government, and its functionaries, in all its departments." (Same, section 798, vol. 1, p. 582.)

It being unthinkable that the power of impeachment should be despotic both in its reach and in its proceedings, then it must be apparent that the extent of that power must be determined by the common law or by statute.

And the great jurist further says:

"It seems, then, to be the settled doctrine of the High Court of Impeachment that, though the common law cannot be a foundation of a jurisdiction not given by the Constitu-

tion or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to that great basis of American jurisprudence. The reasoning by which the power of the House of Representatives to punish for contempts (which are breaches of privileges and offenses not defined by any positive laws) has been upheld by the Supreme Court, stands upon similar grounds; for if the House has no jurisdiction to punish for contempts until the acts had been previously defined and ascertained by positive law, it is clear that the process of arrest would be illegal." (Same, section 799, vol. 1, pp. 583–84.)

And in the absence of legislation by Congress, it is now by common consent conceded that what are causes for impeachment, in addition to those specifically mentioned in the Constitution, is to be determined by the parliamentary and common law of England as it was when our Constitution was adopted, excepting so far as such parliamentary and common law is repugnant to the spirit of our institutions.

That is, what are impeachable offenses is defined by law, not by the Court for the Trial of Impeachments. Its only function is to determine whether the acts charged constitute impeachable offenses as defined by the law, and not by the Court itself.

What then is the law of impeachment in this State?

The power of impeachment is granted, and the tribunal to try the impeachment is provided for by the Constitution.

Constitutions primarily are only statements of principles upon which governments shall be conducted, and the distribution of the powers of government, stating by whom they shall be exercised. As a rule they are not self-executing but depend upon existing laws or statutes, then in existence or thereafter to be enacted, to carry them into effect. So says the Court of Appeals in the 47 N. Y. (People ex rel. Jackson v. Potter, 47 N. Y. 375–80.)

To illustrate: the provision of section 6, article 1, of our State Constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment

of a grand jury, by inference provides for indictments of persons for capital or otherwise infamous crimes by grand juries, but there is nothing in the Constitution defining what is a capital or otherwise infamous crime.

Under its provisions certainly no one would contend that a grand jury in the first instance, and a trial court finally, has the power of determining what is or is not a capital or otherwise infamous crime.

And in granting the power to impeach, and in providing a tribunal for the trial of impeachments, the Constitution did not confer upon the Assembly or this Court, the power of determining what are impeachable offenses, any more than it conferred upon the grand jury or trial courts the power of determining what are capital or otherwise infamous crimes.

Standing alone those provisions are inoperative, unless, as has been held, as we have heretofore shown as to the impeachment of United States officials, resort can be had to the common and parliamentary law of England. As to our State that is put beyond question for our State Constitution has provided, in section 16 of article 1, that such parts of the common law, and of the acts of the Legislature of the colony of New York as formed the law of that colony in 1775, and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same.

So existing laws were continued and relied upon to put the provisions of the Constitution into force and effect, until legislation, when necessary, could be had.

The necessity for legislation to give force and effect to the provisions of the Constitution in relation to impeachment has always been recognized, and in the Constitution of 1846 it is expressly provided that,

> "Provisions shall be made by law for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative, and who shall be elected at general elections, and also for supplying vacancies created by such removal."

The same direction appears in the Constitution of 1894 as section 7 of article 10.

This language is applicable to every elective State officer, except judicial and legislative. It applies to the Governor and Lieutenant Governor, as well as to all other State officers.

It is to be further noticed that provision is to be made for removal "for misconduct or malversation in office" only. That is, no provision is to be made for removal from office for "misconduct or malversation" out of office.

This language, by familiar rules of interpretation, excludes the Legislature from making provision for the removal of officials for anything done, or omitted to be done, by them before they became officials. It must be taken as the expression of the will of the people that public officials are to be removed only because of official misconduct, and not for acts done by them before they became public officials.

Pursuant to that provision of the Constitution the Legislature in the Code of Criminal Procedure (sections 12 to 20, inclusive, and sections 118 to 131, inclusive), has made provision for the removal of public officials, the causes for such removal, and the procedure thereon.

The necessity of giving effect to the Constitution has always been recognized, even in relation to the power of impeachment.

From the time of our first Constitution down to the present time, impeachments have always been provided for by statute, following usually the terms of the constitutional provisions.

Section 33 of the Constitution of 1777 provides:

> "That the power of impeachment of officers of the State for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in Assembly, and that it shall always be necessary that two-thirds of the members present shall consent and concur in such impeachment."

That was followed by the enactment of a statute in the same language of the Constitution itself, chapter 10 of the Laws of 1801, section 5. 1 K. & R. 182.

Article 5, section 2, of the Constitution of 1821, effective December 31, 1822, provides as follows:

> "The Assembly shall have the power to impeach all civil officers of this State for mal and corrupt conduct in office, and for high crimes and misdemeanors."

But that the majority of all the members elected shall concur in the impeachment.

That was followed by the enactment of a statute in identical terms. Revised Statutes, pt. 1, ch. 7, tit. 2, sec. 15, 1828.

The Constitution of 1846, article 6, section 1, effective January 1, 1847, provides that:

> "The Assembly shall have the power of impeachment by the vote of a majority of all the members elected."

The present Constitution, 1894, article 6, section 13, is identical in its provisions as to impeachments with the Constitution of 1846.

In 1850, a Code of Criminal Procedure was reported by a commission, which was not enacted into the law until 1881, being the present Code of Criminal Procedure; section 17, as originally reported by the commission, is at present section 12, and reads as follows:

> "The Court for the Trial of Impeachments has the power to try impeachments, when presented by the Assembly, of all civil officers of the State, except justices of the peace, justices of justices' courts, polices justices and their clerks, for wilful and corrupt misconduct in office."

It will be observed that all the Constitutions, except that of 1846 and our present Constitution, describe for what officials could be impeached. The Constitution of 1777, "for mal and corrupt conduct in their respective offices." The Constitution of 1821 "for mal and corrupt conduct in office, and for high crimes and misdemeanors."

These were very general descriptions of an impeachable offense, but still descriptions and definitions, leaving the Court to determine whether the particular acts charged in the articles of impeachment constituted "mal and corrupt conduct in office," or a "high crime or misdemeanor." And in determining what was a "high crime or misdemeanor" resort had to be, in the absence of legislation, to the common or parliamentary law.

The Constitutions of 1846 and 1894 conferred the power of impeachment of public officials upon the Assembly, and created a Court for the Trial of Impeachments, without saying what should constitute cause for impeachment, but left that to be determined by existing law or laws to be thereafter enacted.

At the time of the adoption of the Constitution of 1846 there was a statute, as we have heretofore seen, providing that civil officers could be impeached "for mal and corrupt conduct in office, and for high crimes and misdemeanors." (R. S., pt. 1, ch. 7, tit. 2, sec. 15, 1828.)

That was a definition or description in general terms of impeachable offenses under our Constitution. That statute remained the law of the State until 1881, when the Code of Criminal Procedure was adopted.

It is familiar law that Constitutions are adopted with a view to existing laws, which are continued in force, unless repugnant to the Constitution, and are relied upon to carry into effect the provisions of the Constitution.

Under the Constitution of 1846, therefore, the provisions of the Revised Statutes I have cited being in effect, a public official could be impeached for "mal and corrupt conduct in office," and that remained the law until 1881, because it was not inconsistent with the provision of the Constitution.

When the Constitution of 1894 was adopted our law provided that the Court for the Trial of Impeachments should have jurisdiction to try impeachments "for wilful and corrupt misconduct in office." That had been law for thirteen years.

That was, and is, a definition of impeachable offenses, and under familiar rules of interpretation excludes all others.

The authors of the Constitution are presumed to have known the existence of that law and to have depended upon it to enforce

the provisions of the Constitution until some other law was enacted to take its place.

Grand juries may be authorized to indict for crimes, and assemblies to impeach, and the courts may be created to try indictments and imprisonments, but there must be some law defining and describing the crimes and offenses for which they may indict, impeach and try, and when the law has described the crimes and offenses so indictable, impeachable and triable, they can indict, impeach and try no others.

When our present Constitution was being formed its authors found upon the statute book of the State a law defining impeachable offenses, limiting the power of the Court to try impeachments "for wilful and corrupt misconduct in office," but they made no change in the phraseology of the Constitution, and they are presumed to have acquiesced in that definition and limitation. That that is so, besides the ordinary and familiar rules of construction, I have appended to my brief as a note, but it is so interesting I will read it, although I had intended it simply for the benefit of the Court without my taking the trouble to read.

That the provisions of the Code of Criminal Procedure in relation to impeachments and impeachable offenses, were considered by the authors of the Constitution of 1894 to be in harmony with that Constitution, would appear from the following facts:

Pursuant to chapter 189 of the Laws of 1890, Governor Hill appointed a commission to revise the judiciary article of the Constitution then in force. That commission was composed of some of the most prominent lawyers in the State: Judge Danforth, as chairman; James C. Carter, Frederick Coudert, William B. Hornblower, Judge Gilbert, Lewis Carr, Wilson B. Bissell and others. Lincoln's Constitutional History, vol. 1, pages 684–85.

After months of deliberation the committee presented to the Legislature a completely revised judiciary article. No action was taken by the Legislature with respect to its recommendations. Many, however, of its most important suggestions were adopted three years later by the convention of 1894 and were incorporated in the new Constitution. Lincoln's Constitutional History, vol. 1, page 721.

Two members of the commission, Hon. Joseph H. Choate and

Mr. Louis Marshall, were elected to the constitutional convention of 1894. Mr. Choate became the chairman of that body and Mr. Marshall a member of the judiciary committee. The latter presented to the convention for its consideration the judiciary article as framed by the commission, and subsequently introduced the same article with various amendments. These measures, together with other proposed changes in the judiciary article, were considered by the judiciary committee of the convention for nearly five months. Every line and every word was made the subject of the most careful thought. The statutes and decisions bearing on the judiciary article were studied and discussed.

After the convention adjourned and the revised Constitution was adopted, Mr. Choate, as president of the convention, requested Mr. Marshall, as a member of the judiciary committee, to prepare amendments to the Code of Civil and Criminal Procedure, respectively, which would harmonize their provisions with the Constitution. This mandate was accepted, and Mr. Marshall submitted to the Legislature of 1895 two bills, which were enacted as chapters 880 and 946 of the Laws of 1895.

Among the provisions of the Code of Criminal Procedure which were thus considered was title LL of part I, which related to the Court for the Trial of Impeachments. The only change made in that title was the addition to section 13 which related to the members of the Court as follows:

> "But on the trial of an impeachment against the Governor or Lieutenant Governor, the Lieutenant Governor cannot act as a member of the Court."

This amendment embodied in the Code the new matter added by the convention to section 13 of article 6 of the Constitution. In all other respects the provisions of the Code of Criminal Procedure, including section 12, relating to the jurisdiction of the Court for the Trial of Impeachments, advisedly remained unchanged.

The significance of these facts which I have just recited is powerfully stated in the dissenting opinion of Judge O'Brien in People v. Helmer, 154 N. Y. 612, whose conclusions were, however, subsequently adopted by the Court of Appeals in People v.

Miller, 169 N. Y. 339; the question there being, as to whether or not the limitations upon the jurisdiction of the Court of Appeals which related to appeals in civil cases, were also applicable to appeals in criminal cases. He said:

> "It is worthy of note that the lawyers in the convention who framed this section and reported it to the convention, and upon whose advice it was adopted, made no mention, either in the debate, or in any report, of any purpose to interfere with appeals in criminal cases, while the effect it was intended to have upon appeals in civil cases was fully explained and debated; and what is still more remarkable is that a member of the judiciary committee, who was prominent in framing the section and urging its passage, is the author of two bills which he presented to the Legislature in behalf of the bar of the State, revising both the Codes of Criminal and Civil Procedure, in order to bring them into harmony with the changes in the practice which the new Constitution, then adopted, had introduced. His work is found in chapters 880 and 946 of the Laws of 1895. These statutes, enacted for the very purpose of carrying the changes into effect, have great weight in the construction of the limitations upon appeals contained in section 9. The Code regulating the procedure in all civil cases has incorporated in it all the limitations upon appeals that are to be found in the section in the very words there used. While in the Code regulating the procedure in criminal cases, and defining the right of appeal in such cases to this Court, they have all been omitted and the practice left just as it was before. It would be impossible to conceive a weightier example of not only legislative construction, but construction by the framers of the Constitution themselves. We know that arguments drawn from like sources, but far weaker in degree, have settled disputed questions with respect to the meaning of the Federal Constitution, and, therefore, they cannot be out of place here."

The words, "for wilful and corrupt misconduct in office," it is true, are very general, but they are sufficient.

It would be, as some writers have written, impossible to fore-

see and accurately describe all possible kinds of official misconduct that an ingenious and corrupt official might conceive and commit, and therefore, it was wiser and safer to describe the offenses in general terms, and let the Court determine whether the facts alleged and proved constitute " wilful and corrupt misconduct in office."

Of course, an act, however wilful and corrupt, committed by a private citizen cannot constitute wilful and corrupt misconduct in office. The articles of impeachment themselves rather recognize that fact.

The articles of impeachment here presented read:

> " Resolved, That William Sulzer, Governor of the State of New York, be and he hereby is impeached for unlawful and corrupt conduct in office and for high crimes and misdemeanors."

The articles of impeachment recite that the impeachment is against him for " wilful and corrupt misconduct in his said office, and for high crimes and misdemeanors."

It will be observed that the wording of the resolution of impeachment and that the articles of impeachment are different; that neither of them follows the wording in our present statute, but it will be assumed that in substance they mean the same, and that the impeachment is preferred against him, " for wilful and corrupt misconduct in office and for high crimes and misdemeanors."

I will assume that I have sufficiently considered the question of the use of the words " wilful and corrupt misconduct in office," and that impeachments must be confined to official misconduct and proceed to a brief consideration of what force is to be given to the use of the words " high crimes and misdemeanors."

It may be said, however, that he can be impeached for other crimes, and the crimes are set forth, and what I have now to say applies more particularly to the first and second article. If they are crimes, then they are indictable, and I undertake to say that the matters and things set forth in those two articles do not constitute indictable offenses. The statements and affidavits referred to in articles 1 and 2 of the impeachment were voluntary,

that is, not required by law. That is to say, if made under section 776 of the Penal Code, there was nothing that required him to include in his statement any list of contributions received by him, but only of contributions made by him. That is all that is required by the Penal Code.

If it is claimed to have been made in compliance with the provisions of the corrupt practices act, then there is nothing in the provisions of the corrupt practices act that requires him to make oath to that statement. So, if made under the one, there is no obligation for him to make a statement of any receipts; only of payments made by him or contributions made by him. If made under the other, he was not required to verify it.

I will not read you the charge — I suppose you have the articles of impeachment — for the sake of saving your time. But the first charge is that his statement did not include certain contributions; that while it recited the receipt of some contributions, that it does not set forth all the contributions he received, and then specifies the contributions that it alleges that he received, but which he did not account for in his statement.

Article 2 refers to the same statement filed by Mr. Sulzer, which it states it was his duty to file within ten days after his election, and declares that it was his duty under said statute to subscribe and swear to said statement, and it charges him both with making the same errors charged in article 1, and also with committing perjury.

Inasmuch as the election law, article 20, known as the corrupt practices law, requires a candidate to file his statement within twenty days, and does not require it to be verified, it is plain that the first charge accuses Mr. Sulzer of violating the provisions of this statute. And whereas the Penal Code, section 776, requires a candidate to file his statement within ten days, and provides also that it shall be verified, it is evident that the second charge is brought under the provisions of the Penal Code. Both charges refer to the same statement, declare that it was the duty of Mr. Sulzer under oath, under each and both of these laws to file a statement of contributions made to him during his campaign, and charge him with the violation of this duty.

Section 776 of the Penal Code reads as follows:

> "Every candidate who is voted for at any public election held within this State, shall, within ten days after such election, file as hereinafter provided, an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election."

I will not read the remainder of the section. It is unnecessary for the purpose of this discussion. This is the last clause:

> "Any candidate for office who refuses or neglects to file a statement as prescribed in this section, shall be guilty of a misdemeanor, and shall also forfeit his office."

By reference to section 780 —

Mr. Marshall (interrupting).— That was changed by subsequent amendment. That was struck out in the following year.

Mr. Herrick.— My associate says that that last clause "forfeit his office" was stricken out by amendment the following year.

That that refers only to contributions made by the candidate would seem to be enforced by a reading of section 780, "No candidate for a judicial office shall directly or indirectly make any contribution of money or other thing of value, nor shall any contribution be solicited; but the candidate for a judicial office may make such legal expenditures, other than contributions, as are authorized by section 767 of this article." So, taken together, it is evident that section referred only to contributions made by the candidate and not to contributions received by him.

What is known as the corrupt practices act, constituting article 20 of the election law, provides for the accounting and the filing of statements by political managers or treasurers of campaign funds, by individuals on their own behalf and by candidates for office.

Complete directions for the manner in which such statements shall be prepared are set forth in the section which applies par-

ticularly to the treasurer of a political committee or party, which is section 546 of that act.

Statements by others than treasurers of parties, it is provided in the last sentence of said section, are to conform, so far as practicable, with the statements to be made, as therein described, by the treasurers of such committees, but the said statements are not necessarily so complete, nor do they cover all the items required from such treasurers.

The last sentence of section 546 reads:

> "That statement to be filed by a candidate or other person not a treasurer, shall be in like form as that hereinbefore prescribed, but in a statement filed by a candidate there shall also be included all contributions made by him."

That is under the corrupt practices act.

If this section directed that "a statement shall be filed by a candidate in like form as that hereinbefore provided for," there can be no question but that the statement so required must contain all the items required in the statement to be made by a treasurer. But the actual wording suggests that a form of statement is prescribed in some other section, and that the Legislature intended that the items prescribed in this other section, so far as they went, should be set forth "in like form" as those provided for in the statement to be filed by a treasurer. But, naturally, the Legislature did not intend that a candidate shall set forth in his statements items not required in the specifications relating exclusively to his statement, although specifically required in the section applying to treasurers.

The expression "the statement to be filed" compels us to look back in the article to find what statement must be filed by a candidate, and this we find in sections 541 and 542 of the said article.

Section 541 requires that a candidate who "shall give, pay, expend or contribute, or shall promise to give, pay, expend or contribute, any money or other valuable thing, except for personal expenses as hereinafter provided, shall file the statement required by section 546."

This section then merely called upon the candidate to file a statement not of contributions made to him or of money paid to

him, but merely of money expended by him, or contributed by him, which said statement shall be in the form provided for the treasurer of a political committee.

And even this statement may not include any money which has been expended by him for personal expenses, and such personal expenses are defined in section 542 as those incurred or paid "in connection with such election for traveling and for purposes properly incidental to traveling, for writing, printing and preparing for transmission any letter, circular or other publication not issued at regular intervals, whereby he may state his position or views upon public or other questions; for stationery, and postage, for telegraph, telephone and other public messenger service; but all such expenses shall be limited to those which are directly incurred and paid by him."

It seems apparent, therefore, that the statement required to be filed by a candidate must under the law include only payments made by him for other than personal expenses as we find above. The very fact that in the last sentence of section 546 the requirement is, that the candidate's statement shall include "all contributions made by him" emphasizes the construction placed upon this section of the corrupt practices act, that he was not required to file a statement of contributions made to him.

The failure to comply with the directions to file a statement of campaign payments, and possibly of receipts, does not constitute a crime under the provisions of the corrupt practices act, contained in article 20 of the election law.

The remedy granted to the people for the failure of a candidate to file such a statement is set forth in section 550 of said act and is, so far as that act is concerned, the exclusive remedy. When a statute creates a new offense, the remedy that it provides is exclusive. That seems to be valid law. When a statute creates a new offense and makes that unlawful which was lawful before and provides a particular penalty and mode of proceeding, that penalty alone can be enforced, and the offense in such a case is a purely statutory offense and cannot be established by implication; and acts otherwise innocent do not become a crime unless a clear and positive intent to make them such a crime is shown. (77 N. Y. and 137 N. Y.)

This section provides that where a candidate fails to make

a correct statement as provided therein, the Supreme Court on a written petition shall direct the candidate summarily to file or to correct such a statement as the case may be. It is the failure of a candidate to obey this direction of the court in such a proceeding and not his failure to comply with this direction of the statute which is penalized by the infliction of a fine or by imprisonment as set forth in section 560 of said act. That punishment is for a contempt of the order of the Supreme Court, and is by fine and imprisonment, and is in no case a prosecution for a crime.

The act provides in the first instance that notice must be given to a careless candidate to correct his omission before he can be punished in any way.

A failure, therefore, to file a correct statement as provided by this act is not an offense of any kind as described by the laws of this State. The act plainly recognizes the possibility, perhaps the probability, of a candidate during the excitement which follows a campaign, forgetting to file a statement within the stipulated time, or if he does file a statement, of making many errors in it. It is to avoid such forgetfulness and errors that the act provides that a notice of such failure and a demand to correct them shall be made in the first instance. It recognizes that without such a notice and demand the omissions or the errors might be innocent and unintentional.

In view of these provisions of this law it cannot be argued that the act of a candidate in failing to file a statement, or in filing an incorrect statement where he has received no notice of these mistakes and no adequate demand has been made for him to correct them, constitutes a violation of this statute.

William Sulzer in swearing that his statement was complete and accurate did not commit perjury.

The attempt is made to accuse him of the crime of perjury because a portion of his statement containing items not required by the statute, was incorrect. The Penal Code, in defining perjury, states:

> "A person who swears or affirms . . . that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true. . . . On any occasion in which an oath is required by law . . . or may be

lawfully administered, and who . . . on such hearing, inquiry or other occasion, wilfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit, or certificate, any material matter to be true which he knows to be false, is guilty of perjury." (Section 1620, Penal Code.)

The entire question of perjury, therefore, rests upon the materiality of the statement in the affidavit.

"From time immemorial the common law has made the materiality of false testimony the essential ingredient of the crime of perjury. From their earliest beginning the statutes have always embodied that rule. Our penal laws but recently embodied have continued it. That in short is the unquestioned law in this State." (Section 96, Penal Code; sec. 1620, Penal Law.)

"The language of the statute is, that a person who wilfully and knowingly testifies falsely in any material matter is guilty of perjury." (People v. Teal, 196 N. Y. 376.)

"The question is raised by these exceptions whether there was a failure to prove, in respect to all or any of the numerous statements upon which perjury was assigned, that they were material to the question and issue before the court. Dunckel v. Wiles, 11 N. Y. 482. It must appear, either from the facts set forth in an indictment for perjury, that the matter sworn to and upon which the perjury is assigned was material, or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction. A false oath upon an immaterial matter will not support a conviction for perjury. (Roscoe Cr. Rep. 728; 2 Russ. on Crimes 489)." Wood v. People, 59 N. Y. 120–22.

"An indictment for perjury is demurrable when it alleged that in the course of the examination of an insurance company by the Superintendent of Insurance the defendant, an officer of the company, was called as a witness, that the only material question upon his examination was whether a certain contract was valid and subsisting and that he falsely, feloniously, wilfully and knowingly testified that he 'thought'

the contract was a liability of the corporation and that he 'believed' it was binding and that he 'considered' that the company owed him money thereon, each of which statements was untrue.

"The existence of the contract being alleged in the indictment, its validity and effect were questions of law, and the defendant's opinion thereon could not have been material." (Syllabus.)

"Wilfully and knowingly testifying to an immaterial fact is not perjury." (People v. Teal, 169 N. Y. 372.)

"The indictment does not in words charge that any or all of the statements therein alleged to have been made by defendant were material or were of and concerning a matter material in the proceedings then being conducted by the examiner. It is not necessary that the indictment so charged, provided the facts, which are set forth therein, are sufficient in themselves to show that the sworn statements alleged to be false were material. But the materiality must be shown in the indictment itself either by direct statement or by the facts stated therein. (Wood v. People, 59 N. Y. 117, 121; People v. Gillette, 126 App. Div. 665, 672; Commonwealth v. Pollard, 53 Mass. 225, 229.) The matters upon which defendant made under oath the statements assigned as perjury were pertinent or material to any matter before the examiner for examination. Upon that examination the questions then and there (i. e. when defendant was sworn and examined as a witness) material were, as stated in the indictment, whether the contract was a liability of the corporation, whether the contract was binding upon the corporation, whether the contract was valuable, whether the corporation owed defendant upon it, and whether it represented a legal claim against the corporation. The apparent equivalent of all these questions is the single one, Was the contract a valid and subsisting one? Whatever may in fact have been the object, or scope, of the examination, for the purpose of this action the indictment has limited it to this single material matter. This being so it is apparent that neither its validity nor its legal effect could be determined

as a fact by ascertaining what any one, even an officer of the corporation, 'thought' or 'believed' or 'considered' upon the subject. In other words, the fact of the existence of such a contract being alleged in the indictment, its validity and effect were on the face of the indictment itself plainly questions of law, in the determination of which the defendant's opinion, or his statements sounding in opinion only, could not be material. It follows that the demurrers to the indictment should have been allowed, and judgment to that effect directed." (People v. Peck, 146 App. Div. 266, 68–69.)

"To constitute perjury the false testimony must be given concerning material matter under investigation." (People v. Goeley, 126 App. Div. 671.)

"Irrelevant testimony, although false, cannot be made the basis of the charge of perjury, nor will a false oath as to superfluous or immaterial matter sustain an indictment for this offense." (38 Cyc. 1418, and cases cited.)

"Superfluous or immaterial matter stated in an affidavit for a writ of habeas corpus, although false, is not perjury." (Wharton's American Criminal Law, 5th ed., vol. 2, sec. 2228.)

The question of materiality is one that must be decided for itself in each different case. In a trial it depends upon the actual issues; in an affidavit required by law it depends upon the requirements of the statutes. Falsely swearing in an affidavit upon any matter required by the statute would constitute perjury; while falsely swearing upon matters which are not required under the law would not be a crime.

If the statement so filed by a candidate is correct, so far as it concerns the matters actually required from him by the statute, but contains incorrect statements of matters not required under the law, the statements not required by the law are immaterial, and the fact that they are incorrect will not constitute perjury although sworn to.

Nor could the charge of perjury be sustained even if the corrupt practices act required a candidate to include in his state-

ment all contributions made to him because this act does not require the statement to be sworn to. The charge of perjury is based upon section 1620 of the Penal Code. This must be coupled with section 1622. Both sections limit their application to oaths required or authorized by law.

"The oath or affidavit must be one authorized or required by law. Perjury cannot be assigned on a voluntary or extrajudicial oath." (Am. & Eng. Encyc. of Law, vol. 22, p. 685, and cases cited.)

"The taking of a mere voluntary oath that is nowhere either authorized or required by law is not perjury." (30 Cyc. 1411, and cases cited.)

"Perjury cannot be assigned of a false oath to a protest taken before a notary public, as part of the preliminary proofs in case of a marine loss. The oath in such a case is a voluntary and extrajudicial proceeding." (Syllabus.) People v. Jacob Travis, 4 Parker's Crim. Rep. 213; Foreman v. Union, etc., 83 Hun 385; People v. Ostrander, 64 Hun 335.

"That law (id. sec. 96) declares that a false oath taken 'on any occasion in which any oath is required by law, or may lawfully be administered, is perjury,' and as a consequence an oath taken on an occasion in which it is not required, if false, is not perjury. Manifestly the meaning of the words 'law' and 'lawfully,' as used in the statute, is the hinge upon which the question turns, and, in ascertaining that meaning, both words may be considered as one, for 'lawfully' flows from, and means in pursuance of or according to, law. It is, in my opinion, well established by principle and authority that where the term 'law' is used in a penal statute it refers to the law of the State; and, applying this rule of construction to the statute (id. sec. 96), it will read: On any occasion in which an oath is required by the law of the State or may be administered in pursuance of or under the authority of the law of the State. A construction in conflict with this rule would be hostile to the theory of the foundation of the State, and destructive of its sovereignty.

"The test, therefore, is, Were the acts of the defendants in swearing falsely to the certificate, acts forbidden by the law of this State? A false oath may not of itself be perjury. To make it perjury it must have been taken in a judicial or other proceeding authorized by law, or on an occasion when an oath was required by law, or must have been administered in pursuance of or by authority of law. The oath upon which the perjury is predicated was not taken in a judicial or other proceeding authorized by law, nor on an occasion when an oath was required by, nor was it administered in pursuance of or under authority of law. The oath to the certificate was not required by the law of the State of New York, therefore it was not required by law; and since it was not required by law, and there was no authority of law for its administration, it was not lawfully administered. That the law of the State of Delaware required such sworn certificate relating to the affairs of a corporation which was its own creation is of no concern to our State, and no obligation rests upon our State to enforce the law of a foreign state relating to the affairs of a foreign corporation.

"Nor does the mere fact that the oath was administered by a duly authorized notary public of the State of New York give it validity. All oaths administered by a notary are not per se valid any more than all false oaths are perjuries. For instance, an oath of title to property, of financial condition, for the purpose of obtaining credit, of the value of merchandise or of the qualities of animals, these and many oaths in like matters may be administered by a notary, but that does not make them the subjects of perjury if false. A notary has not unlimited powers to administer oaths and by the mere act of his officiating make that perjury which is not declared by law to be perjury. If such were the rule, every falsehood, even on the most trivial rule, if expressed in the form of an oath before a notary public, would be a perjury. State v. McCarthy, 41 Minn. 59. Two things must concur to validate an oath before perjury can be assigned. The oath must be required or authorized by law, and the officer

before whom it is taken must be duly qualified to administer it. If either essential be absent, there cannot be perjury." (People v. Martin, 38 Misc. Rep. 68, 71, 72.)

Inasmuch as the corrupt practices act does not require a candidate to swear that his statement is correct, a false oath that it is complete and correct does not and cannot constitute perjury, and a candidate could not be indicted therefor.

The failure of William Sulzer to file a complete and accurate statement of all contributions made to him, and his affidavit that the statement filed by him was complete and accurate, do not constitute any offense recognizable by our laws.

First: The election law does not require a statement of contributions made to a candidate.

Second: The failure of a candidate to file the statement required by this act is not an offense but subjects him to a peremptory demand by a court to perform this duty.

Third: There is no allegation that William Sulzer ever received such a demand.

Fourth: The statute recognizes a candidate's right to be given notice of errors in his statement, and his right to an opportunity to correct them. The State cannot call him to account until first it has accorded him these rights that the statute affords.

Fifth: The Penal Code does not require a candidate to file a statement of contributions made to him, and there are no other statutes on this subject.

Sixth: Incorrect statements of facts, inserted in an affidavit but not material thereto, do not constitute perjury.

Seventh: Perjury cannot be based on an oath which was neither required or authorized by law.

Eighth: As the election law does not require the statement to be verified, and as neither the election law nor the Penal Code requires the candidate to insert contributions made to him, there is no ground for the charge of perjury, nor for the charge of neglect of duty.

Now, as I have called to your attention, the charge in this impeachment is for wilful and corrupt misconduct in office, and for high crimes and misdemeanors.

There is no warrant in law for the use of the words "high crimes and misdemeanors."

As used in the Constitution of the United States, and formerly in our State Constitution, they were undoubtedly intended to cover all kinds of impeachable cases under the common and parliamentary law of England, but in and of themselves they are meaningless.

The late Mr. Justice Miller, of the United States Supreme Court, in his lectures on constitutional law, says:

> "No satisfactory definition has ever been given or generally accepted of the phrase 'for high crimes and misdemeanors.'" (p. 214.)

In the very learned brief upon impeachments prepared by the Hon. William Lawrence for the use of the managers upon the impeachment trial of President Johnson and which was revised by Mr. Butler and approved by the managers, it is said:

> "Christian, who may be supposed to have understood the British Constitution when he wrote, says, 'when the words high crimes and misdemeanors are used in prosecution by impeachment the words high crimes have no definite significance but are used merely to give greater solemnity to the charge.'" (Johnson's Trial, vol. 1, p. 176.)

That is to say, when an impeachable act was alleged, it was dignified by calling it a "high crime and misdemeanor." They were never words descriptive of any crime, and they were never used in connection with any act committed by a private citizen, and never in characterizing an act committed by a public official before he became such an official.

Whatever significance, however, was formerly attached to the words, is of no importance now. They have been dropped out of the Constitution and out of our statutes. That must be presumed to have been done designedly, and with the intention that public officials should be impeached only for the causes provided for by law, and, no longer appearing either in our Constitution or our statutes, the Assembly has no right to charge any act or acts, opin-

ions or beliefs, committed or held either before or after holding office as "high crimes and misdemeanors," and thereby constitute them impeachable offenses.

But whatever an impeachable offense may be held to be, it can only be an offense committed by a public official while holding office.

Shortly after the adoption of the Constitution of 1846, legislative construction, the same as now contended for, was given to the power of impeachment in a case where inquiry was being made into the conduct of certain former State officials, among others one named Fuller. (Lincoln's Constitutional History, vol. 4, p. 603; also pp. 158–60 of vol. 1, Trial of Barnard.)

It was referred to the judiciary to inquire into and report among other things:

> "Whether a person could be impeached and deprived of his office for misconduct or offenses done or committed under a prior form of the same or any other office."

And the judiciary committee reported:

> "That the Constitution intended to confine impeachment to persons in office and for offenses committed during the term of the office from which the person is sought to be removed."

And further:

> "2—That a person holding an elective office is not liable to be impeached under section 1 of article 6 of the Constitution for any misconduct before the commencement of his term although such misconduct occurred while he held the same or another office under the previous Constitution."

The report of the judiciary committee was approved and adopted by the Assembly. I set out the full report to the committee.

To sustain our contention it is not necessary to go so far as did the committee in the case of Fuller and others, in holding that a man may not be impeached, after he ceases to be an official, for

offenses committed while he was an official. The case of Judge Barnard is not in conflict with the contention here made in behalf of the respondent. Barnard was impeached for misconduct in office, not for misconduct as a private citizen. He was impeached in the year 1872 while holding his second term of office. The charges included some for official misconduct during his first term which ended December 31, 1868, but that year he was elected for another term which commenced January 1, 1869.

Upon the trial the contention was made that he could not be impeached during his second term for acts committed during his first. A discussion upon that subject will be found at pages 151 to 191 of volume 1 of the Barnard trial. The managers and counsel upon the part of the prosecution were men of great industry and learning and undoubtedly produced all the authorities that could be found in any wise bearing upon the question; cases where members of Parliament, of Congress and of legislative bodies had been deprived of their seats because of prior misconduct, also the cases of Judges Cardozo and McCunn, who likewise were impeached, some of the charges being for misconduct during prior terms of office, but not a single instance, not a single case was produced where a man has been impeached for acts committed by him when a private citizen.

Of course, the cases of expulsion of members of Parliament and other legislative bodies had not the slightest bearing, because those were not cases of impeachment but of the exercise of the power of expulsion, exercised under the right that every legislative body has of judging of the qualifications and election of its own members.

At the time of the impeachment of Judges Barnard, Cardozo and McCunn, there was a statute in existence providing that the Assembly should have the power to impeach all civil officers of the State "for mal and corrupt conduct in office and for high crimes and misdemeanors."

Under the terms of that statute and the provisions of the Constitution they could have been impeached, as they were, for acts committed during a previous term and disqualified from thereafter holding office. Their misconduct was official misconduct; misconduct while in office, not the misconduct of a

private citizen, and for that misconduct they could be impeached whether in or out of office.

This construction that I give of the Barnard case was given to it by the Supreme Court of Nebraska, in State v. Hill (36 Neb. —, s. c. 20 L. R. A. 573), where Judge Norval said:

> "Judge Barnard was impeached in the State of New York, during his second term, for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment proceedings against Judge Mubble of Wisconsin, and on the trial of Governor Butler, of this state, and in each of which the ruling was the same as in the Barnard case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each co-respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offenses occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired, and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists; but if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office."

That a public official can be impeached for official misconduct, although no longer holding public office, was held in the case of Belknap, who was impeached for acts committed by him while Secretary of War. He resigned from his office, his resignation was accepted, and the question was raised upon his trial as to whether he could be impeached for acts committed during his term of office after he had ceased to be such officer, and it was held that he could be; the possible punishment for misconduct being twofold, that is, removal from office and disqualification from holding office in the future, and this latter punishment could be inflicted although he had ceased to be an official.

While such was the formal holding it is noticeable that when

the question was put to the Senate as to the guilt or innocence of Mr. Belknap, nearly all, if not all, of those senators who voted for his acquittal, did so upon the ground, as stated by them, that having ceased to be a public official he could no longer be impeached.

As some analogy may be attempted to be drawn between removals from office by process of impeachment and by means other than that of impeachment, it is well to consider the language of the Constitution conferring the power of impeachment and the language of section 7 of article 10, requiring the Legislature to make provision for removal for malversation and misconduct in office, in connection with the rule laid down by Lord Mansfield in the case of Rex v. Richardson, 1 Burr. 517, as to the causes for which officers or corporators may be removed. He says:

> "There are three sorts of offenses for which an officer or corporator may be discharged:
>
> "First: Such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to exercise any public franchise.
>
> "Second: Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> "Third: The third sort of offense for which an officer or corporator may be displaced is of a mixed nature, as being an offense not only against the duty of his office, but, also, a matter indictable at common law."

As to the first of these acts, acts not connected with his office, Lord Mansfield said:

"There must be a previous indictment and conviction." The reason for that is obvious, that there he has the right of trial by jury, a right to which every citizen is entitled, before he can be removed from office upon an indictable offense not connected with his office.

It will be observed that the Constitution confines the causes for which officials may be removed within much narrower limits than does the definition given by Lord Mansfield just quoted.

But even under the definition of offenses given by Mansfield,

there is nothing set out in the first, second and sixth articles of impeachment that brings them within either of the definitions so given.

The first, "such as have no immediate relation to his office," where Lord Mansfield holds that there must be a previous indictment and conviction. That is to say that where the offense is not a political one or one not connected with the duties of his office, he is entitled to a trial by jury, where all his rights can be fully protected, and only after conviction can he be removed from office. That is, that upon a conviction for felony the office held by the person so convicted is forfeited. (Penal Law, sec. 510.) So our Penal Code provides.

> "Such as are only against his oath and the duty of his office."

Certainly there is nothing charged in the first, second or sixth articles of impeachment that are either against the oath of office of the Governor, or against the duties of his office. At the time of the alleged offenses he had no official duty to perform, no official oath to take.

> "The third sort of offense . . . is of a mixed nature . . . not only against the duty of his office, but, also, a matter indictable at common law."

That is, it must be both against the duties of his office and indictable at common law.

It should need no argument to justify the statement that receiving moneys and not accounting for them, making a false return in the statement required to be made, and swearing to it, are not offenses against the duties of the office of Governor, and unless they are, and are indictable, then they do not come within the definition of offenses as given by Lord Mansfield for which an official may be removed from office.

The making of a statement of the receipts and disbursements as a candidate, swearing thereto and filing the same, has no connection with the office to which the person has been elected or with the duties pertaining to such an office. It is a statement required

to be filed by both successful and defeated candidates, and the making and swearing and filing thereof is not a condition of his entering upon the office to which the successful candidate has been elected. It is not the vestibule of office, it is not the door of entry because it is the path that must be taken by the defeated and by the successful candidate alike.

In the case of Guden (71 App. Div. 422, 30–3), Mr. Justice Bartlett, now Judge Bartlett of this Court, considers this definition of Lord Mansfield of the offenses for which an officer or corporator may be discharged, and also a considerable number of cases in this country in which was considered the question as to whether officials could be removed for acts committed by them prior to entering upon the discharge of the duties of such office, and he finally concluded in his opinion in the Appellate Division thus:

> "In addition to the foregoing cases, which he had examined and criticised, cited in the learned and careful opinion of Mr. Justice Gaynor, I have examined all those cited in the various briefs submitted upon the argument, and while it may be conceded that courts have not infrequently expressed the opinion that the misconduct for which an officer may be removed must be committed after his accession to office, yet no actual decision has been brought to our attention which denies such power to remove for a corrupt agreement made prior to the beginning of the officer's term, which agreement can only be performed in the course of administering the office. Indeed, there is a distinct intimation the other way in State ex rel. Gill v. Common Council, 9 Wis. 254, 261, where this passage occurs in the opinion: 'We do not say that in no case could acts done during a prior term justify a removal. Thus if, after a treasurer was elected, it should be discovered that during his prior term he had committed a defalcation and been guilty of gross frauds in the management of his office, it might perhaps be just ground for removal. But where, as in this case, the charges show nothing more than a mere neglect of some formal duty which the law may have acquired, involving no moral delinquency and which, if violations of duty at all, must have been well known to the appoint-

ing power, we do not think, where they relate entirely to acts during a prior term of office, that they constitute due course of law for the removal of an officer. For such offenses, if offenses at all, his reappointment should be regarded as a condonation.' "

It would seem that a fair construction of the learned justice's holding in that case is that where the alleged act was partially committed before entering upon the duties of his office and partially thereafter, or where it consisted, as in the Guden case, of a corrupt agreement made before, but to be carried into effect after induction into office, that that was a case for removal of the particular class of officials to which Guden belonged.

The Guden case is in some respects an instructive one, and has some bearing, other than that above indicated, upon the question now under consideration.

Guden had been removed from office by the Governor under the provisions of the Constitution providing,

> " The Governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense."

That section includes the office of sheriff and Guden had been elected sheriff.

It will be observed that this section does not define the causes for which removals may be made, except that it clearly indicates that there must be some cause, and an opportunity to defend.

The only question to be considered in the Guden case was whether the Governor had jurisdiction to act. If he had jurisdiction, then the courts could not review his action, and in determining whether the Governor had jurisdiction or not the question arose as to whether the acts of Guden constituted official misconduct.

The Governor in his opinion removing Guden found that he had made a corrupt promise and agreement to make certain appointments in consideration of the proposed appointees' activity

and influence in securing votes for him; that such promise constituted a crime; that he violated his oath of office which required him to swear that he had not, directly or indirectly, paid, offered or promised to pay, contributed, offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding of votes at the election at which he was elected, and that he had not made any promise to any one for the giving or the withholding of any such votes, and that such oath was taken by Guden before entering upon the duties of his office as sheriff, and the Governor said:

> "This act of taking the oath cannot fairly be said to be an act independent of his present official life, for this oath constituted the very initial act of taking office, an act without which he could not have assumed the duties of the office. Surely, when I find the power of this office so zealously guarded by the court in order to prevent the intrusion of unfitness, open by perjury, it is my duty to arraign the intruder upon the threshold and declare that by his unlawful act in taking the office, as well as by his crime in securing it, he has disqualified himself from holding it." (P. 22–24, Case on appeal.)

That is to say, the Governor found that in the very act of entering upon his office, Guden was guilty of misconduct, guilty of a crime, at a period, to use the words of another, which is the "twilight zone," between private and official life, where it is impossible to mark the separation between the official and the non-official act.

I am asked to read to you the constitutional oath. That is the oath that Guden took.

> "And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or witholding of a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding of any such vote."

When the case came before the Court of Appeals, the learned justice writing the principal opinion evidently considered that a much broader power was conferred upon the Governor by this section than was given to Courts of Impeachment, as is indicated by the following language:

> "The suggestion that, if the courts do not interfere, some chief executive may proceed in disregard of those principles which Courts of Impeachment have established, should not be given weight, for the ability to act quickly in the removal of administrative officers and clerks is as important in the conduct of government as in the management of a gigantic corporation or large individual enterprise. The attempt to safeguard the rights of the official or the clerk should not be carried to such an extent as to override the interests of the public, for the public business is of paramount importance. . . . Hence, in their wisdom, the framers of the Constitution put the public interests in the foreground, and provided a simple and prompt method of removal of county executive officers by the Governor of the State." (171 N. Y. 535.)

When the case came before the Appellate Division it was said by counsel for both parties that the court possessed the powers of determining whether the Governor had acted within his jurisdiction or not; and, in considering that question, and the nature of the charges brought against Guden, upon which the Governor acted, and the findings of the Governor thereon of a corrupt agreement made before election, but to be performed afterwards, the court said:

> "Furthermore, it is to be observed that the corrupt agreement alleged in the particular charge now under consideration related not to a time preceding the election and qualification of the officer, but that it was impossible of execution until he should become vested with the title of the office, thus recognizing the fact that it must be an official act. In other words, it was a corrupt agreement, the time of performing which was necessarily postponed to a period when

he should become a public officer. In this respect the case differs, I think, from any of those cited by counsel or in the opinion below. . . . Whatever the conclusion might be, if the acts committed before Guden entered into office had no direct relation to his subsequent official conduct, I am of the opinion that a corrupt promise, made before election, to exercise his official powers in a particular way, affords a sufficient basis in law for the removal of the officer by the Governor, under section 1 of article 10 of the Constitution. It seems to me that the relation of the promise to the subsequent official tenure is so close as to make the act of entering into such a corrupt agreement affect the usefulness of the officer as clearly and directly as could any official misconduct committed wholly after the official term began." (71 App. Div. 426.)

When the case came to the Court of Appeals two opinions were written, one by the then chief judge and one by Judge O'Brien. The chief judge in his opinion did not consider the question as to whether the charges against Guden were acts committed before or after, or partially before and partially after, he entered upon the discharge of the duties of his office, but placed the decision upon the ground that the power of removal was an executive power vested in the Governor with the exercise of which power the courts would not interfere. In Judge O'Brien's opinion he states:

"It is admitted on all sides that before a removal can be made the Governor must acquire jurisdiction. There must be a charge of some official misconduct on the part of the officer and he must have been served with a copy of the charge and given an opportunity to be heard. A mere statement, in writing, of some act or omission on the part of the officer, that in no sense can constitute misconduct would not be a charge within the meaning of this provision of the Constitution. It is not necessary that the charge be stated with all the precision of a pleading in a court of law or equity. The Governor has power to prescribe his own rules of procedure and determine whether the charge is sufficiently spe-

cific or otherwise, but there must be some act or omission on the part of the officer stated in the papers, which amounts to official misconduct, and when such a paper is presented to the Governor he acquires jurisdiction of the person of the officer and of the subject matter of the charge. For any error of law or fact that he may commit in the progress of the investigation there is no power of review in the courts. The courts can inquire with reference to a single question only and that is the jurisdiction; but the power to inquire as to jurisdiction necessarily implies the right to examine the nature and character of the charge, in order to see whether it is in any proper sense a charge at all within the meaning of the Constitution.

"In my opinion, the charges in this case were sufficient to confer jurisdiction upon the Governor. In one of the charges presented to him and which appears in the record it is, in substance, alleged that the sheriff abdicated his powers and duties with respect to the appointment of his subordinates to an irresponsible body of men called a patronage committee. That is to say, he entered into an agreement with this committee to make such appointments of such subordinates as it determined upon, and that a list of forty persons was furnished to him by this committee to be appointed as his subordinates and that he appointed them. The appointment of these persons, under such circumstances, was an official act relating to the powers and duties of his office." 171 N. Y. 536–37.

So that it is fair to assume that in both the Appellate Division and in the Court of Appeals it was held that at least one of the charges against Guden was an act committed either partially or wholly after he had been inducted into office, and, therefore, was official misconduct.

The true significance of the Guden case, however, is that even under the very broad power of removal granted to the Governor by the section of the Constitution we have cited, having no limitations upon it such as expressed in section 7 of article 10 of our present Constitution, and being much broader, as intimated by

the chief judge of the Court of Appeals, than the power of impeachment, it was still held that that power is not unlimited, but is one limited and regulated by law, and that a cause for removal must be at least one connected with office and not separate and apart therefrom; and that when such a charge is made, and only then, will the court refuse to review the action of the Governor in determining that such charge had been sustained, and removing the accused official from office.

It would be a useless display of learning and industry to review all the cases bearing upon the subject of removal from office in this and other states. That has been done to a considerable extent in the very learned opinion of Mr. Justice Bartlett already referred to. Suffice it to say that we have been unable to find a single case in this State where a public official has been removed from office for acts committed by him while a private citizen and not a public official. The nearest approach thereto is that of Guden, which we have just discussed; and the language of section 7 of article 10 of the Constitution, heretofore quoted, in unmistakable terms provides that the only offenses for which an official may be removed is "misconduct or malversation in office" not "misconduct or malversation" out of office.

Without further continuing this discussion it is respectfully submitted that this Court should so interpret the law as to confine impeachable offenses to "wilful and corrupt misconduct in office," and not to extend it further than it has ever before been extended in this country or in England for over two hundred years, so as to include offenses committed by a private citizen before he became a public official.

To so extend it is to make the impeaching power a truly "awful" power. No statute of limitations will run against it. An upright and honest official may have an unfortunate past not known to the general public; a past that has been lived down and atoned for; that yet may be dug up by partisan malice, by an unscrupulous majority, and make use of at least to suspend him from office indefinitely; which may be known to corrupt and unscrupulous political leaders who place him in public office, and then with threats of exposure endeavor to coerce him to abuse the power of his office, and failing in that cause him to be im-

peached, in form, for crimes and offenses committed out of office, but in fact for his refusal to commit crimes while in office.

I cannot, I will not, believe that this great Court will set a precedent that will extend the law beyond what is written, and place the honest public official, who may have erred, at the mercy of blackmailers and scandal mongers, political or otherwise, but will confine the power of impeachment to its primary purpose of removal from office of an unfaithful public official for misconduct in office only, leaving to the ordinary tribunals of justice his punishment for crimes committed while he was a private citizen.

Now, pursuant to the permission of the Court heretofore granted, Senator Hinman will read Judge Vann's brief.

Mr. Hinman.— May it please your Honor:

As the Constitution does not define impeachable offenses, can the Legislature define them?

The Constitution gives the Assembly the power to impeach and the Senate and judges of the Court of Appeals the power to try impeachments, but does not attempt to specify the offenses for which impeachment will lie. The Legislature, however, has assumed to do so by section 12 of the Code of Criminal Procedure, which limits the grounds of procedure to "wilful and corrupt misconduct in office."

Section 37 of the Penal Law, entitled "Proceedings to Impeach Preserved," simply effects the object of the title. It provides that,

> "The omission to specify or affirm in this chapter any ground or forfeiture of a public office . . . or any power conferred by law to impeach, remove, etc., . . . any public officer . . . does not affect such forfeiture or power."

The judiciary law simply makes the Court for the Trial of Impeachments a court of record. (Section 2.)

The object of impeachment is the removal of a public officer for the protection of the people, but not to punish the incumbent. Even the disqualification to hold office afterward, when imposed, is rather to prevent than to punish. The provision that the officer

removed shall still be liable to indictment and punishment in the criminal courts, shows that the object is not penal, for otherwise he could be punished twice for the same offense. (Constitution, article 6, section 13.)

Impeachment, however, is a criminal proceeding, and the defendant is entitled to every reasonable doubt and to a strict construction. (Trial of Judge Barnard, vol. 1, p. 214; Nebraska v. Hastings, 37 Neb. 96–119.)

When the Constitution is silent as to what offenses may be cause for impeachment, recourse must of necessity be had to the common law and precedents, for otherwise every department of government would be at the mercy of the Assembly and the Court of Impeachments.

According to the weight of authority, impeachment, not regulated by Constitution or statute, will lie only for misconduct in office or for a crime either statutory or at common law. When the Constitution does not speak on the subject a statute may regulate it by providing what is an impeachable offense by enlarging or narrowing the scope established by precedents. The Legislature can change the common law on any subject unless restrained by the Constitution. It can abolish common law crimes, as it has in this State. (People v. Knapp, 206 N. Y. 373; Penal Code, sec. 2; Penal Law, sec. 22.) It can create new crimes by making acts criminal which were innocent at common law. If the Constitution had enumerated certain impeachable offenses, as our earlier Constitutions did, the Legislature probably could neither add nor take away. As it did not, the Legislature may place reasonable limitations on the broad power conferred so as to regulate its exercise. It could enact, for instance, in accordance with previous Constitutions, many precedents and ancient tradition that the power should be limited to misconduct in office and to high crimes and misdemeanors. It could exclude from consideration by the Court petty crimes whenever committed, such as the violation of city ordinances or of the game law and the like. It could exclude any act not involving moral turpitude. There is now no crime known to our law except as defined in the Penal Code. [That should be in the statute. It is an error in printing.] As the Legislature passed the Penal Code it can repeal

it, even without restoring the common law on the subject. In case it should do so there would be no high crime or misdemeanor and nothing except, perhaps, misconduct in office would be left for the Court to act upon. This would be a practical limitation of the power of the Court, if the Legislature could do it, absurd as it is to think it would do it.

The Legislature has undoubted power to pass an act of limitations applying to both civil and criminal actions based on the lapse of time, and such an act, many of which have been passed, would be binding upon all courts, including the Court of Impeachments. Otherwise, that Court would be a law unto itself, which the framers of a Constitution, aiming to prevent the exercise of arbitrary power by any branch of the State government, could not in reason have intended. Therefore, it must be conceded that the Legislature has some power to limit the action of the Court in convicting and removing from office. The limitation itself has limitations in turn, for obviously the Legislature cannot so limit as substantially to defeat the power of the Court. Where is the line to be drawn? Clearly according to the rule of reason. A reasonable limitation is within, an unreasonable limitation is without the power of the Legislature. Construction that there is no power to limit would be unreasonable; construction that there is absolute power to limit would also be unreasonable; and the true construction lies between these two extremes.

Aid to construction is found in preceding Constitutions and in precedents. The Constitution of 1777 gave:

> "The power of impeaching all officers of the State for mal and corrupt conduct in their respective offices." (Section 33.)

This is substantially the same as section 12 of the Code of Criminal Procedure.

The Constitution of 1821 enlarged the power by giving the right to impeach "for mal and corrupt conduct in office and for high crimes and misdemeanors." (Article 5, section 2.)

The Revised Statutes of 1830 followed the language of the Constitution of 1821. (1 R. S. 456.)

The Constitution of 1846 gave the power of impeachment without enumerating or describing the offenses for which impeachment would lie. It omitted the words of definition contained in the two preceding Constitutions.

The judiciary article prepared by the Convention of 1867, and adopted in 1869, simply continued the provision of the Constitution of 1846, giving no definition.

Our present Constitution also fails to give any definition, but it is significant that when the Constitution of 1894 was framed and adopted, the Code of Criminal Procedure was in force, it having been passed on the 1st of June, 1881, and section 12 has stood without change ever since. The framers of our present Constitution, therefore, found a statute in force limiting impeachable offenses to wilful and corrupt misconduct in office. If not satisfied with that limitation would they not have changed it? As they made no change of the provisions in the Constitution of 1846 or 1867 on the subject, does not the presumption arise that they were satisfied with the limitation and definition already prescribed by statute, or were at least willing to leave the matter to the Legislature? When the Constitution confers a power in general terms without attempting to define or limit it in any way, it is open to the Legislature to define and limit, provided they do not infringe in some substantial way upon the general power itself. Certainly there is nothing in the Constitution forbidding it, and as constitutions enumerate rather than define, the Legislature may define and in defining limit, providing they do not in effect abolish. The Legislature has all the power of legislation there is, except as restrained by the Constitution, and the Constitution does not expressly restrain the Legislature from defining impeachable offenses.

There is no reason for holding that the Constitution impliedly prohibits definition and limitation by the Legislature, because having failed to define or limit itself and obviously not intending to allow the Court of Impeachments to be a law unto itself, or give it the right to hold every important public officer at its mercy, it necessarily left it either to the Court, guided by precedent, which means by the common law, or to the Legislature, which can abolish the common law and substitute other provisions

therefor. Conceding that if the Legislature does not act, the Court of Impeachments necessarily has control of the subject, when the Legislature has acted in a perfectly reasonable way, its action is binding upon all courts. Otherwise we should have the rule that the Legislature may make a law binding on all courts but one, leaving that to be guided by its own discretion, although it consists in the main of legislators liable to be influenced by partisan considerations. If the Legislature should provide that the violation of any city ordinance should be a misdemeanor punishable by fine and imprisonment, could it not add the limitation that it should not constitute an impeachable offense? Is not this what it has done in principle and effect by making a multitude of acts crimes but providing that only wilful and corrupt misconduct in office shall be a crime for which impeachment will lie?

The definition of the Legislature is reasonable, because it is strictly in line with the object of impeachment, which is simply to protect the State by the removal of a public officer.

The public officers law, following the Revised Statutes, provides that "Every office shall be vacant upon the happening of either of the following events: . . . 3. His removal from office." (Public officers law, sec. 30; 1 R. S., 5th ed., 456.) This is doubtless what is referred to by the words "his removal from office" in section 6 of article 4 of the Constitution, and both undoubtedly refer, in part at least, to the automatic removal from office by conviction for a felony under existing statutes.

The Legislature could have provided that misconduct wholly outside of the functions of office should be cause for impeachment, such as habitual drunkenness, gross immorality, or the commission of any crime involving moral turpitude. It did not do so, but, on the other hand, under its power to define and regulate the exercise of the power conferred, it limited impeachable offenses to wilful and corrupt misconduct in office. If the Legislature could not do this, many of its statutes are void. The Governor is commander in chief of the military and naval forces of the State (Constitution, art. 4, sec. 4), but is the military law void in so far as it regulates his duties as such? Cannot the Legislature provide what the Governor may do in time of war

or may not do in time of peace, provided it does not trench upon his general power as commander in chief?

The Supreme Court has general jurisdiction in law and in equity (art. 6, sec. 1) but are all the statutes void which regulate and limit the exercise of this power by adding to, taking away, and the like? The police power is not created by the Constitution, and is in apparent conflict with many of its provisions, yet, as its exercise is not expressly forbidden, it is held to exist and even to underlie that instrument.

The Constitution prohibits the State from giving away its money, but statutes authorizing the payment of claims not sanctioned by law, although sanctioned by morals, are held to be within the power of the Legislature. (Cayuga County v. the State, 153 N. Y. 279–83; art. 8, sec. 9.) How can this be unless the Legislature can regulate the subject? Many other decisions to the same effect bear directly on the legislative power which is the subject under discussion. The Assembly now presents certain articles in defiance of a statute passed by the Legislature of which it is an inherent part.

We are under government by law and the Legislature is the law-making power. Should we be under a government by law if the power to define impeachable offenses, involving such grave consequences, were left wholly to the arbitrary discretion of a court? There is no middle ground; either the Legislature has power to make law on this subject, as it has on most others, or the Court is a law unto itself, not simply in matters of procedure, but in matters of substance also. It could convict the Governor of the State and remove him from office because he stole cherries when a boy or spat on the sidewalk when a man. It could convict for acts not criminal, either in law or morals, and there would be no remedy, for there is no appeal from the judgment of the Court of Impeachment. Have we a court in this State which is wholly beyond the reach of legislation and which can not only enforce law but make it? Its power, if without restraint, extends in both directions, and it can at will lawfully adjudge that the wholesale theft of money from the State treasury, or the sale of appointments, or even treason and rebellion are not impeachable offenses. Either there is no limit to its power or the Legislature

within reasonable limits can define its power as it has by a statute which, as reenacted without substantial change, has stood for more than thirty years with no complaint or question, although a constitutional convention has been held since its passage.

A statute defining and regulating the subject, passed more than eighty years ago, though not now in force, shows when considered with the statute passed fifty years later, which is in force, that for nearly three generations it has been the general understanding that the Legislature has the power to define and limit. This is a practical construction of great value, entitled, as the courts hold, to controlling weight. (Chicago v. Sheldon, 9 Wall. 50, 54; People ex rel. Williams v. Dayton, 55 N. Y. 367; City of New York v. N. Y. City Railroad, 193 N. Y. 543, 549.)

Power to legislate is not granted by the Constitution, but underlies it and is supreme except as restrained by the fundamental law. Presumption always favors the validity of a statute, and no law should be adjudged unconstitutional unless it is so beyond doubt. Where is restraint found in the present Constitution? Nowhere, unless the grant of a power in general terms, of itself, restrains the Legislature from regulating the exercise of the power.

The action of the court on the trial of Judge Barnard is not in conflict with these views, because that trial took place in 1872, years before the Code of Criminal Procedure was passed defining impeachable offenses. At the date of the Barnard trial there was no statute on the subject, unless the Revised Statutes were in force, which gave the right to impeach for mal and corrupt conduct in office and for high crimes and misdemeanors. The Code of Criminal Procedure had not been passed when Samuel J. Tilden wrote his celebrated opinion at the request of the Senate in 1868, and hence, his views on this question do not apply to the subject now under consideration, though it may be remarked that in other respects they are in substantial accord with the views herein expressed (Tilden's Public Writings, vol. 1, p. 474). The same is true of the noted discussion of impeachment by Judge Theodore Dwight in 6 American Law Register, 257, 641, and of other articles in law periodicals published at about the time of the trial of Judge Barnard.

This question is earnestly pressed upon the attention of the Court, not only on account of its importance at the present trial, but also on account of its importance in the future, for the action of the Court may be followed by grave consequences affecting the welfare of the State for generations.

Mr. Fox.— Shall we distribute to the Court now copies of the argument just read?

The President.— I think so.

(Copies of argument distributed to the Court.)

Mr. Brackett.— With the permission of the Court: The articles here charge impeachable offenses — if proved as set out, they require a verdict of guilty from this Court.

Briefly summarized, the first article charges the filing of a false statement of contributions to the defendant and expenditures by him, while a candidate for Governor, in violation of the election law.

The second, the same, in violation of the Penal Law, and perjury in making oath to the correctness of such statement.

The sixth, the remainder of the three under attack by this pleading, charges larceny by the defendant in having converted and appropriated to his own use campaign contributions made to him by various persons named.

It will be seen, therefore, that all three articles thus challenged by this pleading charge the defendant with crimes.

We are not now arguing the completeness or sufficiency of form of the articles, but the broader question of what constitutes impeachable offenses, and whether, the form of the articles being held good in whole, or in part, and the facts charged proven, the defendant is guilty of offenses for which impeachment may be had.

Whenever an impeachment trial has been had in this western hemisphere, there has arisen the perpetually recurring question, "What is an impeachable offense?"

The question has, and always, developed violently antagonistic opinions. On the one hand has been the claim that nothing but indictable crimes are grounds of impeachment and that the proceeding is highly penal and subject to all the strictness of pro-

cedure of the criminal law. On the other extreme is the contention that impeachment is not a prosecution for crime at all, but a mere inquest of office, a political prosecution pure and simple, instituted solely for the protection of the government, or of the state. There is room for much of research, and very curious learning might be exhibited by one who cares to go exhaustively into the distant history of the general subject, and the precedents. The arguments on either side of the question are endless. But no attempt at detailed examination will here be made on behalf of the managers. The brief of Judge William Lawrence, revised by General Butler, on the one hand, and the arguments of Judge Benjamin R. Curtis and Mr. Evarts on the other, on the trial of President Johnson, have rendered much research back of the time of the Johnson trial largely supererogatory, if not distinctly useless, on the subject of what constitutes offenses for which impeachment may be had.

No one with any pretensions to a knowledge of the constitutional or legal history of the country can fail to feel assurance from the great names of those who argued, that every possible phase of the question was discussed and that every authority then existing and pertinent, was cited and analyzed.

In the Lawrence-Butler brief on the Johnson trial, an impeachable offense is thus defined:

> "We define, therefore, an impeachable high crime or misdemeanor to be one in its nature of consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, with violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose."

Another most valuable contribution to the question was made by the House Judiciary Committee in 1912 in the Archbald case. In this report Judge Clayton argues from the lectures of Richard Wooddesson in Law Lectures delivered in Oxford in 1777 (vol. 2, pages 355–58) that the influences of magistrates and officers intrusted with the administration of public offices, and the abuses of their delegated powers "may not unsuitably engage the authority

of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice and they cannot consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the Legislature. On this policy is founded the origin of impeachments."

On the functions of impeachment, quotation is made by Clayton from Rawle on the Constitution (p. 211):

> "The delegation of important trusts affecting the higher interests of society, is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice . . . are sometimes productions of what are not unaptly termed 'political offenses' which it would be difficult to take cognizance of in the ordinary course of judicial proceeding."

And this from Story (5th ed., vol. 1, p. 584):

> "One cannot but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers."

The report of Judge Clayton then continues:

> "The term 'misdemeanor' has a twofold legal significance. Under the common law it signifies a criminal offense, not amounting to felony, which is punishable by indictment, or other special criminal proceeding. As applied to civil officers, in the sense of the lex parliamentaria it signifies mal administration or misbehavior in office, irrespective of whether such conduct is or is not indictable. It is well established by the authorities that impeachable offenses under the British Constitution and under our Constitution are not limited to statutable crimes and misdemeanors, or to offenses indictable under the common law and triable in the courts of ordinary jurisdiction."

In his Commentaries on the Constitution, the learned John Randolph Tucker defines impeachable offenses as follows (vol. 1, sec. 200), giving only part of his definition, beginning with his third subdivision:

> "(c) High crimes and misdemeanors. What is the meaning of these terms? Much controversy has arisen out of this question. Do these words refer only to offenses for which the party may be indicted under the authority of the United States? Do they mean offenses by the common law? Do they include offenses against the laws of the states, or do they mean offenses for which there is no indictment in the ordinary courts of justice? Or do they include mal administration, unconstitutional action of an officer wilful or mistaken, or illegal action wilful or mistaken?"

Coming down again to subdivision g:

> "(g) . . . Again, if the judge is drunken on the bench this is ill behavior, for which he is impeachable. And all of these are generally criminal, or misdemeanor—for misdemeanor is a synonym for misbehavior. So, if he omits a judicial duty, as well as when he commits a violation of duty, he is guilty of crime or misdemeanor; for, says Blackstone, 'crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it.'"

Thereupon, at 12.30 p. m., the Court declared a recess until 2.30 p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2.30 p. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.— Senator Brackett, if you will resume your argument.

Mr. Brackett.—With the permission of the Court: I was reading when we adjourned this morning from the Commentaries

on the Constitution by John Randolph Tucker. Continuing and quoting from that work:

> "To confine the impeachable offenses to those which are made crimes or misdemeanors by statute or other specific law, would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it."

With the permission of the Court, I will read the last three lines again.

> " . . . would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it."

Cooley, in his Principles of Constitutional Law, says:

> "The offenses for which the President or any other officer may be impeached are such as in the opinion of the House are deserving of punishment under that process. They are not necessarily offenses against the general laws. In the history of England, where the like proceeding obtains, the offenses have often been political, and in some cases for gross betrayal of public interests punishment has very justly been inflicted on cabinet officers."

I recall one case that is cited where a trial was had for administering medicine to the king without the prescription of a doctor.

> "It is often found that offenses of a very serious nature by high officers are not offenses against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty, which are dangerous and criminal because of the immense interests involved, and the greatness of the trust which has not been kept. Such cases may be left to be dealt with on their own facts and judged according to their apparent deserts."

George Ticknor Curtis, in his work, says this (vol. 1, pp. 481–82):

"Among the separate functions assigned by the Constitution to the Houses of Congress are those of presenting and trying impeachments. An impeachment, in the report of the committee of detail, was treated as an ordinary judicial proceeding and was placed within the jurisdiction of the Supreme Court. That this was not in all respects a suitable provision will appear from the following considerations: Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime, nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offenses against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed, as where the individual has, from immortality or imbecility or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer."

Watson, in his work on the Constitution, phrases it thus (vol. 2, p. 1034):

"A misdemeanor comprehends all indictable offenses which do not amount to a felony, as perjury, battery, libels, conspiracies, attempts and solicitations to commit felonies, etc. These seem to be the definitions of these terms at common law, but it would be strange if a civil officer could be im-

peached for only such offenses as are embraced within the common law definition of 'other high crimes and misdemeanors.' There is a parliamentary definition of the term 'misdemeanor,' and a modern writer on the Constitution has said: 'The term "high crimes and misdemeanors" has no significance in the common law concerning crimes subject to indictment. It can only be found in the law of Parliament and is the technical term which was used by the Commons at the Bar of the Lords for centuries before the existence of the United States.' Synonymous with the term 'misdemeanor' are the terms misdeed, misconduct, misbehavior, fault, transgression."

Again (vol. 2, pp. 1036, 1037):

"A civil officer may so behave in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. . . .

"It is not essential that an offense should be committed in an official capacity in order that it may come within the purview of the constitutional provisions relating to impeachments."

Story, of whom some of you will remember Wendell Phillips said that if ever there was anyone a little crazy on the subject of the independence of the judiciary it was Joseph Story — says this (5th ed., vol. 1, secs. 796–99):

"Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offenses which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked, the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable, however enormous may be his corruption and criminality."

"Congress has unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanors."

In the American and English Encyclopaedia of Law, second edition (vol. 15, pp. 1066–68) it is said:

"The Constitution of the United States provides 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. If impeachment in England be regarded merely as a mode of trial for the punishment of common law or statutory crimes, and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the national government there are no common law crimes, it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by Federal statute? This view has been maintained by very eminent authority, but the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate. In each of the only two cases of impeachment tried by the Senate in which a conviction resulted the defendant was found guilty of offenses not indictable either at common law or under any Federal statute, and in almost every case brought, offenses were charged in the articles of impeachment which were not indictable under any Federal statute, and in several cases they were such as constituted neither a

statutory nor a common law crime. The impeachability of the offenses charged in the articles was in most of the cases not denied. In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense; but after exhaustive argument on both sides this defense was practically abandoned. The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase 'high crimes and misdemeanors' is to be taken, not in its common law, but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruption, mal administration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it."

Black, in his work on Constitutional Law, says (2d ed. pp. 121–22):

"Treason and bribery are well-defined crimes. But the phrase 'other high crimes and misdemeanors' is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on an offense against the Constitution or the laws which, in the judgment of the House, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is, of course, primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not

restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment. It will be perceived that the power to determine what crimes are impeachable rests very much with Congress. For the House, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a 'high crime or misdemeanor.' And the Senate in trying the case, will also have to consider the same question. If, in the judgment of the Senate, the offense charged is not impeachable, they will acquit; otherwise, upon sufficient proof and the concurrence of the necessary majority, they will convict. And in either case there is no other power which can review or reverse their decision."

Judge Clayton, in the Archbald report, then continues (p. 26):

"In 1862, West H. Humphreys, United States District Judge for the District of Tennessee, was impeached on several specifications, one of which was based on his action in making a speech at a public meeting, while off the bench, inciting revolt and rebellion against the Constitution and government of the United States. The evidence clearly showed that he was in no wise acting in a judicial capacity, yet he was convicted on this charge. A number of the impeachments of judges of the several states of the Union have been predicated on various acts of debauchery entirely separate from the performance of their official duties. Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must need be committed in an official capacity. If such

an atrocious doctrine should receive the sanction of the congressional authority there is no limit to the variety and the viciousness of the offenses which a federal judge might commit with perfect immunity from effective impeachment."

On the Johnson trial Charles Sumner held: "That this high tribunal is the sole and exclusive judge of its own decision in such case, and each case is to be decided upon its own circumstances in the patriotic and judicial good sense of the representatives of the states." To this opinion, the biographer of Charles Sumner — your honors will find it in the 30th American Statesmen Series — the learned Moorfield Storey, then and still of the Massachusetts bar, says: "He voted without hestitation for conviction, and while it is now clear that no especial harm was done through the brief remnant of Mr. Johnson's term, and many felt that a dangerous precedent was avoided, we may hereafter find that under the common law a dangerous precedent was established and learn to consider the doctrine of Sumner the safer for the country."

In his admirable work on the Constitution, Roger Foster gives this summary, and in any examination that is given to the subject, I think I can truthfully say to your Honors that the work of Mr. Foster is as luminous and as satisfactory as any that will be found anywhere. In his work (vol. 1, p. 582), he says:

> "Four theories have been proposed. That, except treason or bribery, no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. That no offense is impeachable which is not subject to indictment by such a statute or by the common law. That all offenses are impeachable which were so by that branch of the common law known as the law of Parliament. And that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit."

The learned author then continues (pp. 585–86):

> "The first two theories are impracticable in their operation, inconsistent with other language of the Constitution

and overruled by precedents. If no crime, save treason and bribery, not forbidden by a statute of the United States, will support an impeachment, then almost every kind of official corruption or oppression must go unpunished. Suppose the Chief Justice of the United States were convicted in a state court of a felony or misdemeanor, must he remain in office unimpeached and hold court in a state prison? . . . Some advocates have gone so far as to maintain, by a misapplication of a term of the common law, that the proceedings on an impeachment are not a trial, but a so-called inquest of office, and that the House and Senate may thus remove an officer for any reason that they approve. That Congress has the power to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgment of the Senate of the United States in the cases of Chase and Peck, as well as those of the state senates, in the different cases which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime."

And there, I believe, you find the precise and the true rule that no one should be impeached for an act which does not have at least some of the characteristics of a crime.

There is nothing thus far quoted from the eminent authorities who have written on the subject, but only with reference to the Federal Constitution, that is not applicable to the situation existing here, under the Constitution of the State. While the Federal Constitution declares treason and bribery to be impeachable, we have omitted the discussion as to those terms and have limited it to those upon the words "high crimes and misdemeanors," which are equally applicable to a proceeding either before the Federal tribunal of impeachment or that of the State.

With this (considering the magnitude of the questions involved and the flood of arguments that have been presented in the discussions on the subject) brief collection of authorities on the sub

ject, the managers will not go further into the question as to whether impeachable offenses are limited to indictable crimes, except to annex hereto as an addendum a digest of every case of impeachment in the Congress, and every one in a state jurisdiction that has come to counsel's attention. Your Honors will find such an addendum annexed to the brief. I think I should in fairness make one correction, and that is in the case of Butler of Nebraska. The addendum states that he was impeached at a special session. That was based upon the remarks of one of the managers, Mr. Doone, a report of which was found in the Nebraska Public Journals in our State Library. Judge Parker, on further investigation, has satisfied himself that such was not the case. With that exception, so far as I know, the addendum is entirely correct, and we have already passed the question of the right to impeach at a special session.

It is manifest, on both reason and authority, overwhelming authority, that impeachable offenses are not limited to indictable crimes, but that impeachment may be had, not only for statutable crimes, but for anything in the nature of crime that denominates and demonstrates unfitness to exercise the functions of office; anything that evidences unfitness to associate with decent people who must meet the officials doing the work of the state. As said by Hawkins, concerning the judiciary, "the authority of government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice."

But in these articles that are here challenged by this plea, all of them charge crime. One of them charges a misdemeanor in the failure to file the statement of receipts and expenditures prescribed by the election law; one of them charges perjury in making a false affidavit as to the correctness of the statement filed with the Secretary of State, while the third under the challenge — the sixth in number of the articles — charges larceny. All these matters are punishable by fine or imprisonment, or both, which brings them exactly within the definition of crime. This is no trial for disgusting manners, nor for lack of dignity, nor for immeasurable boastings — all of these may be offensive to the last degree, but they are not in the charges here, nor impeach-

able. The defendant is charged with crimes. So the controversy that has raged round the point whether crime must be charged against the offender, or a mere violation of duty, positive or negative, is sufficient to convict, is not here at all.

The defense, however, rests, in large part at least, upon the proposition that, while crimes are charged against the defendant, they are not crimes committed during his official term nor relating to the duties of his office, and, therefore, he may not be impeached because of them.

If we reflect a moment on the object of the grant of the power of impeachment, the fallacy of this contention is apparent. The power was granted "to free the Commonwealth from the danger caused by the retention of an unworthy public servant" (Foster, p. 569).

It is true that for the offenses here charged the defendant could be, and should be, indicted by a grand jury, convicted by a petit, but that does not advance the contention of the defendant a single point. The Constitution itself answers any argument of such claim by saying that both methods may be had — the fact that indictment may be had does not prevent impeachment. The exact contrary is true; the remedies are concurrent. Section 6 of article 1 provides that indictment is not necessary in cases of impeachment; while section 13 of article 6 further says that a party impeached shall, notwithstanding, be liable to indictment and punishment according to law. So the defendant may be indicted and punished on conviction, but that does not answer the just position of the managers when they demand the conviction of the defendant, for both proceedings are allowed.

Consider a moment the position in which the prosecution of the crimes here charged as committed before the beginning of the defendant's official term would be placed, in proceedings by indictment by a grand jury and by a trial. The defendant is indicted, but he is, and remains, the Governor of the State, without even a suspension of the functions of his office. There is no provision by which upon indictment he becomes suspended, or his functions cease, nor at all, except in case of impeachment; nor is there any provision that I know of by which he can temporarily abdicate the functions of his office and turn them over to his lieutenant.

Then, and then only, when the Assembly has impeached, do these functions of the office pass to the Lieutenant Governor until the trial of the impeachment is concluded. Indictment of a Governor has no such effect. He stands for all purpose of the trial the Governor.

Assume, then, an indictment found and on sufficient evidence. The way that the district attorney goes about his preparation for the trial does not suit the defendant — he is too zealous — he looks too much for conviction. So he, the defendant, giving him an opportunity to be heard so as to comply with the Constitution, calmly removes his prosecutor and a more satisfactory one is substituted — one who will be more complacent to acquittal.

The judge about to hold the term where the trial is to be had is regarded as too upright and fearless. Another is assigned by the defendant to take his place. If conviction is had the question of punishment is put upon the trial judge, whose future may be made, or marred, by the man upon whom he must impose sentence. And, having been sentenced, the defendant, thereupon, issues himself a pardon.

Can such a situation be calmly considered?

It is not tolerable that such conditions should surround the only method of prosecuting a Governor for well proven crimes and our system has limited us to no such — on the contrary, it has carefully provided for just such a contingency in the provisions for the impeachment trial.

It will be answered that, if a Governor thus under indictment should remove a district attorney, or thus assign a trial judge, such acts would be impeachable, and it is true. But the mischief has then been done. He has been acquitted, has, in fact, acquitted himself on the trial of the indictment, or has pardoned himself, and so goes unwhipped of justice, which was never intended in the system.

And the closing paragraph of section 13 of article 6, "but the party impeached shall be liable to indictment and punishment according to law," is sure evidence that it was contemplated that a criminal holding office should first be impeached and convicted, and thereby stripped of his official influence and power thus to acquit himself by the methods stated, and then, standing as he

should stand before the law, as a private person, he should be tried as a private person, on indictment duly found.

One of the persuasive reasons for the establishment of a court of impeachment to meet such a case as the one at bar is found in the preamble preceding the enacting clause of what finally became section 33 of the Constitution of 1777, as adopted (the preamble was not adopted but was used in the convention), offered in the deliberations of the convention, "and in order that all delinquents, however exalted their rank and station, may be amenable to the laws," the court of impeachment should be established. (Lincoln's Constitutional History, vol. 1, p. 538.)

It is an established doctrine that the proceedings and debates contemporaneous with the adoption of a provision, constitutional or legislative, are competent, in attempting to discover the intention of such provisions. All the circumstances surrounding the birth of the provision may be considered in ascertaining its meaning.

Our highest court has thus held in People v. Stephens, 71 N. Y. 527, 537; O'Brien v. Mayor, 139 N. Y. 543, 588; O'Brien v. Stanton, 159 N. Y. 225, 229.

It was intended by this provision for a court of impeachment, inserted in the Constitution of the State from the very first, and continued, although not unchanged, to the present day, thereby to constitute a tribunal that would be of sufficient size, sufficient independence, sufficient in experience in public affairs and in statecraft, sufficient in dignity and independence, to insure that justice should be done to the most powerful official, when necessary to protect the State, or to safeguard its dignity, or its decency.

The defence, in resting upon the proposition that impeachment may not be had, must claim that the people have a right to elect a criminal to high office, and that, having done so, there is no relief, that such election purges the offender from the taint of crime and leaves him free to assume the role of an honorable man among honorable men.

What is the result of holding that a person guilty of, for example, perjury, who, successfully concealing his criminality, chances to be elected Governor of the State is immune from a

prosecution or proceeding to remove his baleful presence from the executive chamber and residence?

Shall it be said to students of our system of government that securing the highest office in the State purges of such loathsome crime; that the way to avoid a punishment for perjury is to be elected to high office, and that such election retains the occupant in association with decent men in high place? If so, then what is the result when, having been thus elected Governor, the individual at once, after his election, but before his inauguration, before his official term begins, commits the perjury? Surely it may not then be claimed that the election previous to the commission of the crime effects any purge of the criminal taint.

Some of the members of the Court will remember, personally, the learned Joshua M. Van Cott, long one of the very learned members of the Brooklyn bar. He was one of the counsel for the managers on the trial of Judge Barnard in 1872.

In an argument of convincing power — which I hope it will be the privilege of every member of the Court to read (Barnard's Trial, vol. 1, p. 7, *et seq.* and 220, *et seq.*) — he denies the result here contended for by the defendant and amply sustains the position of these managers.

But, truly there is little support in the precedents for any such doctrine as this, that an election to office after the commission of the crime for which impeachment is sought is condonement of such crime.

In the Barnard case the justice was impeached and convicted during his second term, upon articles charging offenses, some of them certainly not crimes at all, committed in his first.

If the doctrine of condonation invoked by the defendant has any relevancy at all here, its application would have acquitted Barnard for all offenses that were committed during his first term, because his second election, or the election of a person the second time, is just as effectual as a condonation and a purge as is his election for the first time. You can find no possible difference between the case of a man who has committed a crime during his first term of office and is elected to a second and then impeached, and the case where a man has committed a crime before any election at all.

Let us continue a little further into the possibilities of the contention of the defendant here.

When the members of the high court of last resort sitting in, and a part of, this august tribunal, come to the courtesies of the next holiday season, must they feel that they are clasping hands with a perjurer and a thief, because the admitted perjury and larceny were committed fifteen minutes before 12 o'clock noon of January 1, 1913, and therefore he cannot be impeached for their commission, whereas, if committed fifteen minutes after noon, he may be?

Must it be that every justice of our trial courts is subject to direction and appointment and assignment at the hands of a man who is subject to be justly convicted of high crime before one of them?

When, at the next regular session of the Legislature, the Senate sends its committee to notify the Governor of the State that it is convened and ready for business, must the message be taken to a criminal or one with criminal characteristics? And must such a man be permitted to send to the houses of the Legislature his views on public affairs and be allowed to approve or disapprove legislation here passed?

When it comes to the dread issue of life and death must the criminal feel that he is applying to a fellow criminal for reprieve or pardon, and, if denied, go to his doom with the just feeling that he has been judged by an unclean man — a fellow criminal with himself?

These questions are their own answer. None of these things must be, nor can. A course of reasoning that leads to any such result as necessary under our system is fallacious and based on a misconception of the genius of our institutions. He who exercises the functions of this great office must, himself, be clean — not necessarily free from fault — not blameless of every of the venial offenses that afflict our common humanity — but he must not have committed crime, nor anything in the nature of crime, that unfits him for association with the great mass of decent and God-fearing men and women over whom, for a time, he exercises authority.

And upon the correctness of this contention the people of the State may safely rest in all their future; as upon its correctness, too, they may invoke the considerate judgment of Almighty God.

It is not true then, that impeachment may not be had, and conviction, during a defendant's official term, save for criminal acts connected with the performance of official duty, or, certainly for criminal acts committed during the defendant's official term.

There have been in the papers from time to time statements that this Court has ruled against Governor Sulzer. I want to stand for the proposition here and now, at any place and at any time, that if it is at all within the power or jurisdiction of this Court, or in any way competent to brush aside every contention that stands between the Governor of the State at the present time, and his opportunity to come here and be cross-examined and make his defense, and demonstrate that he is longer a fit and clean man, it is doing to Governor Sulzer himself the greatest good that can come to him during the term for which he was elected.

The Constitution of the State makes no such limitation. "The Assembly shall have the power of impeachment, by a vote of all the members elected," is its language, granting the power in unlimited terms.

This power of impeachment in the Assembly has come down from the time of the Constitution of 1777, adopted at Kingston on April 20th of that year. Section 33 of that instrument had this language, "that the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in the Assembly." And this, in terms, limited impeachment to official misconduct.

I shall give the authority of some great names hereafter who found under that language that impeachment might still be had for acts outside the official term, but for the purpose of this argument it is perfectly competent I think, and I am willing to admit as true, that this language of the first Constitution of 1777, which I have read, did limit the power of impeachment to official conduct or misconduct connected with the office.

This was followed by article 5, section 2 of the Constitution of 1821, in these words: "The Assembly shall have the power of impeaching all civil officers of this State for mal and corrupt conduct in office" — which was all that was given by the provisions of the instrument of 1777 and in the Constitution of

1821 was added, " and for high crimes and misdemeanors " with no limitation as to whether they, such high crimes and misdemeanors, were committed officially, or during the term of the official committing them, or prior thereto. (It should be noted here that the word " high " used in this connection means nothing. It is used for sonorous purposes, and I think for that only. Christian, in his notes to Blackstone, so says [vol. 4, p. 260]). It would have been easy to have placed the new words " and for high crimes and misdemeanors " where they would have been subject to, and been limited by, the old provision " in their respective offices," but that was not done. They were not placed before those words " in their respective offices," but after.

This language of the Constitution of 1821 continued until the Constitution of 1846, when there was a still further broadening of the power of impeachment in the Assembly by this language (article 6, section 1): " The Assembly shall have the power of impeachment by a vote of a majority of all the members elected," and precisely the same language was continued in the judiciary article reported by the convention of 1867, and adopted, although the remainder of the instrument was not adopted at the polls, as it was also continued in the Constitution of 1894) article 6, section 13), as it is today.

We have it then that the Assembly, in express terms, has had the power of impeachment ever since we have had a constitution at all, but under the Constitution of 1777 it was only to the extent, and could only be exercised against the civil officers of the State, " for mal and corrupt conduct in their respective offices;" that the Constitution of 1821 added to such mal and corrupt conduct in their respective offices the words " and for high crimes and misdemeanors " without the limitation " in their respective offices," leaving it that, although impeachable mal and corrupt conduct must still be " in their respective offices," such high crimes and misdemeanors thus added were sufficient cause for impeachment whether committed in or out of office, during the term of office of the accused, or prior thereto; while the two subsequent instruments, that of 1846 and that of 1894, as well as the judiciary article adopted in 1867, simply said, " the Assembly shall have the power of impeachment by a vote of all the mem-

bers elected," thereby leaving it that not only was it not necessary that the "high crimes and misdemeanors" should be committed in office (as it had been unnecessary since 1821) but that, thereafter, after 1846, it was unnecessary (although it had been necessary before) that the mal and corrupt conduct which was impeachable should be while holding, or in the exercise of the functions of, the office filled by the person impeached.

These changes of language thus, each time, removing limitations theretofore existing and thereby broadening the impeaching powers of the Assembly, are significant. Had it not been the intention of the people thus to broaden the powers given by the language of the previous instruments, they would have remained unchanged. The fact that there was such change of language unmistakably signifies the intention to change the power, and any examination of the changed language, even the most cursory as well as the most careful, will demonstrate that the change did materially and vitally broaden this power of impeachment in the Assembly. This view is not only the only reasonable one, but it is tremendously strengthened and confirmed and demonstrated correct by the debate in the conventions where the opinions were debated and where the changes were made.

In the convention of 1821 there were distinguished names: Chancellor Kent, Van Vechten, Livingston, Wheaton, Young, Talmadge, and many others. The section on the court and the power of impeachment was debated, not briefly, but exhaustively. (Proceedings and Debates, pp. 430–40, 443–46, 646.) The Chancellor was watching the interests of the judiciary, but was entirely satisfied when it was provided that impeachment was to be had only by a majority of all the members elected to the Assembly, and conviction only by a two-thirds vote, and the question at times waxed warm as to whether greater control of the judicial branch was not required. The debate with respect to impeachment and the extent of limiting it, was not with respect to the propriety of the power of impeachment at all, but simply as to how great a number it should require to impeach. Chancellor Kent, representing the judiciary of the State, and he himself at the head or that judiciary, who believed with his whole soul in the most thorough independence of the judiciary, announced himself as

entirely content with the provision when impeachment could be had by a majority of the members of the Assembly elected and when conviction could be had by a two-thirds vote. I think it was in that convention that someone said — whether it was said there or at some other time, it is true now — that when the time comes that any officer of the State, subject to impeachment, is impeached by a majority of the elected members of the Assembly, the nearest representatives of the people in official life in the State, that when time comes, the power for good of the officer impeached is gone, and it does not make much difference what becomes of the trial thereafter, so far as any influence on his part is concerned.

The discussion being had in the convention, whether to add to the impeaching power, as given in the Constitution of 1777, Mr. Wheaton said:

"But it was indispensably necessary to extend it further than it was carried by the Constitution of 1777, which never sent to trial and punished public officers for official misconduct. But there might be many cases of crime which would render it wholly unfit that a public officer should remain in office, or be ever again entitled to the confidence of his country, which were entirely unconnected with official misconduct."

If this were so in the year 1821, I ask the members of this Court how infinitely greater it is true in this year of grace 1913. With all the agitation for a closer responsibility of officials of all kinds, it is no time to limit and contract the power that exists to bring faithless officers to book. It is no time. It is no time when the Mississippi is running bank full on its way to the gulf to attack and weaken the enbankments that confine it within its borders and keep it from spreading ruin. It is no time when pestilence stalks in the land to weaken the health laws that protect the community. It is no time now, when the people are demanding, and are properly demanding, a strict, close and quick account of their officials, executive, judicial, legislative — it is no time under such circumstances for this Court, by any process, to contract the powers which it holds, nor to add to the agitation, nor to prevent the just relief which impeachment gives.

Mr. Wheaton having said that there might be many cases of

crime which would render it wholly unfit that a public officer should remain in office, or be ever again entitled to the confidence of his country, which were entirely unconnected with official misconduct, what was done? The section was then passed as amended.

The thing, then, was "not done in a corner." It was debated. It was claimed in the debate that greater power of impeachment was needed — that there might be, in his language, "many cases of crime which would render it wholly unfit that a public officer should remain in office . . . which were entirely unconnected with official misconduct;" and, thereupon, the Constitution of 1777, which they were then, in 1821, revising, containing the provision that the power of impeachment of civil officers rested in the Assembly, only "for mal and corrupt conduct in their respective offices," they voted to add to such impeachable causes, for the very reason claimed by Mr. Wheaton to be necessary — to this mal and corrupt conduct in office — the words "and for high crimes and misdemeanors," without at all saying that such crimes and misdemeanors must be connected in any way with the performance or nonperformance of public duty.

I think it is not straying too much if I digress a single minute from the printed brief, to say that the managers here want to stand broadly upon the proposition that a man may be wholly unfit to be Governor of the Empire State some little time before he is ready for state's prison. The dividing line between the two, between ripeness for state's prison and qualification for the office of Governor, is broader than the defendant claims.

No stronger evidence of the intention of the convention to do exactly what it did do can be found; and it settles beyond cavil the contention here between the managers on the one hand and the learned counsel for the defendant on the other — and settles it in favor of the contention of the managers.

In the year 1821, in Massachusetts, Judge Prescott was impeached for misconduct in office. My friend has spoken of the fact that no statute of limitations runs with respect to impeachment. If I remember the dates correctly, Judge Prescott was impeached in 1821 for offenses that were committed in 1805. Shaw, afterward the great chief justice, was of counsel for the managers. The only causes of impeachment, as then described

in the Massachusetts Constitution, were for misconduct and maladministration in office. Judge Shaw said:

> "Perhaps, in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability, and integrity, might reasonably be construed to be misbehavior and misconduct in office."

You see, Judge Shaw was struggling with the proposition, advanced by the other side, that it must be for misconduct and maladministration in office under the Constitution of Massachusetts, yet he says:

> "Perhaps, in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability and integrity, might reasonably be construed to be misbehavior and misconduct in office. I should certainly yield with great reluctance to the position of one of the learned counsel, that the commission of an infamous offense by a judge — as perjury or forgery for instance — would not render him liable to impeachment. It would certainly be a great defect in the Constitution if a man could be brought to the bar one day, convicted of an infamous offense and sent to the pillory, and the next could assume the robes of office and sit in judgment and denounce an ignominious punishment upon a fellow criminal not more infamous than himself."

In 1872 the judiciary committee of the Assembly of this State presented reports recommending that Judges Cardozo and Barnard, justices of the Supreme Court, be impeached — Cardozo, "for mal and corrupt conduct in office, and for high crimes and misdemeanors"— Barnard only for "mal and corrupt conduct in office."

Samuel J. Tilden and David B. Hill were members of that committee. Hill dissented from so much of the report in the

Cardozo case as stated that impeachment should be for high crimes and misdemeanors, wishing to leave it only for mal and corrupt conduct in office. Tilden, with three other members of the committee (leaving the division of the committee five to four against Tilden's contention) dissented from the report in the Barnard case, desiring to include in the resolution the words "for high crimes and misdemeanors," instead of leaving it simply "for mal and corrupt conduct in office." These matters are not of consequence except as evidencing that the committee had considered the difference between the two causes for impeachment — mal and corrupt conduct in office on the one hand, high crimes and misdemeanors not connected with official action on the other — and that it recommended impeachment of Cardozo for both, Barnard for but the one.

The judiciary committee asked Mr. Tilden to prepare some notes on the subject of what are impeachable offenses, and, in pursuance of the request, he did prepare a complete and thorough opinion on the subject. It evidences in every part his profound thought and learning and is invaluable in any study of the subject under discussion. He was at that time a member of the Assembly and of the judiciary committee, although he was not elected one of the managers. Two years and a very few months later, he was the Governor of his State. Four years from the time he gave this opinion, he was the candidate of his party for the presidency of the United States, and there are those still living who passionately believe that he was elected to that high office. His name and his fame certainly must have weight in any court constituted as this Court here. His conclusions were these: (Tilden's Public Writings and Speeches, edited by John Bigelow, vol. I, p. 472 et seq.)

> 1. Impeachment under our Federal and State Constitutions is a proceeding to remove a public officer, if cause exist. Its object is not to punish the individual, but to protect the people, even the disqualification to hold office, if added to removal, being more preventive than penal.
>
> 2. Impeachment as it existed in England has been modified here, in that

(*a*) Judgment may not extend beyond removal and disqualification.

(*b*) The party remains liable to trial and punishment in the ordinary courts — thereby separating the two elements, assigning jurisdiction of the personal crime to the ordinary courts and reserving impeachment to remove and disqualify an officer unfit to exercise the functions of the office.

3. Deducing the grounds of impeachment from the nature and objects of the procedure, while they may be called offenses, the word offense must be held, certainly in New York, to include acts which create personal unfitness for office.

4. The Constitution of 1777 described impeachable offences as "mal and corrupt conduct in office." That of 1821 added "and for high crimes and misdemeanors." That of 1846 gave the power of impeachment without any words of description of cases to which it should apply. It omitted the words of definition of 1777, the more extended phraseology of 1821, and conferred the power in the broadest and most general terms. The judiciary article of 1867 continued the same words.

5. Physical disability is surely a cause of impeachment, the failure to resign in such case being a moral delinquency. Can it be doubted that a moral disability is an impeachable offense? All this yields too much to the notion that a ground of removal must be an offense. Unfitness, inability to serve the public, creates not merely a cause, but a necessity, for removal.

6. Misconduct wholly outside the functions of an office may be of such a nature as to exercise a reflected influence upon those functions and to disqualify and incapacitate an officer from usefully performing those functions. In such case the misconduct constitutes an impeachable offense and is ground for removal. The words "high crimes and misdemeanors" are not limited to official acts.

7. Mr. Tilden then adopts the definition of George Ticknor Curtis in his "History of the Constitution of the

United States" (p. 481) as follows: "The purpose of an impeachment lies wholly beyond the penalties of the statute of the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist when no offense against positive law has been committed as when the individual has, from immorality, or imbecility, or mal administration, become unfit to exercise the office."

8. He then notes and approves the language of Justice Shaw in the Prescott trial, now repeated for convenience (p. 482):

> "Perhaps in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability, and integrity, might reasonably be construed to be misbehavior and misconduct in office. I should certainly yield with great reluctance to the position of one of the learned counsel, that the commission of an infamous offense by a judge — as perjury or forgery for instance — would not render him liable to impeachment. It would certainly be a great defect in the Constitution if a man could be brought to the bar one day, convicted of an infamous offence and sent to the pillory, and the next could assume the robes of office and sit in judgment and denounce an ignominious punishment upon a fellow criminal not more infamous than himself."

And Mr. Tilden adds:

> "The doubt which seems to exist in the mind of that great jurist arose from the words of description of impeachable offenses in the Constitution of Massachusetts, which literally relates only to acts done or omitted in office."

9. "The Constitution and laws of the State of New York have left us free from any possibility of so narrow a construction as that which Chief Justice Shaw disputed in its application to the Constitution of Massachusetts. They recognize the principle that a personal crime may create a personal disqualification to exercise the functions of a public office, although the particular offense may be totally disconnected with that office. They do not limit the range of impeachable acts, omissions, or defaults, which may work such a disqualification, to any term of office or to any time or place, but leave the whole judgment as to whether or not the disqualification is produced to the supreme and exclusive jursidiction of the High Court of Impeachment, which is the ultimate agent of the sovereign people in their supervisory power over public officers."

In considering the question, Mr. Tilden discussed further the effect of the statutes then in force bearing on the subject. The Revised Statues of 1830 had a section then in force as follows: "The Assembly has the power of impeaching all civil officers of this State for mal and corrupt conduct in office, and for high crimes and misdemeanors, but a majority of all the members elected must concur in impeachment," following exactly the language of the Constitution of 1821.

This section of the statute remains unchanged after the adoption of the Constitution of 1846. As to its effect, Mr. Tilden says:

"If the omission of the words of description made by the Constitution of 1846 and continued by the amendment of 1867, has any effect in enlarging the definition established by the Constitution of 1821, the enlarged rule would prevail over the statutory iteration of the words of the then existing Constitution."

I hope I have made this plain because it is the precise situation in which we find ourselves now.

The statute of 1830 provided for impeachment in the language of the Constitution of 1821, as it then stood in 1830. But

in 1846, the power of impeachment being greatly broadened by the Constitution of that year and left entirely to the Assembly without limitation or definition, the Legislature neglected or forgot to change the statute of 1830 but left the statutory direction with respect to impeachment precisely as it had been under the limited language of 1821, just as our friend on the other side, to whom was committed the reconcilement of the codes with the Constitution adopted in 1895, forgot or overlooked this section 12 of the Code of Criminal Procedure, and did not conform it to the language of the Constitution.

Precisely the same condition exists now, and on first consideration may seem embarrassing. It is, in fact, not at all so.

Section 12 of the present Criminal Code says:

> "The Court for the Trial of Impeachments has power to try impeachments when presented by the Assembly, of all civil officers of the State except justices of the peace, justices of justices' courts, police justices and their clerks, for wilful and corrupt misconduct in office."

This section formed a part of the Code of Criminal Procedure when it became a law as chapter 442 of the Laws of 1881, and it has remained ever since unrepealed and unamended.

If by this section it is sought to spell out a limitation of the power of impeachment in the Assembly and which was granted to it by the Constitution of 1846, and has ever since continued in the words "The Assembly shall have the power of impeachment by a vote of all the members elected," the answer is that it is wholly nugatory as an attempt to curtail a power of the Assembly, specifically granted to it by the Constitution in unlimited terms. Argument is not needed — curtailment of constitutional power cannot be effected by a legislative enactment. Matter of Stilwell, 139 N. Y. 337, 341.

The grant to the Assembly of the power of impeachment is by the Constitution and no act of the Legislature could, nor can, in any wise limit such power or jurisdiction granted by the people directly in the adoption of the Constitution, to any officer or body doing the work of the State.

I am not at all unmindful of the delightful brief prepared by Judge Vann, read here by one of the learned counsel for the defense, but it stands true that if the Legislature can impose any limitation at all on this constitutional grant of power to the Assembly, it may go to any length in limitation, although the Constitution gives the power of impeachment to the Assembly in the broadest and most comprehensive terms. If the Legislature can say that impeachment can be had only for malversation in office, then it can go to any length and say that it shall not be for any purpose other than murder. The minute we admit the contention made in the brief of Judge Vann that there can be any legislative limitation at all to the power of impeachment, that minute we give to the Legislature the right to take all the power away, or all but an insignificant portion.

It simply is true that this broad power of impeachment in the Assembly thus granted by the Constitution cannot be limited in the slightest degree by the Legislature. Not one jot or tittle of the power of the Assembly can be gainsaid by section 12 or by any similar enactment that the Legislature can make. Section 12 stands as though it had never been because it is an attempt by legislative act to withdraw from the Assembly the power to impeach for any offenses except misconduct in office, while the Constitution makes no such limitation.

A step further before my conclusion: If it be said that the Assembly, by passing this section 12 of the Criminal Code in 1881, consented to a curtailment of its jurisdiction in impeachment trials and, therefore, is estopped, the perfect answer is that no power granted to an officer, or a body, by the Constitution can be limited by consent of the person or body, to whom it is granted, or otherwise. The grant of power imposes the duty of its exercise in the public service. Where a court has jurisdiction of the subject matter brought to its attention, it is not a question of discretion whether it shall exercise such jurisdiction or not, if properly invoked. It is bound to do so. Power in a public officer, or public body, is to be exercised or not, at the whim of the officer. It carries with it the correlative duty of the exercise of that power in the public interest, and no waiver of such power or jurisdiction, no consent to any legislation attempting to limit

it, can in the slightest degree affect the actual existence of the power as granted by the Constitution, nor in the slightest degree affect the obligation to exercise the power when properly asked. Mann v. Fearson, 9 How. (U. S.) 248, 259; Mayor v. Fargo, 3 Hill 612; People v. Albany, 11 Wend. 539, 542, 543; Phelps v. Hawley, 52 N. Y. 23, 27; Hagadorn v. Raux, 72 N. Y. 583, 586.

In the language of Mr. Tilden, the enlarged rule in the Constitution prevails over the statutory iteration, in 1881, of the words of the Constitution of 1821.

Another method of reaching the same result is that section 12 of the Criminal Code thus passed in 1881 was repealed by the adoption of the present Constitution in 1895, again giving to the Assembly the unlimited power of impeachment in the same language as of the Constitution of 1846 and the judiciary article of 1867. The adoption of the Constitution of 1895 operated as the repeal of such section 12 — a repeal of a higher body and certainly as effectual as though such a repeal had been by the Legisture itself passing a repealing act.

Mr. Tilden based something of argument upon the statutes of 1830. If deemed of consequence it will be found that section 30 of the present public officers law is the same as the law of 1831.

It comes then that this opinion of Mr. Tilden, statesman that he was, a man of the broadest views as well as a most eminent lawyer, that the position from which he spelled his conclusions existed in 1872 precisely as the conditions exist now, and the conclusions that he reached there are compelling in favor of the contention of the managers here. We have then no embarrassment whatever over the existence of section 12 of the Criminal Code. The questions under consideration are to be settled in precisely the same way as though it had never been passed.

It is, however, now claimed by the learned counsel for the defendant that section 7 of article 10 affects the situation, justifies this section 12 of the Criminal Code as constitutional and defeats this, our, contention. The section thus invoked reads as follows:

> "Provision shall be made by law for the removal for misconduct or malversation in office of all officials, except ju-

dicial, whose powers and duties are not local or legislative, and who shall be elected, at general elections and also for supplying vacancies created by such removal."

This section first came into the organic law as section 7 of article 10 of the Constitution of 1846, and has since remained without change.

The process of reasoning that seeks to give this section any applicability to the question under argument is obscure; how it may be used to justify any limitations of the unlimited power of impeachment granted to the Assembly by the Constitution, is not at all apparent. The language of the section and its physical position in the organic instrument, alike, evidence its nonapplicability to any phase of impeachment proceedings or of the power of impeachment.

We have seen that impeachment and impeachment trials are governed by article 6, section 13, article 6 being the one on the judiciary, where provisions for impeachment are properly and naturally placed.

The subjects of the Executive and his power are treated in article 4, the other State officers, except the judiciary, by article 5, the judiciary by the various sections of article 6. Article 7 covers the matter of State credit, power to contract debts, the sinking fund, etc.; article 8 relates to corporations, commissions and boards; article 9 to schools, and then comes article 10, in which the section under discussion is found. It begins by treating the subject of county officers, sheriffs, clerks, district attorneys and the like (article 10, section 1). Section 2 provides for the appointment or election of county and lesser officers; section 3 relates to the duration of term of officers, where such term is not provided for by the Constitution; section 4 provides that "The time of electing all officers named in this article shall be prescribed by law;" section 5 treats of the filling of vacancies; section 6 defines the political year and then comes this section 7 before quoted in full.

The Constitution has come down in this article, away from the offices of Governor, Lieutenant Governor, judges and legislators, and is here treating the subject of officers of lower rank. If the

defendant's counsel are right, this continuous diminuendo suddenly ceases, and we at once have the tremendous crescendo of a return to the power of impeachment, which, as mere arrangement, would be grotesque.

The section refers to inferior officers, other than judicial, inferior to Governor and Lieutenant Governor, and provides that their removal may be provided for by law. The Constitution, deeming it beneath its dignity to treat of such lesser subjects, it is remitted to the Legislature to provide by law for such removal. And this contention is enforced by the fact that the Legislature has provided by law for such removal of such lesser officers, but nowhere for the removal of Governor or Lieutenant Governor (public officers law, sections 32–36).

Section 32 of the public officers law provides that the Secretary of State, Comptroller, Treasurer, Attorney General, or State Engineer and Surveyor, may be removed by the Senate, on the recommendation of the Governor, for misconduct or malversation in office, if two-thirds of all the members elected to the Senate shall concur therein.

Section 33 takes care of the cases of removal by the Governor, of officers appointed by him to fill vacancies in minor places.

Section 34 allows the taking of testimony in removal cases, while 35 relates to mere procedure and 36 to removal of town and village officers by the court.

This practical construction by the Legislature, by the various revisers and codifiers of the statute, nowhere saying a syllable about removal of the Governor or Lieutenant Governor, nowhere here mentioning impeachment, either its power, or its proceeding, is some — slight perhaps, but still some — evidence of construction of this constitutional section.

But that this article 10 does not, in any part, refer to, or affect, the office of Governor and Lieutenant Governor is demonstrated beyond challenge by the language of section 4 of the article, before quoted: "The time of electing all officers named in this article shall be prescribed by law." The time of electing the Governor and Lieutenant Governor is fixed by article 6, section 3 as the same time when members of Assembly are chosen, which

is (article 3, section 9) the Tuesday succeeding the first Monday in November, until otherwise directed by the Legislature.

When, therefore, section 4 of article 10 remits to the Legislature the power to prescribe the time of electing all officers "named in this article," the officers named in the article are other than those the time of whose election is fixed by the Constitution in its other parts.

The contention of the defendant, however, still is that this article 10, section 7, gives to the Legislature the power to enact section 12 of the Criminal Code, and renders it forceful and not obnoxious to the Constitution. The language does not purport to limit in any way the general grant of the power of impeachment given to the Assembly by section 13, article 6. As to judicial officers, by the Constitution itself is given:

(*a*) The power of impeachment (article 6, section 13);

(*b*) Removal by both houses by a two-thirds vote of each house (article 6, section 1).

This power of removal of judges under this constitutional provision in no way limits or affects the power to impeach them. The proceedings are concurrent. If this be so — if a constitutional power to remove does not affect impeachment proceedings — how can a legislative power of removal have any effect on impeachment proceedings? Twice within the decade the power of removal of a justice of the Supreme Court has been invoked in the Legislature, but no counsel, the most zealous, has ever claimed in brief or argument, that such power of removal precluded or limited the power of impeachment.

It stands true, then, that as to the judiciary, by the Constitution itself, we have both the power of impeachment and the power of removal; as to all other officers except members of the Legislature who are taken care of by the power of expulsion the power of impeachment is given by the Constitution and, as to all such other officers but the Governor and Lieutenant Governor, the right to enact laws for their removal is given to the Legislature, and it has acted under this power. But nowhere may the Legislature limit, in any way, the right given to the Assembly in broadest phrase, to impeach any officer, executive or judicial, for any reason it sees fit.

We have thus far argued for the power of impeachment in the Assembly and the right of conviction in the court of impeachment, first, upon the general doctrine applicable anywhere in the Republic, and second, upon the proper construction of our State Constitution.

There is another line of reasoning that reaches the same result and, at the same time, accentuates and confirms the previous argument.

The argument has proceeded upon the concession (although for the argument only) that the claims here charged against the defendant were committed not only outside the day of his term of office, but totally disconnected therefrom. But no such lack of connection exists; on the contrary, the crimes charged are immediately and vitally connected with the defendant's official term — so vitally connected that it is no violence of speech to say that they were official acts and must be so treated here.

The election law (chapter 22 of the Consolidated Laws), passed in 1909, which codified the various corrupt practices acts up to that time, and which was amended by chapter 891 of the Laws of 1911, has imposed new duties upon one running for office, has created new relations between a candidate for office and official duty when office is finally assumed — relations so close and so well defined as to render any ancient precedents on the subject, whether crimes committed prior to the official term are impeachable or not, largely obsolete. A detailed examination of the provisions of this election law is not necessary. It is sufficient to say that among other things it is designed to control the expenditure of funds, and generally to prescribe the duties of candidates and of those in charge of the selection of nominees and the election of candidates.

Of the laws in force at the time of the general election in 1912, immediately affecting the question here discussed, were sections 546 of the election law and 776 of the Penal Law.

The first, that of the election law, requires to be filed within twenty days after election a statement setting forth all the receipts, expenditures, disbursements and liabilities of a committee and of every officer, member and other person in its behalf, which shall include the amount received, the name of person or committee from whom received, the date of its receipt, the amount of every ex-

penditure or disbursement exceeding five dollars, the name of the person or committee to whom it was made, and the date thereof and, except where made to another committee, the purpose of the expenditure or disbursement.

A candidate is required to file the same statement and, in addition, all contributions made by him.

The latter (section 776 of the Penal Law) requires to be filed a statement by a candidate within ten days after election, showing in detail all the moneys contributed or expended by the candidate, directly or indirectly, by himself or through any other person, in aid of his election. It requires that there shall be given the names of the various persons who received the moneys, the specific nature of each item and the purpose for which it is expended, or contributed. To this there must be attached an affidavit, subscribed and sworn to by such candidate, setting forth that the statement is in all respects true and a full and detailed statement of all moneys contributed or expended by him, directly or indirectly by himself or through any other person in aid of his election.

It will thus be seen that from the time a person is nominated for office he comes under the provisions and directions of the law. He is not yet an officer, but he is seeking to become one and, in order to become one, is required to conform to these directions of the statute.

There has thus been prefixed to the office what we may call an official vestibule, so placed that a person entering into the office must pass through it. And it is no stretch of language to say that the law practically makes an officer of a candidate — and of an officer-elect. He is certainly subject to the direction of the law from the moment he is nominated.

The object of all this is patent. Misconduct as a candidate corrupts public duty in office. Wickedness in a candidate is as surely inherited by the official as any hereditary taint by the child from the parent.

The title to one of the acts leading up to the present law expresses it fully — "An act to amend the election law in relation to the publicity of contributions to, and expenditures of, campaign funds, and providing for judicial inquiries thereto." (Chap-

ter 502, Laws 1906.) The purpose of the statute is not captious. It is genuine and for the purpose of affording positive information to all interested, to the people at large, not only how much and for what the candidate himself has contributed, but the persons who have made contributions to him, so that there may be no misunderstanding either as to the amount of contributions thus made, or the character of those who made them. It was intended that the people should have this information, so that, among other things, during the administration of the office, it could be observed whether there was any attempt being made to reward by official patronage, or appointment, those who had made undue contributions in aid of the election of the official dispensing such patronage.

While the act of filing the statement of expenses is required to be done before the official takes his office, its purpose is to insure pure conduct in the preliminary struggle for the office, and it has become a matter of the deepest concern to all the people of the State that the various candidates shall comply with this provision, fully and completely. Not once since this policy embodied in the corrupt practices acts has been entered upon, has there been any variableness or shadow of turning, with respect to it. Every step in legislation has been to strengthen and complete the scheme and to make stronger its provisions. It was attempted to make forfeiture of office one of the results of failing to file a statement as prescribed by law, but this was held unconstitutional, as creating extra constitutional test for office. (Saxe on Elections, p. 174, and cases there cited.)

The charge here made (among others), is that the defendant, William Sulzer, made and filed a grossly false statement under these provisions of the statute, and then corruptly swore that it was true. The statement thus filed showed receipts by the defendant from sixty-eight contributors to the amount of $5,460 and expenditures aggregating $7,724.09. It is charged that contributions enumerated in the article, to the amount of $8,500, were made to the candidate and not reported.

By this corrupt practices legislation, the position of a candidate is legally, indissolubly linked with that of the official. It is as much required that he shall make this statement of the amounts

received by him and the expenditures, as it is required that he shall take the official oath as Governor, when inaugurated. The one cannot be separated from the other, and one is as positive a direction as is the other. The making of a false statement of receipts and expenditures, is just as much a violation of duty and the commission of a crime, as is the violation of the official oath taken upon induction into office.

It comes then, instead of the candidate being required to take but an oath before he enters upon the duties of his office, he is required to make this certificate during the inchoate period, just after he has been voted for as a candidate, and to take the oath when he assumes the duties of the office. The falsity of statement of receipts and expenditures is as surely a violation of official duty and, not perhaps as noxious in its effect and yet in view of the purposes of the statute scarcely less so, and just as much scandalizes the State and is just as much evidence of moral unfitness for the office, as the violation of the inaugural oath taken at the beginning of the term. He who deliberately fills out a false statement in November is not fitted, nor fit, for public office in January; he who commits larceny in October may not be intrusted with the responsibilities of high office three months later.

Where is the harm that can come to the State from the violation of the oath of office that does not come from a false certificate as to what has been done while a candidate for office — where the shame in the one case, that does not follow in the other? Indeed, the falsity of the certificate as to the receipts and expenditures is the more precisely provable and the more precisely wrong than is the violation of the official oath, because it relates to specific and absolute facts, while the violation of the official oath may have something of difference of opinion as to what constitutes official duty in a given case, in its defense. But there can be no possible defense or palliation of the act of suppressing contributions and expenditures or in making a false affidavit as to them.

In all this there is nothing of effort to convict the defendant for lying. The world hates a liar, but it is not for lying that we ask conviction of William Sulzer. In pursuance of the imperative directions of the statute — a statute based on the soundest

reasons — he is charged with filing a false certificate of contributions made to him. In doing so he violated the law and committed a crime. Appended to this false statement, thus filed, is an affidavit, duly sworn to before a magistrate, attesting to the correctness of the statement. Argument is not here had as to whether the crime of perjury may be predicated upon this false affidavit. It is had on another phase of the case, by another counsel who will succeed me. But, whether guilty of legal perjury, or whether, on a quibble that finds its congenial atmosphere at the Old Bailey, or the Tombs Police Court, he shall escape judgment of that loathsome crime, he intended to commit perjury and believed that he was committing it, in subscribing this oath. All the blackness of heart; all the intention to do wrong; all the revelation of infamous character, that are demonstrated by a legally false oath, are demonstrated by this intention to commit perjury, as too, by the certificate itself, the violation of the statute designed to prevent corruption at the polls.

It may be urged that the statute creates no penalty of forfeiture of office, for a false certificate of receipts and expenditures, during the candidacy of the person making the oath. It is true. But, as before seen, it attempted to do so, but was declared impossible under the Constitution. If it could, no impeachment would, perhaps, be necessary. We are not here arguing any question of automatic removal, but the question of what is an impeachable offense.

To repeat, varying the phrase very slightly — no man may now legally become Governor of the Empire State, unless and until he shall have done two things: one, certified to his receipts and expenditures while a candidate, and appended thereto his affidavit that it is correct; the other, the oath he takes upon his inauguration, the instant that he becomes the highest official of the State. Both are connected with his office, one as much as the other; both precede his actual investment with the powers and duties of the position, the one by a few weeks, the other by a single instant.

A person making a false certificate of contributions and expenses is guilty of a misdemeanor (Penal Law, sec. 776), for the filing of a false statement is, of course, not a compliance with

section 776 which requires the filing of a true one, which has not been done.

Will it be claimed by the learned counsel for the defense that, if it were clearly alleged and proved here that the defendant were guilty of the crime of bribery in the purchase of votes at the election where he was chosen, it would not be an impeachable offense because the crime was committed before the beginning of the official term? I cannot think that they will make any such contention. If they do, I suspect that they will be without the support of a single member of the Court. Yet bribery is not mentioned in the Constitution as an impeachable offense, and, if it is such, it is only under the general grant of the power of impeachment, without attempt at definition, only as a high crime and misdemeanor, and if it is so guilty and impeachable, as of course it is and must be, it is for a crime committed before the official term began, is something done as an individual, not any act as Governor, nor any malversation in office, or for misconduct in office. How may an official be impeached for bribery committed before his term began, but connected with his election to the office held, and not be impeached for evasion of the statute as to filing a certificate of receipts and expenditures connected with his election? Bribery at the election is not mentioned as a cause of impeachment, neither is a false certificate as to election expenses. Either, if impeachable at all, must be because of the commission of a crime. Both are done in connection with the election to the very office held and one is as corrupting to the party doing it, as much an evidence of the moral unfitness that disqualifies the offender from continuing to hold his office, and is as truly impeachable, as the other.

All the cases of expulsion from a legislative body for bribery in obtaining election to the office are applicable here. Expulsion from a legislative office for bribery is but the equivalent of impeachment of an executive or judicial officer for the same offense. Impeachment of a legislative member is not a proper method of procedure, and so far as counsel have discovered was done only in the Blount case in the early part of the last century — never in this country before or since. The Lorimer case, fresh in the minds of all, is the latest, where expulsion was had for such cause. In that case,

in all cases where action has been had for bribery in securing the office, the offense has been committed, of course, and of necessity, before the official term began.

It stands true, then, that in the State of New York the offenses here charged are impeachable; that, if proved, they show a moral unfitness to fill the office of Governor, or any office, and the defendant's contention with respect to the nature and effect of the crimes charged must be overruled.

APPENDIX

(Accompanying Mr. Brackett's argument)

Federal impeachments

WILLIAM BLOUNT, *Senator from Tennessee.*

Impeached July 7, 1798, for conspiring while a senator to conduct hostile expedition against Spain in the Floridas and Louisiana, in order to conquer same for Great Britain. Also for exciting and encouraging Creek and Cherokee Indians to begin hostilities in the Floridas and Louisiana for the same purpose — all in violation of treaty between United States and Spain. Blount filed a plea to the jurisdiction on ground that he was not then a senator, and was not then, or at the time of the offenses charged, a civil officer of the United States. (He had been expelled by the Senate before his impeachment.)

Plea sustained 14 to 11 and Blount acquitted; the result of this ruling being that none but a civil officer can be impeached.

Managers included Messrs. James A. Bayard and Robert G. Harper, Samuel W. Dana, Dennis, Evans, Gordon, Hosmer, Pinckney, Sewal, Imlay and Kittera.

Respondent's counsel.— Jared Ingersoll and A. J. Dallas.

JOHN PICKERING, *United States District Judge, N. H.*

Impeached February, 1803, for delivering ship Eliza to claimant after attachment, without requiring bond as provided by law; refusing to hear testimony offered by district attorney on behalf of United States; refusing to allow an appeal from his judgment; drunkenness on bench and using profane language.

Pickering did not appear; but his son, through Robert Harper as counsel, filed a petition that Pickering was insane and asked

more time. Denied. Trial proceeded, Pickering being absent and not represented.

Guilty 19 to 7 on each article.

Sentenced to removal from office.

Managers.— Messrs. Nicholson, Early, Rodney, Eustis, John Randolph, jr., Samuel L. Mitchell, George W. Campbell, Blackledge, Boyle, Joseph Clay, and Newton.

SAMUEL CHASE, *Justice Supreme Court, United States.*

Impeached March, 1804, for misconduct on trials of John Fries for treason, and James T. Callender for sedition; an improper attempt to induce a grand jury to find an indictment against a certain newspaper; and for delivering a political harangue to a grand jury in Maryland and other misconduct in office.

Chase answered at length, admitting many facts; but explaining them by able argument.

Acquitted.— Highest vote against him, 19–15.

Aaron Burr, Vice President, presided at trial.

Managers.— John Randolph, Joseph Nicholson, Rodney, Early, Boyle, Nelson, and G. W. Campbell.

Respondent's counsel.— Luther R. Martin, R. G. Harper, Joseph Hopkinson, and Philip B. Key.

JAMES H. PECK, *Judge United States District Court, Missouri.*

Impeached in April, 1830, for punishing Luke Edward Lawless for contempt, because he published a letter pointing out errors in one of Judge Peck's decisions regarding a Spanish land claim. Peck answered, justifying his act.

Acquitted.— 22 guilty; 21 not guilty.

Managers.— James Buchanan, Henry R. Storrs, Ambrose Spencer, George McDuffie and Charles A. Wickliffe.

Respondent's counsel.— William Wirt and Jonathan Meredith.

WEST H. HUMPHREYS, *United States District Judge, Tennessee.*

Impeached May, 1862, for accepting and discharging duties of judge under Confederacy without resigning as United States judge, and other treasonable acts. Humphreys did not appear. Tried as if plea of "not guilty" had been entered.

Convicted, and sentenced to removal and disqualification to hold an office by unanimous vote.

Managers.— Bingham, Pendleton, Trin and Dunlap.

ANDREW JOHNSON, *President of United States.*

Impeached, February 24, 1868, for removing Stanton as Secretary of War in violation of tenure of office act, and an act to define certain conspiracies; for making speeches contemptuous of Congress.

Johnson answered raising legal questions only. Chief Justice Chase presided. Trial occupied from March 30 to May 6, 1868.

Acquitted.— 35 guilty, 19 not guilty.

Managers.— Benjamin F. Butler, Thaddeus Stevens, John A. Bingham, George S. Boutell, James F. Wilson, Thomas Williams and John A. Logan.

Respondent's counsel.— Henry Stanbery, Benjamin R. Curtis, William M. Evarts, William S. Groesbeck and Thomas A. R. Nelson.

WILLIAM W. BELKNAP, *Secretary of War.*

Impeached, 1876, for bribery, receiving $6,000 to $12,000 a year from post-trader appointed by him.

Belknap resigned and President Grant accepted his resignation. Immediately thereafter, and on the same day, he was impeached.

Plea was filed to jurisdiction upon ground that Belknap was not an officer of United States when impeached.

Overruled by vote of majority, but less than two-thirds.

Counsel for Belknap refused to plead further and trial proceeded as if Belknap had pleaded "not guilty."

Acquitted.

Managers.— Scott Lord, J. Proctor Knott, W. T. Lynde, John A. McMahon, Eldridge G. Lapham, George F. Hoar, Jenks.

Respondent's counsel.— Matthew H. Carpenter, Jeremiah S. Black and Montgomery H. Blair.

CHARLES SWAYNE, *Judge United States District Court, Florida.*

Impeached December, 1904, for claiming and receiving $10 a day for expenses while holding court outside his district;

for not residing in his district; for abuse of judicial power by causing a receiver of railroad, appointed by him, to furnish him with free transportation, private car, etc., for unlawfully adjudging certain lawyers in contempt of court.

Swayne answered.

Acquitted.

Managers.— Messrs. Palmer, Jenkins, Gillet, Clayton and Smith.

Respondents' counsel.—Anthony Higgins and John M. Thurston.

ROBERT W. ARCHBALD, *Judge United States Commerce Court.*

Impeached 1912, for unlawfully, and through his influence as a judge, making contracts and obtaining options, valuable to him, from railroad companies and others, who were litigants before him; for accepting presents of money, from lawyers and litigants to pay his expenses on a pleasure trip; for appointing as commissioner of jurors, a general attorney for a railroad company.

Archbald answered.

Convicted, removed, and disqualified.

Managers.— Henry D. Clayton, Edwin Y. Webb, John C. Floyd, John W. Davis, John A. Sterling, Paul Howland and George W. Norris.

Respondent's counsel.—R. W. Archbald, Jr., A. P. Worthington, M. J. Martin and Alexander Simpson.

State impeachment

ARKANSAS

POWELL CLAYTON, *Governor of Arkansas.*

Impeached, 1871, for conspiring with members of the state Supreme Court to unlawfully deprive Lieutenant Governor James W. Johnson of his office, to which he had been elected and for which he had duly qualified; for unlawfully removing a county probate judge; for aiding in frauds in the election of members of the state legislature; for accepting bribes, etc.

At the same time a resolution was passed, suspending Clayton from performance of his duties as Governor, and the members of

the House of Representatives by force locked him into the executive chamber and nailed the door, in order that he might not escape and act. The next day he notified the Assembly that he was advised by counsel that the Assembly had no power to suspend him from office.

The next day after the impeachment of Governor Clayton the House of Representatives adopted a resolution of impeachment against John McClure, chief justice of the state, for engaging in the conspiracy with the Governor above mentioned.

As soon as a quorum of the Senate was present, articles of impeachment against the Governor and chief justice were presented.

Other state officers were impeached about the same time.

The Senate thereupon adopted rules for impeachment, which forbade the managers from arguing any preliminary or interlocutory question during the trial for more than ten minutes, and otherwise restricting the managers. Thereupon, the managers reported to the House that in their opinion nc fair or impartial trial could be had. The report was accepted and the managers discharged, and the speaker of the House authorized to appoint another board of managers, which was done. The new managers then reported that they were unable to find sufficient evidence which would warrant the preparation of particular articles of impeachment against the Governor, and requested that they be discharged. The House thereupon resolved "that further proceedings in the impeachment of Powell Clayton be dispensed with, and that the action of this House heretofore taken, be set aside and cancelled; that the Senate be informed of the action of this House in the premises, by the clerk of the House, and that the committee of the board of managers be discharged."

On the same day Governor Clayton sent the Senate a message, declining to accept the position of United States Senator.

A single article of impeachment was presented against Chief Justice McClure for unlawfully issuing an order restraining James M. Johnson, as Lieutenant Governor, from exercising the duties of the office of governor during the period above mentioned.

A compromise was arranged under which Johnson resigned and was appointed Secretary of State. Governor Clayton was re-elected to the Senate of the United States and accepted the office.

A special chief justice was appointed by the Governor to preside on the trial of Chief Justice McClure, who filed a demurrer to the articles upon the ground that although he was charged with unlawfully issuing an order it was not alleged that he did it with corrupt motive. The demurrer was unanimously sustained.

California

William R. Turner, *Judge of the Eighth Judicial District.*

Impeached in 1851, for committing Stephen J. Field for contempt of court to an imprisonment for forty-eight hours and a fine of $500, and his disbarment for taking legal steps to set aside the contempt proceedings, and the similar treatment of two other members of the bar who assisted him in the matter. Mr. Fields was released by habeas corpus immediately after his arrest, but Judge Turner had him arrested again, threatening with commitment the judge who granted the writ, and after the attorneys had been restored to the bar by a mandamus from a higher court, attempted again to disbar them. The matter was compromised by a passage of a law, redividing the state into judicial districts, and assigning Judge Turner to another part of the state.

He subsequently resigned to avoid an impeachment for habitual drunkenness and other charges.

Henry Bates, *State Treasurer.*

Impeached 1857, for conspiracy to defraud the State through loans and deposits of the state's funds, and other official misconduct.

The respondent pleaded to the jurisdiction of the court in his answer, which alleged that his resignation had been accepted by the Governor, and that he was no longer in office when the articles were adopted by the Assembly.

The managers filed a replication which alleged that the respondent was treasurer of the state at the time of the impeachment; that if he had been indicted, the indictment was found after the articles had been presented. To this Bates filed a plea which claimed that the allegations in his answer, which were not

denied by the replication, were sufficient to show that the court had no jurisdiction. The Senate overruled the objection to the jurisdiction and ordered a further answer, which the respondent refused to make.

Convicted, removed from office and disqualified in a judgment which recited the fact that he had resigned after his impeachment.

JAMES H. HARDY, *Judge of the Sixteenth Judicial District.*

Impeached 1862, for wilfully and wrongfully making decisions for the benefit of his friends in civil and criminal suits pending before him; for drunkenness upon the bench and other misconduct in office.

He was convicted by a two-thirds vote, under the fifteenth article of impeachment, which charged him with profane language out of court, expression of sympathy with secession, Jefferson Davis and the Confederacy.

Sentenced to removal from office.

FLORIDA

HARRISON REED, *Governor.*

Impeached 1868, for lying while transacting business with members of the Legislature; for giving commissions to officers in blank; and for embezzlement.

The articles of impeachment were presented to the Senate in the presence of only eight senators, twenty-four being the entire number of the Senate when full, but several elected being disqualified by the acceptance of inconsistent offices, and vacancies existing also through resignation, so that eight was a majority of the number of senators in office. By the state Constitution on impeachment of the Governor, he was suspended from office until the end of the trial. Immediately, the Lieutenant Governor issued a proclamation that he was acting Governor. Governor Reed refused to surrender possession of his office and requested an opinion of the Supreme Court on the question of whether a quorum of the Senate had been present when the impeachment was presented, and whether the proceedings had the effect of suspending him from office. The Lieutenant Governor wrote to the

court, claiming that it ought not to give a legal opinion upon the questions which were within the exclusive jurisdiction of the Senate and Assembly. The court held unanimously that no quorum of the Senate was present when the impeachment was presented, and, consequently, Governor Reed had not been suspended from office.

In the Matter of the Executive Communication of the 9th of November, 1868, 12 Florida, 653.

In the meantime the Legislature had adjourned, and when it reconvened, both houses recognized Governor Reed in office, and the impeachment was abandoned.

Georgia

Henry Osborne, *Judge Superior Court, Camden County.*

Impeached 1791, for falsification of election returns.

Convicted, removed and disqualified for thirty years, and fined $600 to defray expenses of impeachment.

John Loving, Samuel Jackson and Fleming F. Adrian, *Commissioners of Fraction Sales.*

Impeached 1825, for retention of moneys collected by them as cash payments for sales of fractional parts of surveys; for withholding large number of state grants so that they might execute complete titles to the purchasers of said fractional surveys, and for the mutilation of records, etc.

Acquitted.

Washington L. Goldsmith, *Comptroller General.*

Impeached 1879, for the collection of illegal fees; for making false returns, and converting to his own use moneys collected as insurance taxes and fees which belonged to the state, etc.

Demurrer to several articles, which was sustained as to one and overruled as to all the others.

Court permitted evidence of offenses charged in articles which were committed during a term of the same office preceding that then held by the respondent.

Convicted, removed and disqualified.

JOHN W. RENFROE, *State Treasurer.*

Impeached 1879, for corruptly receiving commissions from banks in return for depositing with them state funds.

Acquitted.

ILLINOIS

THEOPHILUS W. SMITH, *Justice of the Supreme Court.*

Impeached 1833, for permitting his son, then a minor, to bargain off the office of clerk of the Circuit Court of Madison county, and to hire another to do the work thereof at $25 a month, reserving the fees of said office to himself. For committing a Quaker to jail and certifying that he was incompetent to serve as a juror, by reason of want of soundness of mind, because he presented himself to the court with his hat on, and other improper conduct in office.

Acquitted.

IOWA

JOHN L. BROWN, *Auditor of the State.*

Impeached 1886, for failure to keep proper accounts and to make reports of office; for bribery and for other misconduct in office.

Acquitted.

KANSAS

CHARLES ROBINSON, *Governor.*

Impeached 1862, for complicity in the sale of bonds of the state of Kansas, par value $56,000, to the United States, at 85 per cent upon their amount, of which the state received only 60 per cent, the remainder being retained by one Stevens, a leading Kansas politician, who made the sale of the bonds.

Acquitted upon the ground that there was no evidence of his complicity in the act.

JOHN W. ROBINSON, *Secretary of State* and GEORGE S. HILYER, *State Auditor.*

Impeached in 1862 for their complicity in the bond transaction above described. Each of them was convicted and removed from office.

THEODOSIUS BOTKIN, *Judge of the Thirty-second Judicial District.*

Impeached 1891, for habitual drunkenness both on and off the bench, and for other misconduct in office.

Demurrers were sustained to the articles, which charged drunkenness when not engaged in discharge of his official duties; the illegal purchase of intoxicating liquors and the frequenting of places where he knew that liquor was illegally sold.

Acquitted.

The case is interesting as giving a view of the state of civilization in Kansas at that time.

LOUISIANA

BENJAMIN ELLIOTT, *Judge of the City Court, City of Lafayette.*

Impeached 1844, for failing to keep records of the naturalization of aliens, and for permitting his clerk to issue false certificates of naturalization.

Convicted and removed from office.

GEORGE M. WICKCLIFFE, *Auditor of Public Accounts.*

Impeached 1870, for bribery and incompetence.

Convicted, removed and disqualified.

HENRY C. WARMOTH, *Governor.*

Impeached 1872, for forcibly expelling from office the Secretary of State and the issuing of a commission to another in his place. For the unlawful appointment, after the adjournment of the Senate, of an Attorney General and judge and other officers. For the offer of a bribe of $50,000 to the Lieutenant Governor, etc.

Respondent appeared by counsel and filed exceptions, disputing the legality of the court and the lower house, on the ground that they were not lawful bodies. The court rejected these and refused to permit them to be filed. Before any further proceedings the Senate requested the advice of the chief justice, whether the trial should proceed after the respondent's term of office had expired.

Chief Justice Ludeling delivered an opinion that it could not, saying: "I question the policy of kicking a dead lion." The Senate adopted this opinion and adjourned.

Massachusetts

William Greenleaf, *Sheriff of Worcester County.*

Impeached 1788, for converting public money to his own use.
Demurred and pleaded not guilty.
Convicted and removed from office.

N. Hunt, *Justice of the Peace.*

Impeached 1794, for making false record entries.
Pleaded not guilty.
Convicted and suspended for one year.

John Vinal, *Justice of the Peace.*

Impeached 1800, for bribery, etc.
Pleaded not guilty.
Convicted, removed and disqualified.

Moses Copeland, *Justice of the Peace.*

Impeached 1807, for entering judgments in the name of a fictitious endorsee upon promissory notes owned by him. For taking judgments in cases before hour of return of summons and refusing to vacate judgments, and for accepting a bribe of $1.50.
Acquitted.

James Prescott, *Judge of Probate County Court of Middlesex.*

Impeached 1821, for extortion in collection of exorbitant fees in excess of amount authorized by statute. Fifteen articles in all, and he was acquitted on all except two.
Convicted and removed.
Among respondents' counsel were Samuel Hoar and Daniel Webster.

Samuel Blagge, *Justice of the Peace.*

Impeached 1826, for making false certificates that negroes and Indians had appeared before him and declared that they were free and resided in free states.
Acquitted.

Michigan

Charles A. Edmonds, *Commissioner of the State Land Office.*

Impeached 1872, for corruptly withholding land for sale for the benefit of certain land dealers, in return for moneys paid to himself and deputies and clerks; for furnishing secret information concerning such lands to land dealers, whose profits he shared, and for other corrupt conduct in office. And for depositing in the post office of the United States in the state of Indiana an obscene newspaper and circulating such newspaper in the state of Michigan, and for other immoral personal conduct.

Acquitted.

Defended by John B. Shipman.

Minnesota

William Seeger, *State Treasurer.*

Impeached 1873, for concealment of delinquencies of his predecessor in office and loaning state funds to private individuals, some of them his bondsmen.

Seeger resigned, and the Governor accepted his resignation, but the Senate voted twenty-six ayes and ten nays that they would receive no evidence concerning such resignation. Seeger's counsel then filed a plea of guilty with a disclaimer of corrupt motives. The Senate thereupon found him guilty and sentenced him to removal from office.

Sherman Page, *Judge of the Tenth Judicial District.*

Impeached 1878, for maliciously adjourning for four years a trial of an indictment for libel against him, pending the adjournment holding the accusor under heavy bail; for refusing to make orders fixing the number of deputies for the sheriff; for nonattendance upon terms of court, and for preventing the payment of such deputies; for maliciously attempting to induce a grand jury to indict a county treasurer who had committed no crime, and for other improper conduct in office.

Acquitted.

Managers were ordered to furnish a bill of particulars as to

certain articles which the respondent moved to quash because too indefinite.

E. St. Julien Cox, *Judge Ninth Judicial District.*

Impeached in 1881, for drunkenness in discharge of his official duties.

Convicted.

Managers were ordered by court to secure bill of particulars as to certain articles to which the respondent had demurred because too indefinite.

Missouri

Richard S. Thomas, *Circuit Judge.*

Impeached 1826, for refusing to recognize the rightful clerk of his court; for putting his own son in the place of the clerk, and for other improper conduct in office.

Convicted.

Albert Jackson, *Circuit Judge.*

Impeached in 1859, for insulting, absuive and tyrannical conduct toward parties and counsel; for imposing illegal imprisonments and refusing writ of habeas corpus, and other improper conduct in office.

Acquitted.

James Proctor Knott was one of the managers on this trial. Judge Jackson defended in person.

Philander Lucas, *Judge Fifth Judicial Circuit.*

Impeached 1872, for certifying bills of costs in blank against a county in his circuit, and for other improper conduct in office.

Respondent answered and defended. Articles were withdrawn at the conclusion of the evidence offered in their support.

Mississippi

Albert Ames, *Governor.*

Impeached 1876, for failure and refusal to comply with a request of the county treasurer to suspend a sheriff and tax collector, who had failed and refused to make reports and payments of taxes collected; for the appointment of justice of the peace and

constables for partisan purposes; for permitting the State Treasurer to remain in office and in possession of the treasury after the state Attorney General had notified the Governor that his bond was insufficient. For defrauding the State of $43,750 by granting contracts without competitive bidding, etc.

Governor Ames wrote to the Legislature that he would resign if the impeachment proceedings were dismissed. The articles of impeachment were withdrawn and he resigned.

ALEXANDER K. DAVIS, *Lieutenant Governor of Mississippi.*

Impeached 1876, for selling a pardon to a convicted murderer, while the Governor was absent from the state. Although he attempted to resign, he was convicted, removed and disqualified.

THOMAS W. CARDOZO, *Superintendent of Education.*

Impeached 1876, for embezzlement of state funds.

Pending the proceedings, he resigned, whereupon the Assembly abandoned the impeachment, and the Senate, sitting as a court, adjourned.

NEBRASKA

DAVID BUTLER, *Governor.*

Impeached 1871, for having stolen state funds, receiving bribes and other corrupt acts in office.

The articles of impeachment in this case were adopted at an extraordinary session, called by the Governor to consider specific legislation. There was no mention of impeachment in the call.

The respondent filed a special plea to the jurisdiction of the court on this ground, which was overruled.

Convicted.

JOHN GILLESPIE, *State Auditor.*

Impeached 1871, for corrupt connivance with Butler in reference to expenditure of state funds and other misconduct in office.

This impeachment was never tried, and the following year, 1872, was withdrawn by the succeeding House of Representatives.

WILLIAM LEESE, *Formerly Attorney General.*

Impeached 1893.

Articles dismissed upon the ground that no impeachment could be sustained against a man who was not in office.

GEORGE HASTINGS, *Attorney General;* JOHN C. ALLEN, *Secretary of State,* and AUGUSTINE R. HUMPHREY, *Commissioner of Public Lands.*

Impeached 1893. Articles charged misappropriation to their own use of public funds.

Acquitted because of lack of proof of criminal intent.

NEW JERSEY

HENRY MILLER, *Justice of the Peace.*

Impeached 1830, for prosecuting before another justice of the peace for his own benefit a note which had been placed in his hands for prosecution and collection before himself for the benefit of the true owner thereof; for attempting to intimidate a defendant from appealing and for failing to keep accurate docket of the proceedings in his court.

Convicted and removed.

DANIEL C. COZENS, *Justice of the Peace.*

Impeached 1837, for issuing summons, entering judgment without the knowledge or consent of the plaintiff named therein, and for using profane language on the bench.

Acquitted.

PATRICK LAVERTY, *Keeper of State Prison.*

Impeached 1886, for improper relations with women prisoners.

Convicted, removed and disqualified.

PATRICK W. CONNELLY, *Justice of the Peace.*

Impeached March 15, 1895, for assaulting lawyer who had called upon him upon official business, and for falsification and alteration of his docket.

Convicted and removed.

New Hampshire

Woodbury Langdon, *Judge Superior Court.*

Impeached 1790, for unlawfully failing to hold court at appointed terms.

Resigned, and proceeding was quashed.

New York

John C. Mather, *Canal Commissioner.*

Impeached 1853, for corruptly favoring contractors; for letting contracts to personal friends for high prices; for neglecting inspection of canals; for claiming and receiving unlawful mileage and other improper conduct in office.

Answered. General denial.

At opening of trial, counsel for respondent moved to quash first five articles on ground that none of them stated impeachable offenses, the principal point being that the statute under which contracts had been let had been adjudged unconstitutional.

Motion denied.

Acquitted.

Managers.—R. Philfaxed Loomis, Marshal B. Champlain, Orlando Hastings, Solomon B. Noble, Walter Sessions, John McBurney, Daniel P. Wood.

Managers' counsel.— John K. Porter.

Respondent's counsel.— James T. Brady and Rufus W. Peckham.

Robert C. Dorn, *Canal Commissioner.*

Impeached 1868, for conspiracy and bribery in letting contracts and other improper conduct in office.

Respondent moved to quash one article as too indefinite. Granted.

Respondent then moved to quash other articles on the same ground. Denied for reason that motion to quash articles must be made as to all articles at one time.

Acquitted.

Managers.— John C. Jacobs, John F. Little, Edmund L. Pitts, M. P. LeBeau, William S. Clark, William B. Quinn, John L. Flagg, Alpheus Prince.

Managers' counsel.— Smith W. Weed, David J. Mitchell.

Respondent's counsel.— Henry Smith, John H. Reynolds, William A. Beach.

GEORGE G. BARNARD, *Justice of Supreme Court.*

Impeached 1874, for unlawfully aiding as such justice, James Fiske and J. Gould to obtain control of the Erie Railroad and Union Pacific Railroad; for improperly favoring certain attorneys; for using obscene and vulgar language while on the bench, and for other improper conduct in office, during his then present term, and during a prior term of the same office.

Respondent moved to quash articles charging improper conduct during a prior term of the same office.

Denied.

Convicted, removed and disqualified.

Managers.— Thomas G. Alvord, W. W. Niles, Albert L. Hays, David B. Hill, James W. Husted, John C. Jacobs, Cyrillo S. Lincoln, L. Bradford Prince and Commodore P. Vedder.

Managers' counsel.—Josiah M. Van Cott, Daniel Pratt, John E. Parsons, Albert Stickney.

Respondent's counsel.—William A. Beach, John H. Reynolds, William O. Bartlett and Rufus F. Andrews.

NORTH CAROLINA

WILLIAM W. HOLDEN, *Governor.*

Impeached 1870, for wrongfully proclaiming counties of Alamance and Caswell in insurrection and occupying the same by military force; for causing unlawful arrests; for refusal to obey writs of habeas corpus, etc.

Trial interesting as it reveals Ku Klux secrets.

Convicted, removed and disqualified.

EDMUND W. JONES, *Judge Superior Court, Second Judicial District.*

Impeached 1871, for drunkenness in public places. A few days after impeachment he resigned, but the Governor refused to accept his resignation unless articles of impeachment were disposed of. The House, thereupon, withdrew the articles.

Ohio

Calvin Pease, *Presiding Judge, Third Circuit of Ohio.*

Impeached 1808, for deciding that a law giving justices of peace jurisdiction of a claim for more than twenty-five dollars and to prevent plaintiffs in other courts from recovering costs when they recovered judgment for more than twenty dollars and less than fifty dollars, was repugnant to both the State and Federal Constitution, and consequently void.

Answered, admitting facts and alleging that he only did his judicial duty as he saw it.

Acquitted.

Judge Tod.

Impeached at about the same time and for similar charges as against Judge Pease; was also vindicated.

John Thompson, *Judge.*

Impeached 1811, for arbitrarily and illegally restricting counsel, in defending trial of one James Graham for larceny, to five minutes, for the purpose of summing up, against the respectful objection of such counsel; for refusing to sign a bill of exceptions when legally tendered, and making improper erasures in such bill of exceptions, and for other improper conduct as a judge.

Acquitted.

James Ferguson, *Justice of the Peace.*

Impeached 1813, for unlawful discharge of persons arrested under a warrant for assault; for refusing to permit the complainant in same case to testify on the part of the state, and for other improper conduct as a justice of the peace.

Acquitted.

Pennsylvania

Francis Hopkinson, *State Judge of Admiralty.*

Impeached 1780, for accepting bribes and presents. Charges dismissed for lack of proof. Court concluded their decision

with an opinion expressing their disapproval of the acceptance of presents by public officers.

James Wilson, afterwards Justice of the United States Supreme Court, and Jared D. Ingersoll were among attorneys for respondent.

JOHN NICHOLSON, *Comptroller General.*

Impeached 1793, for improper recognition of new loan certificates, which had been issued in pursuance to previous act of the Legislature, which had been annulled by a later act. For certifying that they were redeemable, and for appropriating the proceeds of some certificates to his own use.

Acquitted, but he resigned immediately thereafter.

On the same day, both houses of the Legislature passed a resolution for his removal as comptroller. Upon the Governor being notified of this action, he advised the Legislature that the respondent had superseded the removal by resigning his office.

ALEXANDER ADDISON, *President of the Court of Common Pleas in the Fifth Judicial District.*

Impeached 1802, for making political harangues in addressing grand juries, and for insulting associate judges in court.

Convicted and removed from office.

Prosecution conducted by Alexander J. Dallas and McKean, as counsel for House of Representatives. Addison defended himself in person with great vigor and ability.

Challenge of members of court not sustained.

EDWARD SHIPPEN, JASPER YEATES, and THOMAS SMITH, (*being all of the Judges of the Supreme Court of Pennsylvania, except Judge Breckenridge, the only democratic member thereon*).

Impeached 1804, for illegally adjudging one Pasmore guilty of contempt and sentencing him to jail for thirty days — the contemptuous action not being in the presence of the court. This was apparently a political impeachment and failed.

Respondents were acquitted.

WALTER FRANKLIN, *President, and* JACOB HIBSHMAN, *and* THOMAS CLARK, *Associate Judges of the Court of Common Pleas of Lancaster County.*

Impeached in 1816, for improperly refusing to compel certain attorneys to pay over client's money which they had collected and unjustly retained.

Acquitted.

The same Judge Walter Franklin was again impeached in 1825 for delaying administration of justice.

Acquitted.

ROBERT PORTER, *President Judge of the Third Judicial District.*

Impeached 1825, for refusal to furnish his reasons for a report which he made as referee and for dismissing exceptions to such report, for the reasons assigned by the party in whose favor the report was made; for insulting litigants in court; for compounding a felony; for intimidation of jurors, etc.

Acquitted.

SILAS CHAPMAN, *President Judge of Eighth Judicial District.*

Impeached in 1826, for illegal arrest; for refusal to file his opinion in case where unsuccessful party desired to review by writ of error, and for favoritism on the bench.

Acquitted.

TENNESSEE

THOMAS N. FRAZIER, *Judge of Criminal Court of Davison County.*

Impeached 1867, for issuing a writ of habeas corpus against members of the Legislature, who had been imprisoned by the Legislature, and for refusing to accept a return of the sergeant at arms of the Legislature, stating said fact, and punishing said sergeant at arms for contempt of court.

Convicted, removed from office and disqualified.

WEST VIRGINIA

JOHN S. BURDETT, *Treasurer of West Virginia.*

Impeached 1875, for agreeing to keep state moneys on deposit in banks which would loan moneys to his son, and for accepting gratuities; careless conduct of the business of his office.

Convicted, removed and disqualified during remainder of term.

EDWARD A. BURDETT, *Auditor West Virginia.*

Impeached 1876, for failure to keep account of moneys received and disbursed by him; for refusing to make official reports, etc.

Acquitted.

WISCONSIN

LEVI HUBBELL, *Justice of Second Judicial Circuit.*

Impeached 1853, for consulting with one of the counsel in a case pending before him during and after the trial, at the same time borrowing from the same counsel $200. For presiding and adjudicating cases in which he was personally and pecuniarily interested; for other improper and indecent conduct in office.

Acquitted.

Mr. Kresel.—May it please the Court: I shall confine myself to an endeavor to answer as much of the respondent's present contention as is set forth in that paragraph of his special plea which is marked "Second." That part of it reads as follows:

> "And this respondent in further response to the first article of impeachment against him says,
>
> "That this Court ought not to take cognizance of the said article, and this respondent objects to the sufficiency thereof for this: That at the time of making and filing the statement therein referred to, there was nothing in the laws or statutes of this State that required this respondent as a candidate for the office of Governor of the State of New York, to make and file any statement in which should be set forth the contributions of moneys received by him while such candidate."

That refers to the first article of impeachment, and then comes this objection to the second article, to wit:

> "And this respondent in further response to the second article of impeachment against him says: That this Court ought not to take cognizance of the said article, and this respondent objects to the sufficiency thereof, because at the time of making the statement and affidavit or oath referred to in said article there was nothing in the laws or statutes of this State that required him to make oath or affidavit to any statement setting forth contributions made to or receipts of money or property received by him, and that the statement to which the affidavit was attached, as set forth in said second article, was not a statement required by law to be made by this respondent."

In support of these objections, it has been argued by the learned counsel for the respondent that no offense is alleged under article 1, because section 546 of the election law, under which that article is drawn, does not require that a candidate should report moneys received by him as contributions; and that, therefore, an omission of such contributions is no offense under that statute; and that article 2 states neither a violation of section 776 of the Penal Law, under which that article is drawn, nor does the charge alleged amount to the crime of perjury.

The argument is that this second article states no offense under section 776 of the Penal Law, because by the terms of that statute a candidate is required to report only contributions made by him, and not contributions made by others to him; and that, therefore, an omission to state the contributions made to him, is no violation of that statute.

It is further argued that this article does not set forth the crime of perjury, because the oath annexed to the statement in question was not an oath required by law.

We do not understand that the respondent challenges the form of articles 1 and 2, but that the argument is directed solely to the substance of the allegation, hence we shall spend no time in an attempt to prove to the Court that articles 1 and 2 are proper

in form in accordance with the precedents in impeachment proceedings.

Now, then, as to the contention that article 1 states no offense under section 546 of the election law; this article charges that the respondent, while Governor-elect of the State, wilfully and knowingly filed with the Secretary of State on November 13, 1912, a false statement of moneys received, contributed and expended by the respondent during his candidacy for that office. That the statement showed receipts of $5,460 from 68 contributors, and disbursements of $7,724.09, but omitted 11 contributions actually received by the respondent, aggregating $8,500. This article clearly charges an impeachable offense, to wit, a violation of section 546 of the election law which had its origin in the corrupt practices act, now included as article 20 of the election law, and which provides as follows:

> "Statement of campaign receipts and payments. The treasurer of every political committee, which, or any officer, members or agent of which in connection with any election, receives, expends or disburses any money or its equivalent, or incurs any liability or its equivalent, shall, within twenty days after such election file a statement setting forth all the receipts, expenditures, disbursements and liabilities of the committee, and of every officer, member and other person in its behalf. In each case it shall include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement, the names of the persons or committee to whom it was made, and such expenditure or disbursement. Expenditures or disbursements in sums under $5 need not be specifically accounted for by separate items, except in the case of payments made for account of or to political workers, watchers or messengers."

Section 546 ends with this statement:

> "The statement to be filed by a candidate or other person not a treasurer shall be in like form as that hereinbefore provided for, but in statements filed by a candidate there shall also be included all contributions made by him."

The purpose of the corrupt practices act, taken in conjunction with article 74 of the Penal Law, is twofold; first, to regulate and restrict the collection and distribution of campaign funds, both as to amount and manner of use; second, to insure publicity through public report and accounting of every dollar used by anybody in connection with the campaign.

A brief summary of the law may serve to show how these purposes are accomplished. The corrupt practices act begins by providing for a "political committee" which shall include every combination of three or more persons cooperating to influence an election (sec. 304). Section 541 of the election law requires any person, including a candidate, who contributes any money to a campaign, to file a public statement thereof unless he makes the contribution either to a political committee or a candidate.

Section 542 restricts the character of the personal expenses which may be incurred and paid by a candidate, and concludes with the words:

> "A candidate shall in any event file a statement of any contributions made by him."

Section 544 requires all officers or agents of a political committee or candidate who receive or disburse money to account therefor to the committee or candidate.

Section 545 requires vouchers for all expenditures, and then follows section 546, which provides that the treasurer of every political committee which received or disburses campaign money shall, within twenty days after election, file an itemized statement of such receipts and disbursements, showing the amount, date and donor, as to each receipt, and the amount, date and donee, as to each disbursement. The section further provides:

> "The statement to be filed by a candidate or other person not a treasurer, shall be in like form as that hereinbefore provided for, but in statements filed by a candidate there shall also be included all contributions made by him."

It is claimed on behalf of the respondent that this provision of section 546 to the effect that the statement to be filed

by a candidate or other person not a treasurer, shall be in like form as that provided for in section 546 to be filed by a treasurer, does not require a candidate to give an account of contributions made by other persons and given to him.

It would seem that the language of this last sentence in section 546 of the election law is perfectly clear and free from doubt. The provision "the statement to be filed by a candidate shall be in like form as that hereinbefore provided for" can have but one sensible meaning, and that is that the information required by that statute to be given by a candidate shall be of the same nature as required of the treasurer of a political committee. Otherwise the provision is meaningless. The words "shall be in like form" certainly cannot mean that the paper upon which the candidate's statement is to be prepared shall be of the same form as the paper upon which a report of a treasurer of a committee shall be prepared, or that it shall be printed in the same form, or that the ink shall be the same or that the size of the paper shall be the same. It must be given some sensible construction, and the only sensible interpretation is that the statement to be filed by a candidate should set forth, just as the statute required the statement to be filed by a treasurer of a political committee to set forth all the receipts, expenditures, disbursements and liabilities of the candidate in the matter of his election, and that the statement shall include the amount received as contributions, the name of the person or candidate from whom received, the date of the receipt, the amount of every expenditure and disbursement, the name of the person or candidate to whom it was made, and the date thereof.

It has been argued for the respondent that this provision of section 546 must be read in connection with the provisions of the preceding sections in the same article, to wit, the corrupt practices act, and it has been argued that section 541 of that article sustains their contention, and that all that a candidate is required to report are contributions made by himself and disbursements made by himself. But applying the same rule of construction which the learned counsel invokes in support of his argument, and reading in connection with sections 546 and 541 the provisions of section 544 in the same article, it becomes clear that even if it be

admitted that the language of section 546 needs interpretation or construction, such construction must be that the statement required of a candidate must include not only contributions made by him, but also those made to him.

Section 541 provides among other things that any person, including the candidate, who expends or contributes any money in aid of an election of a public official except to the chairman or treasurer of a political committee, or to a general agent authorized by such committee, or to a candidate or to an agent of a candidate, must file a statement such as is required by section 546. In other words, this section provides that if John Smith had made a contribution to the respondent herein, who was a candidate for election, John Smith need not file a statement of such contribution because he gave it to a candidate. And the question therefore still remains if John Smith is not to report it, who must account for and file a statement of such contribution?

The learned counsel for the respondent say that the candidate, the respondent here, need make no such statement. The provisions of the statute would indicate that as long as the contribution is made to a candidate or to an agent of a candidate, the burden is thrown upon such candidate to report such contribution. The whole history of the legislation upon the subject of campaign contributions and campaign expenses clearly shows that the one purpose of it to was give the widest publicity possible to such contributions and expenses. The public wants to know and is entitled to know who gave money to help elect our public officials. If the respondent's contention is correct, namely, that he as a candidate was under no obligation to report contributions made to him personally, then it would follow that contributions made by third parties to candidates directly would never see the light of day, would never become public, and the purpose of the law would be defeated. But the statutes are not so impotent. Section 544, to which I call attention, provides as follows:

> "Whoever, acting as an officer or member or under the authority of a political committee, or under the authority of a candidate for public office, or for any office, whether public or not, to be voted for at a primary election, or for

nomination at a primary election or convention, or for nomination by petition under the provisions of the election law."

Now, then, going back to the beginning,

"Whoever receives any money or its equivalent or promise of the same, or expends or incurs any liability to pay the same, shall,"

Do what?

"Shall within three days after demand and in any event within fourteen days after such receipt and expenditure, promise or liability, give to the treasurer of such candidate or to such candidate or an agent authorized by him, a detailed account of the same."

An account of what? An account of such receipt, expenditure, promise or liability.

"He shall give a detailed account of the same with all vouchers required by this article."

In other words, the statute provides that an agent of a candidate who receives a contribution shall within fourteen days give an account of the same to the candidate and then the candidate shall include the same in his report.

It would seem, therefore, that this section clearly contemplates that a candidate shall report contributions made to him or to his agent or other persons, because the statute provides that within fourteen days after such receipt, expenditure, promise or liability, the agent shall give a detailed statement to the candidate with all vouchers required by this article. And the statute proceeds to provide that this shall be a part of the accounts and files of such candidate.

"A detailed account of the same" must necessarily refer to the preceding language in the statute, namely, an account of the receipts, expenditures, promises or liabilities, and the statute provides that the candidate shall make such account part of the accounts of such candidate. So not only is it provided by section

546 that a candidate must report contributions received by him, but a reference to the other provisions in the corrupt practices act indicates clearly that such was the intention of the framers of this law and such was the plain provision of it.

Sections 550 to 560 provide a summary method of enforcement of the requirements of the corrupt practices act by proceedings for contempt as follows:

If any person or committee either fails to file a statement at all or files a false or defective statement or fails to comply with any other of the requirements of the article, the Supreme Court or any justice thereof may compel compliance with the law, upon application of the Attorney General, district attorney, any candidate or any five qualified voters at the election. The court or justice is vested with summary jurisdiction to inquire into the facts and circumstances of such alleged violation of the law, and the proceeding is given a preference over other causes both in the court of original jurisdiction and on appeal.

If the court finds that the offense was not wilful, it shall require the offender forthwith to comply with the law. If the offense was wilful or if the offender fails to comply with the court's judgment, the court may impose a fine not exceeding $1,000 or imprisonment for not more than one year, or both.

Thus we have a complete scheme for regulation of and publicity regarding every dollar used for campaign purposes. Every candidate must account for moneys received and disbursed by him. Every political committee must account for moneys received and disbursed by it. Every person who contributes money independently of a candidate or committee must report the contribution. For a wilful violation of the act the court may summarily punish by fine or imprisonment or both.

Turning now to article 1 of the articles of impeachment, we find the respondent charged with a gross violation of the provisions of the election law. As Governor-elect of the State he did file with the Secretary of State a statement purporting to conform to the provisions of the statute, in which were set forth receipts from 68 contributors of $5,460, and expenditures of $7,724.09, but this statement is alleged to have been false and a

wilful violation of the statute, in that the respondent omitted therefrom 11 other contributions which he had received, aggregating $8,500. That such conduct amounts to an impeachable offense is, we submit, self-evident. The acts charged would have made the respondent liable to a fine of $1,000 and imprisonment for one year. Can it possibly be argued that this high Court is to be stripped of power to punish for such an offense, and that the offender is to go free, merely because a contempt proceeding was not brought in the precise manner and within the precise period required by the statute? Surely the power of a sovereign people is weak indeed, if such an offender can be restored to the executive chair of this State.

The concluding paragraph of section 546 reads as follows:

> "The statement to be filed by a candidate or other person not a treasurer shall be in like form as that hereinbefore provided for, but in statements filed by a candidate there shall also be included all contributions made by him."

The term "like form" used in section 546 of the election law means not only that the candidate's statement must be made out on a paper similar in form to the paper used by a treasurer of a political committee, but that the candidate's statement must contain the same items of information as are required in the statement of a treasurer of a political committee.

Our analysis of the statute has shown that publicity of campaign funds is secured through a threefold accounting; first by candidate, second by political committee, third by every person who gives independently. Obviously, a political committee need account only for money received and the method of disbursement, for it cannot in the nature of things have money of its own. Hence the provisions of section 546, which require the treasurer of the committee to file a statement showing the receipts and disbursements. Naturally a candidate must file a similar statement of receipts and disbursements; otherwise a contribution made to a candidate by a private person would never become public, and the whole purpose of the statute would be defeated. Hence the provision in the concluding sentence of section 546 that "the statement to be filed by a candidate or other person not a

treasurer, shall be in like form as that hereinbefore provided for." But a candidate may have private funds and may wish to make a private contribution apart from the money received and disbursed in connection with his own campaign fund.

Therefore, the additional requirement " but in statements filed by a candidate there shall also be included all contributions made by him." Whether or not the Penal Law requires a candidate to account for his campaign receipts there can be no question that the election law does require such.

In form, the article is not open to criticism. It may not measure up to the niceties of a pleading in the form of an indictment, but that we have shown is not requisite in articles of impeachment. The article alleges:

1 That the respondent was a candidate for a certain public office.

2 That having been such candidate it was his duty to file the statement required by section 546 of the election law.

3 That he filed what purported to be such a statement, and

4 That the statement was false, as he knew in certain particulars set forth at length.

Here, then, in plain and concise language is set out every element of a violation of this particular statute in a form in which, we venture to say, even an indictment would be proof against demurrer.

We submit, therefore, that article 1 is good both in form and substance.

We now come to a consideration of article 2.

This article charges that the respondent, while Governor-elect of the State, filed in the office of the Secretary of State, on November 13, 1912, a statement under oath, purporting to show his campaign receipts and expenses in which he set forth that such receipts amounted to $5,460 from 68 contributors, and that the expenditures were the items, aggregating $7,724.09. The article charges that this statement was false to the knowledge of the respondent, in that he had received contributions from the various persons whose names are set forth in the article, such

contributions aggregating the sum of $8,500, and that he committed perjury in swearing to a false affidavit attached to such statement.

It is contended on behalf of the respondent that section 776 of the Penal Law, under which this article is framed, and was apparently drawn, does not require a candidate to report contributions received by him, but only contributions made by him, and that, therefore, the omission of certain contributions received by him cannot be a violation of this section; and that section 546 of the election law does not require a candidate's statement to be under oath, and, therefore, no perjury can be predicated upon the false affidavit which is attached to his statement.

Section 776 provides:

> "Failure to file a candidate's statement of expenses. Every candidate who is voted for at any public election held within this State shall, within ten days after such election, file, as hereinafter provided, an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who received such money, the specific nature of each item, and the purposes for which it was expended or contributed. There shall be attached to such statement an affidavit setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly, by himself or through any person, in aid of his election. Candidates for offices to be filled by the electors of the entire State or any division or district thereof, greater than a county, shall file their statements in the office of the Secretary of State. The candidates for town, village and city offices, excepting in the city of New York, shall file their statement in the office of the town, village or city clerk, respectively, and in cities wherein there is no city clerk, with the clerk of the common council of the city wherein the election occurs. Candidates for all other offices, including all officers in the city and

county of New York, shall file their statements in the office of the clerk of the county wherein the election occurs, unless the county has a commisioner of election, in which case candidates shall file their statements in the office of such commissioner of elections."

The statement filed by the respondent contains a list of 68 contributions aggregating $5,460, and an itemized list of the expenditures, aggregating $7,724.09, and attached to said statement is an affidavit, sworn to by the respondent, before a commissioner of deeds of the city of New York, which reads as follows:

"State of New York,
City and County of New York } ss.

Wm. Sulzer, being duly sworn, says that he is the person who signed the foregoing statement, that said statement is a full and detailed statement."

Of what?

"Of all moneys received, contributed or expended by him."

Now, leave out "contributed and expended" and read it

"that said statement is a full and detailed statement of all moneys received by him, directly or indirectly, by himself or through any other person in aid of his election.

(Signed) WM. SULZER."

Sworn to before a commissioner of deeds on the 13th day of November, 1912.

Neither of the objections urged against this article is tenable

The objection that section 776 of the Penal Law refers only to contributions made by candidates themselves is too narrow, and violates the very purpose for which the statute was enacted. The history of the entire legislation upon the subject of publicity of moneys received and spent in aid of elections of public officials, indicates a clear intention of the Legislature to give to such receipts and expenditures the widest publicity possible, and any statute upon this subject must receive at the hands of the court a liberal construction which would tend to carry out this

unmistakable legislative intent; unless, therefore, the language of section 776 clearly admits no interpretation other than that urged for it by the respondent, the Court must give to that section the liberal construction claimed for it by the managers.

The statute requires the filing of " an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself, or through any other person in aid of his election." We contend that the word "contributed" is not modified by the phrase " by him," but that that phrase refers only to the word " expended " immediately preceding the phrase, and that the word " contributed " is modified in that sentence only by the last phrase in the sentence, " in aid of his election." The disjunctive " or " separating the words " contributed " and " expended " indicates clearly the intent of the Legislature not to limit or qualify the meaning of the word " contributed " in the same way as the word " expended " is qualified. " Contributed " in that sentence means contributed by anybody, while " expended " refers only to expenses made by a candidate himself.

This construction harmonizes with the whole scheme and the purpose of the legislative enactment regulating campaign funds and the publicity to be given to them, while the construction contended for by the respondent defeats that very purpose. The object is to disclose to the public not only the amounts and objects of the candidate's expenditures, but the source of all contributions received by him. Furthermore, a statement of the receipts is necessary and important in order to check up his reports of disbursements and thus minimize the possibility of fraud and corruption.

The provisions of section 775 of the Penal Law immediately preceding the section now in point are significant as showing such legislative intent.

Subdivision 4 of section 775 prohibits

> " any gift, promise or contribution upon the condition or consideration of receiving an appointment to a public office or a position of public employment."

Section 776 then proceeds to require every candidate to file " an itemized statement showing in detail all the moneys con-

tributed or expended by him." Thus we have in the former section a prohibition against contributing money in consideration of a promise of appointment and in the latter section a requirement that every candidate shall report all contributions received by him in order that the public may watch his conduct in office and may judge whether his appointments are influenced by contributions which he has received during his candidacy.

But assuming for the purposes of the argument that the construction of this section made by the respondent is the correct one, what follows? Only this: that the false statement filed by him is not brought strictly within the letter — though it is surely within the spirit of the provisions of section 776 of the Penal Law, and that, therefore, he could not be convicted of the crime defined by that statute. But the question whether crimes only are impeachable offences I think, I may say, this Court is going to decide in only one way.

It is now quite beside the question that the acts charged in this article do not constitute an offence under section 776 of the Penal Law. The statement is nevertheless false and it is charged that the respondent knew it was false when he made it. Is he to escape condemnation in this Court for knowingly making this false statement under oath because forsooth a strained and narrow construction of the language of the statute keeps him just out of the grasp of the criminal law?

So much for the objection under section 776.

Now, as to the question of perjury.

The claim that this article must be quashed because it charges that the respondent committed perjury in swearing to the false affidavit is surely untenable.

Perjury is defined as follows by section 1620 of the Penal Law, omitting that part of the statute which is not relevant:

> "A person who swears . . . that no . . . affidavit or other writing by him subscribed is true . . . on any occasion on which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice, or may lawfully be administered and who . . . on such . . . occasion, wilfully and

knowingly . . . deposes . . . falsely, in any material matter, or states in his . . . affidavit, . . . any material matter to be true which he knows to be false, is guilty of perjury."

Article 2 charges that the respondent made and filed a statement which he swore was " in all respects true and that the same is a full and detailed statement of all moneys received, contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election," when in truth and in fact the statement was not a full statement of all moneys contributed, since there were omitted from the statement contributions amounting to $8,500.

The charge contains every element of the crime. The respondent has sworn that an affidavit or writing by him subscribed is true. The oath is required by section 776 of the Penal Law, and he has wilfully and knowingly stated in his affidavit a material matter to be true which he knew to be false, to wit, that the accompanying statement was in all respects true and was a full and detailed statement of all moneys received or contributed or expended by him in aid of his election, whereas, in fact, it was an incomplete and false statement of such receipts and contributions.

But it is argued that our interpretation of section 776 of the Penal Law is incorrect, and that the only statement required of a candidate by that section is a statement of moneys contributed (by him) or expended by him in aid of his election. For the reasons hereinabove set forth, we contend that such an interpretation of the section is illogical, strained and tends to defeat the very purpose of the statute. But even if this construction of the section be accepted we still maintain that the respondent's conduct as charged in article 2 amounts to the crime of perjury. The respondent certainly professed and intended to swear to a false statement of his campaign receipts. That he was required to file such a statement of receipts by the election law, section 546, if not by the Penal Law, cannot be questioned. Because he combined the two statements in one and swore to the correctness of the whole, can we pick out one false item and say that as to this he did not perjure himself while as to other false items he might have or did perjure himself?

And at this point it may not be amiss to call the Court's attention to the circumstances surrounding the adoption of the form of statement which was used by the respondent in order to show that not only did the respondent intend this statement to be taken as an accurate account of all contributions received by him, but that the persons officially charged with the duty of adopting a form to be used by candidates have acted under the belief that section 776 of the Penal Law required a statement under oath of all contributions received by a candidate.

And curiously enough, in the adoption of this very form of statement, one of the learned counsel for the respondent played no small part. We learn from the Secretary of State's office and from the Attorney General's office that when the corrupt practices act was enacted in 1909, and section 776 was reenacted in the Penal Law, it became the duty of the Secretary of State, pursuant to the requirements of the corrupt practices act to adopt a form to be used by candidates in making their report. The corrupt practices act, as is well known, was enacted largely through the instrumentality of an association known as the "Law and Enforcement League." Our brother, Judge Herrick, now of counsel for the respondent, was at that time the counsel to the Law and Enforcement League. The Secretary of State, cooperating with the Attorney General, drew up the form of statement which is now in use, and which was used by the respondent in making his report, submitted it to Judge Herrick for his approval, and Judge Herrick approved it, and, it will be noted, that the printed form contains a copy of section 776 of the Penal Law and contains the form of affidavit which was made by William Sulzer:

> ". . . . . being duly sworn, says that he is the person who signed the foregoing statement, that said statement is in all respects true and that the same is a full and detailed statement of all moneys received, contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election."

Thus, the learned counsel for the respondent was at that time at least of the opinion that section 776 did require a candidate to

report under oath all moneys received, contributed or expended by him.

Mr. Herrick.— Have you any objection to my interrupting you?

Mr. Kresel.— No, I do not think so.

Mr. Herrick.— I was not counsel for that league and no such form was submitted to me.

The President.— I think it is just as well to avoid these personalities.

Mr. Herrick.— It is not a personality, may it please the Court, but simply a correction.

The President.— I think it is wiser not to go into it. You can refer to their decisions, but I think it is wiser not to refer to these particular gentlemen, on the one side or the other, as having decided anything, and surely there is no law of estoppel that counsel having argued a point in one case may not argue the reverse of it in another case.

Mr. Kresel.— But even if the statement of receipts was not expressly required by the Penal Law, it certainly became a material part of a statement which was required by that law, and which he made, filed and swore to in accordance with the provisions of that law. Moreover, the statement of receipts, as we have shown above, is important and material as tending to support the accompanying statement of expenditures and disbursements. If in fact the respondent received contributions aggregating $8,500 in addition to the contributions for which he accounts, then manifestly the statement of expenditures must be false and incomplete, for he would then have received upwards of $13,000 in his campaign fund and accounts for the disbursement of only $7,700.

Under the broad interpretation which has been placed upon the perjury statute by the courts of this State, we submit that the acts charged unquestionably constitute perjury.

The Court of Appeals as recently as 1903 has said:

> "It is to be observed that the statute has essentially enlarged the rule which existed at common law in relation to

the crime of perjury. The evident purpose of the Legislature was to adopt a statute which would include and provide for the punishment of the act of taking a false and corrupt oath in this State whenever it was required or permitted by our laws or by the laws of any other state or commonwealth that might be regarded or treated as valid here. In other words, the purpose of this statute was to include within the definition of the crime of perjury the taking of any and every false and corrupt oath unless it was purely voluntary and extrajudicial, in not being required, authorized or permitted by any law that might be enforced or carried into effect in our jurisdiction or elsewhere, or in not being necessary for the prosecution or defense of a private right or for the ends of public justice wherever sought to be administered." People v. Martin, 175 N. Y. 315, 319.

In Wood v. The People, 59 N. Y. 117, the Court of Appeals held that it is not necessary that the false statements tend directly to prove the issue in order to sustain an indictment for perjury; if circumstantially material or if it tends to support and give credit to the witness in respect to the main fact, it is perjury. Whereas in the case at bar, as we have pointed out above, the false statement as to receipts is circumstantially material in that it tends to support and give credit to the affiant in respect to the main fact, namely, the amount of expenditures and disbursements.

We, therefore, submit that under a logical and reasonable construction of section 776 of the Penal Law the sworn statement of campaign receipts was a necessary and vital part of the statement required to be filed by the respondent and that even if this Court construes that section otherwise, nevertheless the items in question were material and the false statement thereof constituted perjury. And even if the respondent's conduct charged in the two articles was not such as would lay him open to conviction in a criminal court for violation of section 546 of the election law or section 776 of the Penal Law or of perjury, yet we say that the acts charged are impeachable offenses, for such an offense need not be a crime. Can it be contended for a moment that a Governor-elect of this great State, who files in the

office of the Secretary of State, to become a public record, a false statement under oath, knowingly and wilfully and fully believing that such statement under oath was required by the laws of the State, may be saved from impeachment, acquitted before this Court and restored to his great office merely because he might legally have omitted the items in question and embodied them in a companion statement to be filed in the same office for the same purpose, but not under oath? Granting for the sake of argument that his conduct just escapes by a technicality the legal crime of perjury, does it not merit condign punishment? May the offender be heard to argue upon such a flimsy basis that he is still fit to administer the affairs of the State and to receive and deserve that public confidence and respect without which no executive could properly fill that high office?

Mr. Parker.— Mr. Presiding Justice, may I have a few minutes?

The President.— Yes.

Mr. Parker.— May it please this High Court of Impeachment: It is not really to add anything to that which has been said by my associates that I ask your attention for a very few minutes. The argument of Senator Brackett I approved as well as the argument of Mr. Kresel. But there is one point to which I desire to give emphasis and one upon which I desire to express a personal view, for it is one about which I have not had an opportunity to consult my associates.

I wish to call your attention particularly to section 7 of article 10 of the Constitution. It has been considered in your hearing today. It is my view that this section 7 has nothing whatever to do with the impeachment provision of the Constitution; that it is a concurrent remedy standing alone and by itself.

Let me invite your attention again to the impeachment provisions briefly. The first Constitution, you will remember, provided for impeachment for mal and corrupt conduct in office. Then came the Constitution of 1821. To it were added three words which were intended to broaden it, so that to the phrase "mal and corrupt conduct in office" was added "high crimes and misdemeanors." Then came the year 1846 when the Constitution was

again revised. This time all the limitations as to cause were stricken out. There were limitations before, less in 1821 than in 1777. But all limitations of every kind were swept out of existence by the amendment of the Constitution in the year 1846. And when the constitutional convention was held in 1904, there was no change in this respect. Then, is it not necessarily true that from 1846 down to this very date, the Assembly of this State has been at liberty by the express command of the Constitution to impeach for whatever cause it sees fit? Now again, the High Court of Impeachment of this State has been at liberty during the same period of time, covering now over 65 years, to convict for such causes as the High Court of Impeachment deems proper. In that same year, 1846, it is evident from other provisions of the Constitution with which many of you are very familiar, I know, and therefore I hate to detain your attention even for a few minutes, it is evident that there was a feeling abroad in this State that there should be an easier method of getting rid of unworthy officials and so they provided in the very first section — I will not stop to read it — they conferred in the very first section of this article 6 as a concurrent remedy, the power upon the two houses of the Legislature by a two-thirds vote to remove from office a judge of the Court of Appeals or a justice of the Supreme Court — to remove from office for cause, the reasons to be stated. While the remedy is concurrent, you find that by this new remedy there was no power of disqualification. There has remained during all the history of the Constitution in the impeachment provision the right to disqualify for future office as well as the right to expel from office, but in this concurrent provision relating to the removal of the judiciary, the power to remove alone is given; the power to disqualify is taken away. This constitutional convention which worked out the Constitution of 1846 apparently reached the conclusion that there ought to be a like concurrent remedy as to certain of the civil officers of this State. For some reason, whether the convention failed to agree upon it or not I do not know, but for some reason it did not work out machinery, as it did work it out as to the removal of judges. It provided that the Legislature should create that machinery.

Now let me read that section 7 of article 10: "Provision shall be made by law"— that is mandatory — " for the removal

for misconduct or malversation in office of all officers except judicial, whose powers and duties are not local or legislative." Now, there was a command laid by that Constitution upon the law-making power of this State to provide the machinery broad enough in its terms to reach the Governor, for it says, "all officers," but it is not at all likely that they had in mind that an attempt would be made to remove a Governor by such method. It was probably intended for the minor administrative officers, but it must be conceded that it is broad enough to include all; but the Legislature was permitted to provide only the method by which these officers should be removed and not disqualified. Here are these two systems of removal, and it is now suggested, as I understand, that section 12 of the Penal Law, in some way or other despite the intention of the Constitution makers to create these two systems, has become a part of the perfect system of impeachment, for there has been nothing added to that impeachment provision for many a long year. It is said that it was possible for the law-making power, the legislative department of the government, which was given authority only to work out the concurrent machinery provided by section 7, so to affect the Constitution upon that subject that despite the plans of those who framed the Constitution so that it should be broad enough to reach all causes which a High Court of Impeachment should deem sufficient to remove a public officer, has been thwarted by this accident, for accident I am sure you will reach the conclusion it was.

I have no doubt whatever that the framers of section 12 drafted it with the idea in mind that they were meeting the command laid upon them by section 7 of article 10 of the Constitution; but, be that as it may, the Constitution lays out one scheme, one course for the removal and disqualification of officials and perfects it, and then it provides another method by which certain officials are to be removed for misconduct in office, and I deny the proposition that it is within the power of the Legislature, which is authorized only to provide a concurrent remedy, to interfere with the other and absolutely completed scheme of the Constitution, embracing the subject of impeachment, which the Legislature was given no power to nullify or change.

The President.— Now, Mr. Fox, if you please.

Mr. Fox.—May it please the Court: after listening, as you have been listening now for several hours, no doubt with intellectual delight, yet even intellectual delight too long continued may result in fatigue, I know that I must have your sympathy, and, frankly, if I could consult my own personal preference, and I know that I should be consulting yours if I could, I should leave the matter in the hands of this honorable Court.

Particularly embarrassing is it to one who has never held official position to be called upon to perform the responsible duty of replying, when he reflects that every one who has addressed the Court today has held either the highest judicial position in the State or some sort of official position connected with the administration of the government of the State. It is keenly embarrassing to follow in argument one who has expressed his personal knowledge that he has no personal doubt as to what the makers of the Constitution intended; and it is perhaps better for me, and I know it would be equally acceptable to you, if I take up, so far as I may be able to do so, the arguments which have been addressed to you, in the inverse order of their delivery.

It has this advantage that at any rate I shall be less likely to misquote what has happened most recently.

The learned and distinguished former Chief Judge of the Court of Appeals who has just taken his seat, announced a doctrine which was a little more advanced than that which had been announced by the former learned assistant district attorney, whose argument in turn also proceeded considerably beyond that to which his predecessor had felt it safe or necessary to go.

If the doctrine just announced be correct, it is quite impossible, it seems to me, to escape the conclusion that an act innocent and lawful when done, might be declared wicked and impeachable by the Assembly, and on conviction the person who did the act might be convicted by this honorable Court. Would that not be an ex post facto law within all the meaning of that term as used in the prohibitory clause in the Federal Constitution?

The learned gentleman who preceded him is of the opinion—at least, whether he be of the opinion or not, he presents the argument that the welfare of the State requires this Court to claim and exercise a jurisdiction and pronounce a judgment the

effect of which will be not only to drive from office the individual, but to deprive the people of this State from ever having his services again in any public office. Why? Why? Says my learned friend, even if the present occupant of the gubernatorial chair has not committed perjury, he at any rate has made a misstatement of facts, and even though it was made before he took office, yet the awful judgment of this Court may, at any rate, and he undoubtedly will contend, ought to be pronounced to the extent which I have indicated.

What, gentlemen, would be the result of that? Why, a man who at some time had been, if you please, cast in judgment in an action for false representations with intent to deceive, could never hold public office again.

The counsel for the respondent are not here to argue in favor of immorality, but the greater principle is, Is it for this Court or the electorate to determine what shall keep a man out of office and what shall put him in office?

No, your honors, far above the question of the innocence or guilt of this respondent is the question of the usurpation of power by the Assembly.

To the first question, the question of the innocence or guilt of the respondent, those who have been summoned to his defense could advance to the issue with confidence, and this Court could decide it with no responsibility other than that of doing exact justice to the man who stands at your bar. Your judgment would affect in no way the supreme law of the land. The counsel who represent the Governor here would be clothed with no responsibility, or charged with no responsibility other and different from that which rests upon every counsel in a criminal trial, but, members of this honorable Court, it is here, in the house of its defenders, if ever or anywhere, that the Constitution should be safe against any attack that may be directed against it from whatever source and prompted by whatever motive. It is only in times of great political excitement that our institutions are in peril. It is no wonder that long ago it was predicted by an acute foreign observer that if our experiment in constitutional government should ever fail, it would be not because of attack from without, but because of assault from within.

What, if the Court please, is this power to impeach? It is the power to accuse. As one of the counsel for the managers said, "the Commons accused; the House of Lords adjudged."

But this power to accuse is a dreadful power. It is not an unlimited power. It is a limited power. It is not a power in this country, at any rate, to accuse anyone, though it was in England at one time and, theoretically, it may be yet. It is not a power to accuse any official for anything.

Let me read to you what Story on the Constitution says, section 798: but before I read that there comes to my mind a statement made by the counsel who opened this argument quoting a statement by a celebrated authority, that unlimited power, said the counsel, makes a beast of a man. How is it if there is more than one man? Is it any the less dangerous because more powerful?

Story says as follows:

> "The doctrine indeed would be truly alarming, that the common law did not regulate, interpret and control the powers and duties of the Court of Impeachment. What, otherwise, would become of the rules of evidence, the legal notions of crimes and the application of principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly that, while every citizen of every state originally composing the Union would be entitled to the common law as his birthright and at once his protector and guide, as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. It is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and the punishments prevail."

We have heard something here of what has come to be known in history as the Sumner doctrine. Says counsel, quoting Sumner, is there any question here but "Is the man guilty?"

Yes, there is another question. The question is, Has he been accused of that of which the Assembly had lawful power to accuse him?

Mr. Sumner may or may not have been the embodiment of New England conscience. Upon that I have no local knowledge, but Mr. Justice Benjamin Robbins Curtis was certainly entitled to speak with authority in matters of law equally with any senator contemporary with Mr. Sumner, and it so happens, may it please the Court, that we have been enabled to procure the record in the most recent of all impeachment trials, that of Judge Archbald, and there the same contention was made, and it was necessary again to repeat to that body what Judge Curtis had said in that trial in defence of President Johnson:

> "But the argument does not rest mainly I think upon the provisions of the Constitution concerning impeachment. It is at any rate vastly strengthened by the prohibitions of the Constitution:
>
> > 'Congress shall pass no bill of attainder or ex post facto law. According to that prohibition of the Constitution, if every member of this body sitting in its legislative capacity, and every member of the other body sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of members of that body? As a Congress you cannot create a law to punish these acts if no law existed at the time they were done, but sitting here as judges, not only after the fact, but while the case is on trial, you may, individually, each one of you create a law by himself to govern the case.'"

You can convict upon anything that you see fit, if you come to the conclusion that a particular individual is unfit to hold public office.

Mr. Judge Curtis continued:

> "According to this assumption the same Constitution which has made it a bill of rights of the American citizen, not only

> as against Congress, but as against the Legislature of every state in the Union, that no ex post facto law shall be passed — this same Constitution has erected you into a body and empowered every one of you to say aut inveniam aut faciam viam — if I cannot find the law I will make one. It has clothed every one of you with imperial power. It has enabled you to say sic volo sic jubeo stat pro ratione voluntis — I am a law unto myself by which I shall govern this case."

And the learned former Chief Judge feels it necessary, in order to sustain this impeachment, to maintain a principle never found in any law book extant that the Assembly can impeach your Governor for anything that it sees fit. But, gentlemen, that is the position into which we felt they would be driven when we came into this trial.

Much has been said in commendation of my friend Roger Foster. His book has been commended to you so strongly that I will read to you from page 1483 of the record of the impeachment of Mr. Archbald a quotation from Mr. Foster — no, page 89, I will read it from our brief. Mr. Foster says:

"An officer should not be impeached for an offense *before his official term.*"

I agree that he is an authority.

Now, what is the question? Reduced to its final analysis, is it not this: "Shall the Constitution of this State, at the request of 79 members of the Assembly, be amended so as to read as follows:

> "The members of the Assembly shall have the power of impeachment not only for wilful misconduct in office but also, in its discretion, for any misconduct before taking office which, to the majority of the members of the Assembly, shall seem to establish unfitness for public office."

What is that, may it please this honorable Court, but arbitrary power; and, if it be an attempt to exercise power not granted, what is it but an usurpation of power? If this Court has any

function whatever to perform, it is to withstand assault upon the Constitution and prevent usurpation of power.

The newspapers have been flooded with talk that the Governor has been usurping power and ought to be impeached therefor. What shall be said of 79 members of the Assembly who have assumed a power and usurped a power they never had?

May it please the Court, the people clothed the Assembly with a truly awful power when they added to the grant of the power of impeachment this provision:

> "In case of the impeachment of the Governor the power and duties of the office shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall cease."

Did the people intend, may it please this honorable Court, that when no charge of the violation of his oath of office had been lodged against the Governor, that a mere accusation of some misdeed in his private past life should have that effect?

The President.— Suspend now, if you please, Mr. Fox.

Thereupon at 5 p. m. the Court declared a recess until 10 a. m. Wednesday, September 24, 1913.

WEDNESDAY, SEPTEMBER 24, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 o'clock a. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.— Now, Mr. Fox, please.

Mr. Fox.— May it please the Court: we owe an expression of obligation — and when I say we, I mean, if the Court will allow me to bracket myself with them for the time being, I mean the Court and the counsel for the respondent, owe a debt of gratitude to the former Chief Judge of the Court of Appeals for the elucidation of the position taken by the managers which you heard from his lips as the Court was about to adjourn; and if I may be permitted to do so, with no desire for fulsome flattery, I know it is a most fortunate thing in a great cause tried before a great Court, that the managers should be represented, not merely by successful advocates who might, in the stress of forensic excitement, be led to argue for positions which, perhaps, in the cooler atmosphere of the council chamber they would not suggest; and when the learned counsel, formerly an honored member of this venerable Court, had finished his argument, it seemed to me that perhaps some time might be required of me in reply to point out the logical conclusion that flowed from his argument. And therefore I say it is that when the case was finally closed and the learned former Chief Judge came to say the last word upon the contention, he elucidated it in the following language which I had to repeat from memory yesterday afternoon, but which I now quote from page 358 of the record. After speaking of the earlier Constitutions of our State, "then" said the learned former Chiel Judge, "came the year 1846, when the Constitution was again revised. This time all the limitations as to cause were stricken out. There were limitations before, less in 1821 than in 1777. But all limita-

tions of every kind were swept out of existence by the amendment of the Constitution in the year 1846. And when the constitutional convention was held in 1904, there was no change in this respect. Then, is it not necessarily true that from 1846 down to this very date the Assembly of this State has been at liberty by the express command of the Constitution to impeach *for whatever cause it sees fit?"*

May it please the Court, that is the proposition to which the case is finally reduced. Now, I intend, with your approval, to follow generally this line of presentation today, as is my duty charged with the responsible function of making the argument in reply. I must, so far as with my limited ability I may be able so to do, at least, point out some of the weaknesses, if I cannot absolutely dispose of the arguments that have been addressed to you on behalf of the managers. After that, I shall pray your attention quite briefly to what are the questions which are involved here, and I shall have something to say, not by way of threat, for that would indeed be as idle as it would be unbecoming, but something in the nature of a very brief appeal to some members of this Court, whose right to sit is unchallenged now, but whose attitude toward the case is such that I conceive it not only proper but my solemn duty so to do. After that I shall, if it meets with your approval, address your attention quite briefly as to what is involved in this novel doctrine never heard before in any court of justice in this State, never broached in any constitutional convention so far, at least, as the learning and industry — and it is difficult to say which excels the other — on the part of the managers has been able to disclose; never submitted to any English speaking people, having the right to make their written constitutions; never intimated in any political platform of any party. At any rate, if ever broached, if ever submitted, if ever argued, never having met with the approval of any legislative or judicial body within the United States.

After we shall have done that, I shall then ask this honorable Court to follow again this same lead of my distinguished friend whom I am now following and again apply to this question the same great fundamental principle which he applied so successfully, and which received the sanction of the honorable Court, to

the first question submitted to this Court, what we lawyers call contemporanea expositio. The legislative and judicial declarations given from time to time, with the approval of the constitution-making powers, should in face of their leaving the language of the Constitution unchanged, have the same effect in regard to impeachments as they did in regard to the right to challenge any member of this honorable Court.

Before I finish with what I have to say in regard to the closing argument in behalf of the managers, let me read further, not for the purpose — although I shall have to do so — of making a correction of matter of fact which in all probability is such as any of us may happen to make, but to carry it to its proper conclusion. Here are the remarks of the learned counsel: "In 1846," reading from page 359, "there was a feeling abroad in this State that there should be an easier method of getting rid of unworthy officials and so they provided in the very section — I will not stop to read it — they conferred in the very first section of this article 6 as a concurrent remedy, the power upon the two houses of the Legislature by a two-thirds vote to remove from office a judge of the Court of Appeals or a justice of the Supreme Court to remove from office for cause, the reason to be stated."

I venture to state that it will appear to you very soon upon undoubted authority that the power of removal thus granted was considered to be, and has been held to be, a broader power than the power of impeachment. The consequences are less severe. There is the removal, but there is no debarring from the right to hold public office. The judges of this Court take an oath as judges of the Court. That does not happen when there is a concurrent resolution, or an investigation under this power, and it has always been recognized that one of the great distinctions has been that in regard to impeachment the Assembly has no power to accuse an official of this State by way of impeachment for acts done before taking office.

May it please the Court, you will remember that when the first of the arguments was being made for the managers on the question of the right of the Assembly to convene itself and to impeach, the learned former senator said that in this very room

the clerk, I think it was, of the Senate had resigned and it was in the matter, so we were told, of the investigation into the conduct of Warren B. Hooker, then, and I believe still, a justice of our Supreme Court.

My brief did not go to print until yesterday morning. That reference was useful, for I am enabled to lay before this Court an exact copy of the recommendation of the judiciary committee of the Assembly made on May 1, 1905, in the very matter to which your attention was called by the learned counsel who was then arguing for the managers.

I quite agree, and those of you, I think, before whom I have had the honor of a hearing, know that I quite agree, that cases are not to be advanced, least of all in a great cause, by personality; and yet we may well follow in the lead of the counsel to the managers in claiming for judicial decisions, or other interpretations, such weight as they may justly receive from the dignity and learning of those who made the utterances, legislative or judicial.

On page 10 of my brief will be found the report of the Senate judiciary committee, to the effect that said acts of Judge Hooker "were immoral and show a personal unfitness in him to occupy the position of justice of the Supreme Court."

Paragraph VI. "That we are of the opinion that the said acts of the said Warren B. Hooker hereinbefore set forth in the several findings of fact, do not constitute cause for impeachment, under the provisions of section 13, article 6, of the Constitution of this State, and section 12 of the Code of Criminal Procedure" — and note, if the Court please, the reference to section 12 of the Code of Criminal Procedure —"for the reason that such acts were not committed in the course of the discharge of his official duty, and do not constitute wilful and corrupt misconduct in office."

But that they do constitute cause for removal.

Let us pursue the inquiry a little further and see what was said in the report of the judiciary committee which was adopted, I am informed, by the Senate. Annexed to the report of the judiciary committee of the Senate, which recommended the investigation of charges, and which was adopted and concurred in by the

committee, is the opinion of the chairman of the committee, and I maintain, may it please the Court, with great confidence, that seldom have we had in the course of our legislative history one whose experience has been wider, whose fidelity to his legislative duties been higher, or who is better qualified to speak in interpretation of the fundamental law of our land.

What is the opinion? "The language of the section as it came into our Constitution in 1821, was this, it being section 13 of article 1" — that is the first correction which the Court will please note as not made by myself, but made by the committee and its chairman, in the opinion from which I am reading. That this change did not come in, as you were informed — undoubtedly by oversight — in 1846, but had come in in 1821, and please accept my statement that I consider the correction as being made by the gentleman whose opinion I am reading, and not by myself.

> "All officials holding their offices during good behavior may be removed by joint resolution of the two houses of the Legislature, if two-thirds of all the members elected to the Assembly, and a majority of all the members elected to the Senate, concur therein.
>
> "By section 3 of article 5 of that Constitution, justices of the Supreme Court held office during good behavior until 60 years of age. There was already in the Constitution when this was added, a provision for impeachment, but to render a judge liable to impeachment (section 33, Constitution of 1777), it was necessary to prove that he had been guilty of misconduct in his official capacity.
>
> "It is manifest, therefore, that in adopting this additional provision in the Constitution of 1821, it was intended to provide for some other case than those covered by the already existing provisions for impeachment.
>
> "The mere fact that another way was provided is prima facie evidence that it was intended to lay a broader foundation for removal, for, if this is not so, why was this additional method provided?
>
> "If, in the performance of his judicial duties, a judge had outraged the laws of the State, whether statutory, or the

principles of the common law, he could be already impeached, and when, going further, another remedy was provided, it must be because the people intended by this provision to keep in themselves the power of removal, even if official misconduct was not shown.

"The very difference," so continues the opinion, "in procedure and in result between a trial for impeachment and a removal by resolution, indicates that it was intended that removal by resolution could be had for less cause than one where impeachment could lie.

"In an impeachment proceeding, the judges of the Court of Appeals, presumably the most learned and conservative members of the legal profession within the State, form a portion of the Court. The members of the Court, including senators, take a special oath as judges in the Court of Impeachment.

"The judgment may extend to disqualification to hold any office in the State. It is a Court of Impeachment and all its members are for the time judges of that Court.

"No such solemnity surrounds removal by resolution. There is no additional oath, no court, no judgment of disqualification. It is a proceeding of the Legislature as such, while impeachment is a proceeding in the most august and solemn court known to the State."

So I think, may it please the Court, that we can write quod erat demonstrandum against the proposition with which I started out before I read this report. So far as it is entitled to consideration there is a corollary from this report, also of indubitable accuracy; if it be corollary, of course it is of indubitable accuracy. That proposition, which I ask you all to bear steadily in mind, when we shall come to lay before you judicial decisions in cases of removal, is as I have just read to you, that the removal could be granted for *less* cause than was required to be shown in impeachment, the judgment in which might debar not only the respondent from office, but the people from having the benefit of his public service forever, and that beyond the reach of appeal. You will also find if you will turn to the memorandum prepared

by my friend, Mr. Elihu Root, jr., at my request, and from which I think it not unseemly to say I think you will receive, as certainly we have received, very great assistance; there is cited the case of Conant v. Grogan.

There was a decision by a general term, the weight of whose judgment is certainly not weakened by the fact that it received the approval of one whom thereafter the people elected to the high position of chief judge of our highest court, and it is with great confidence, therefore, that I read you very briefly what I am about to read as a preliminary to other decisions on the same subject. In that case it was said:

> "The court should never remove a public officer for acts done prior to his present term of office. To do otherwise would be to deprive the people of their right to elect their officers."

And there are others. I will not take the time to read them.

May it please the Court, with those two utterances, each in accord with the law and made, the latter in 1887, and the former in 1905, it is certainly no breach of decorum to say tempora mutantur nos et mutamur in illis.

May it please the Court, let me call your attention to that line of argument which I said I thought it incumbent upon me to take up. That is all that it seems necessary to say, and I do not say that in any spirit of boasting, all I say is that the limits of time make it impossible for me to say more in regard to the arguments advanced by the learned counsel who last preceded me. But I desire to call your attention to page 39 of the brief submitted, or argued, or read to you by the learned former senator. I do not have it here.

The President.— To whom do you refer?

Mr. Fox.— Mr. Brackett read the brief. I do not know that it is his brief; that is the reason I corrected myself. I say, read by him and signed by all the counsel for the managers.

There is almost always in an argument that comes to an erroneous conclusion, a fallacy, and I think it lies in the state-

ment that we find here. You notice I say "I think." It always is difficult, of course, for an advocate to be sure that he does justice to arguments on the other side, but I have no intention of understating it.

Beginning at the bottom of page 38, "By this corrupt practices legislation," reads the brief, "the position of a candidate is legally indissolubly linked with that official. It is as much required that he shall make the statement of the amounts received by him and the expenditures, as it is required that he shall take the official oath as Governor when inaugurated. The one cannot be separated from the other. And one is as positive a direction as the other."

And in some way in the brief it is said here — Judge Herrick called my attention to it — that it is essential for him to make the affidavit in order to enter upon the office. There was an act which passed which disqualified a man from office in case of a false statement in such an affidavit. That was held to be contrary to the expressed policy of the State in the Constitution, and of course it is not true. When I say it is not true, all understand that I am speaking legally only, with no desire of saying that anybody stated anything that was not true as a matter of fact. The affidavit is not made by a successful candidate, or by the affiant as a successful candidate. In the recent election there were three candidates for the position of Governor. All presumably filed affidavits. Suppose they were all false. We could not impeach the two defeated candidates, for they did not take office. And you will see in another part of my argument, which I shall come to very soon, that if it is now held that you can impose a forfeiture or penalty upon the successful candidate, you are imposing a penalty or forfeiture not authorized by law, and you are punishing one of the three in a way that the others could not be punished, although the cases were exactly the same.

I shall call your attention very briefly to the rule in England. I had said — and you will pardon me for repeating it when I was closing yesterday afternoon, that the Assembly was practically asking you to amend the Constitution of this State. Now, what is the situation today? What is our law? Can it not all be said, very briefly? All citizens, or all private citizens, are liable to indictment, and on conviction to punishment, and surviving punishment is the right to ask, at any rate, for

executive clemency? Notwithstanding, and if he be a public officer, the offender is liable to impeachment for wilful misconduct in office if convicted. He is debarred from ever holding any office again, and notwithstanding conviction in impeachment proceedings, he remains liable to indictment and conviction by a jury. Thus, on the one hand is it not true that the people preserve the right to punish any offender notwithstanding his election to office, and on the other hand, I beg to inquire why should election to office itself operate to impose upon the man who takes the oath of office a penalty which the law did not affix when the act alleged against him, and committed in private life, was done? Either all private citizens are liable to impeachment, or none are liable to impeachment. Originally, in England, and it may still be true there theoretically, a private citizen was liable to impeachment. Here, however, that has not been the law. My attention is called to the fact that in the book of Mr. Foster on the Constitution (vol. 1, page 588), which received justly such unstinted praise from those who recited it first in this argument, it is said:

> "An examination of the English precedents will show that, although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the state at large."

And forty-eight cases are cited. Note, more than those, there are appended to the learned brief filed here by the managers, I should think more than forty-eight cases, and not one of them proceeded upon an allegation and conviction of an offense done by the public officer before he took public office. Those were all cases before Congress or in some state of the Union. I beg your indulgence to read to you. I am not in the habit, gentlemen, when I am arguing before that branch of this Court which sits immediately in front, of reading opinions, but we are progressing with such celerity in the matter of rendering decisions, that perhaps it is incumbent upon me to impress upon your mind, as I go along, what there is in the way of decision, in order that you may have it at hand if you should be called upon to render a judgment more speedily than is customary in the ordinary tribunals of justice.

Story says:

> "In such a government" that is, a republican government, "all the citizens are equal and ought to have the same security of a trial by jury for all crimes and offenses laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value as a protection against the resentment and violence of rulers and factions in criminal prosecutions makes it inestimable. It is there and there only that a citizen in the sympathy, impartiality, the intelligence, and the incorruptible integrity of his fellow citizens, impanelled to try the accusation, may indulge a well-founded confidence and sustain and cheer him. If he choose to accept office, he would voluntarily incur all the additional responsibility growing out of it."

In the trial of Judge Chase, which took place in 1804 — I think the earliest of the impeachment trials in this country — Luther Martin of counsel, who had himself been a member of the constitutional convention, said:

> "Is the House of Representatives to constitute a grand jury to receive information of a criminal nature against all the citizens and thereby deprive them of a trial by jury? Public officers when they accept their offices, accept them on these terms, and as far as relates to the tenure of office and relinquishing that privilege, they therefore cannot complain."

May it please the Court, a defendant has a voice in the selection of the jury that is to try him. A unanimous judgment is required to establish his guilt and from the judgment of conviction he has a right to appeal to executive clemency, and if executive clemency be granted, he is restored to all his political and civil rights without abridgement.

I ask you this question, preceded by a brief statement of facts:

On the 31st day of December, 1912, William Sulzer was in possession of these inestimable rights. If he has lost them or any one of them, when and how did it happen? It must have happened on January 1, 1913. It must have happened solely because on that date he took the oath of office and entered upon the discharge of the duties thereof. No other act subsequent to the commission of the alleged offense is set forth in either one of these three articles. How comes it, may it please the Court, that this respondent is to be deprived of his constitutional rights in the absence of any allegation of the doing of any act subsequent to that on the doing of which his constitutional rights accrued, except a lawful one?

Nay, more. Assuming that these acts constitute perjury, the law affixed to the commission of that act certain pains and penalties when it was done, and no other.

How comes it that the Assembly of this State has power through an accusation of this kind to bring the respondent before this honorable Court, having the right, as it has, to subject him to another penalty and forfeiture than that to which he was subject when the alleged act was done?

There were three candidates for office. Suppose, as I suggested a moment ago, that each one of these gentlemen (each one will pardon me for making the assumption) made a false affidavit in regard to his expenditures or receipts, whichever it may be. No one of them does any act that meets with the condemnation of any law of this State, but one of the three gets more votes than either of the others, so you impose upon him the disqualification for that which one of our courts has described as the highest privilege of a citizen in a republic, to hold office under the favorable suffrages of his fellow citizens. Nay, more. You go further, may it please this honorable Court — or this Assembly argues you may go further — and deprive the people of the right forever, though they might all be knocking at your doors and demanding it, of the right to continue to have, or at some future time to have, by recalling him again to office, the service of the man who received more votes than either of the other two, and whose acts differed in no way whatever from those of either of the other two.

Is any authority suggested? Is any public necessity suggested? It has been argued here that the very close connection between this affidavit and the taking of office has something to do with the fundamental principles involved here. Well, of course it has not. The two learned gentlemen who followed the first speaker were quite right. The legal conclusion, as I said in starting, is that any act or else no act prior to taking office is the thing to which we must look. In the case of People ex rel. Bush v. Thornton, decided in November, 1881, the opinion being by the very learned Justice Bockes, the facts are stated as follows. The relator and the defendant were rival candidates for the office of county judge of Sullivan county at the general election in November, 1878. They were the only candidates in nomination and voted for at that election save as there were a few votes for that office returned, scattering, and not necessary to be here noticed. The successful candidate published a notice or promise: "I hereby repeat that if elected to the office of county judge I will pledge myself to take only $1,200 for my services, but I will pay out of my own pocket for the coal necessary to heat my law office, but I will pay for all stationery and letter heads and will see that those persons needing blanks shall pay for them themselves." Now, the learned court held, and of course it was plain as it could be, that this offer was contrary to law; and it was asked to remove from office the person who had been guilty of that offense. The learned court said:

> "The offer of a bribe to an elector is unquestionably a grave offense, and is punishable as such, but it is punishable only in the manner and to the extent prescribed by the Constitution and laws. Section 2 of article 2 of our State Constitution excludes from the right of suffrage every person who shall even accept or offer a bribe for the giving or withholding of a vote at any election. And by statute bribery of an elector as well as the offer to him of a bribe, having in view the influencing of his vote, is made a misdemeanor punishable by fine and imprisonment. Such are the penalties prescribed by the Constitution and laws of our State against those offenders. But they are not declared to be also ineligible to office, or to be disqualified from holding office.

Now, it is a canon of construction applicable alike to constitutions and laws relating to criminal or quasi criminal matters, that when either defines an offense and imposes a penalty therefor, the specification of such penalty is an implied prohibition against all additional punishments and forfeitures. In The State v. Pritchard (36 N. J. 101, 105), it was insisted that inasmuch as the law prohibited a convict from being a witness in a judicial proceeding, and in consequence thereof the Constitution deprived him of the right of suffrage, as a necessary result there was a deprivation also of the prerogative to hold office. Beasley, Ch., J., answered that this was a manifest non sequitur. The learned judge added 'Because as a punishment the law has denounced the loss of two of the rights of citizenship it does not follow that a third right is to be withheld from the delinquent.' And, further, he says: 'Indeed the reverse result is the reasonable deduction, because it is clear on common principles that no penalty for crimes but that which is expressly prescribed can be executed. The fact that several penal consequences are annexed by statute to the commission of a breach of the law cannot warrant the aggravation by the judicial hand of the punishment prescribed.'

"It was further held, at Special Term, that the defendant was not eligible to the office to which he was elected by the electors of the county, because he could not truthfully take the oath of office; that because he could not truthfully take the oath of office he was in no better position to retain the office and discharge its duties than if he had neglected to take the oath. This ruling we deem to be unsound. Where, in the Constitution or the laws of this State, is it declared that false swearing in taking the oath of office disqualifies a person from holding the office to which he was elected? We are not cited to any such constitutional or statutory provision, nor are we aware of any. Such false swearing may be perjury, but the crime of perjury has certain pains and penalties attached to it by law. Can the court add to them any others not declared either by the Constitution or laws? This question is answered by our conclusion on the subject last

above considered. As has been already stated, it does not lie with the court to enhance the pains, penalties and forfeitures provided by law for the punishment of crime; nor can it add any disability to these pains and penalties not expressly declared by the Constitution or laws.

"Disability to hold office would follow indictment and conviction of perjury, as the statute declares that an office shall become vacant in case the incumbent shall be convicted of an infamous crime.

"The law requires that a person elected to office shall take and subscribe the requisite oath of office, and that if he shall omit so to do within the prescribed period the office shall become vacant. But it does not further declare that the office shall also be deemed vacant if the officers shall not swear to the truth in taking such oath, or that he shall in that case be disqualified from holding the office. The law denounces against the offender certain pains, penalties, forfeitures and disabilities, and these, and none other, the court may inflict and impose."

I will not read more. But there are other cases cited here in which the question of bribes is taken up. The oldest one is Commonwealth v. Barry in the third Kentucky reports. This was a proceeding to remove Barry, a clerk of the court, under a certain article of the Constitution of Kentucky which provides for clerks, and that they shall be removable. The court said "We could never think of putting an officer to the trouble and expense of defending himself upon a charge while we are satisfied by the proof that it would not be a sufficient case to remove him from office. We are of opinion that proceedings under this section of the Constitution must be confined to *misconduct in office.*" You will see, may it please the Court, running all through the decisions, that in these removal cases they assimilate the impeachment proceedings to a certain extent to criminal cases. The Constitution provides that laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery and other high crimes and misdemeanors. As far as the Legislature has acted or may act under this latter section of the Constitution,

it would require a conviction under a regular prosecution for the crime charged and the production of the record of conviction before this Court would take up the subject. To determine that this Court could for every misconduct in private life committed by a clerk remove him from office would be putting every clerk in the arbitrary power of the Court and might be exercised to the worst of purposes, just as it would put every officer in the arbitrary power of the Assembly.

I remember now that Mr. Tilden was quoted. Did anyone ever see anything from the pen of Mr. Tilden that the past life of a successful candidate for the presidency would be ground for impeachment? Let us then as a result of the most fanciful imagination apply this doctrine, let us suppose if such a thing could be possible — of course it could not be — that a President of the United States who was carrying out in a forceful and aggressive manner very distinct policies entrusted to his charge and in which a majority of his fellow citizens believe, should turn out after taking office to have developed before taking office a habit of making statements in regard to facts which were not entirely in accord with the truth; had perhaps developed what might be called an habitual disregard of the truth, and had also developed a habit of charging people who differed with him with not telling the truth, would anybody suppose you could impeach him for anything of that kind, and yet my learned friend says a disregard of the truth is one of any causes for which a public officer may be impeached. But there are other cases in regard to this subject of bribery. There is one in Pennsylvania where precisely the same doctrine is held, Commonwealth v. Shafter, in the 3d of Watts & Sargeant, 338. So that we must not forget in times of political excitement when some of us are driven by a desire to put out of office some person who has become unpopular, that we may be depriving him of the rights guaranteed to him by the Constitution. Let me ask you this question, may it please the Court. This is September, 1913. This respondent has not been in office a year. Suppose these articles had been dismissed because of lack of jurisdiction, or suppose for some reason or some defect they had never come before you and this respondent had given this State for the following twelve months an administration excelling that

which had ever been given by any Governor. Is it possible that in the face of good conduct in office he could be called here to answer the charges that are made today? But if they are made today, why would they not be good at the last end of his term? Would a plea of faithful and effective service be demurrable? If so, what did Story mean when he said that impeachments were of vast importance both as a check to crime and an incentive of virtue, meaning, of course, public virtue. If there be no official misconduct alleged, if there be no suggestion of a violation of the oath of office, if there be no instance of what Madison preferred to call maladministration, where did the Assembly of this State gain its jurisdiction to charge the Governor of the State in these articles and bring him before this honorable Court asking for his removal and debarment forever from public service? Let me read you from the record in the Archbald case, page 1474, a very few words, and I read you from the 78th number of the Federalist, the bottom of page 1474 of that record:

> "The standard of good behavior, says Hamilton, is one of the most valuable of the modern improvements in the practice of governments. In a monarchy it is an excellent barrier to the despotism of princes. In a republic it is no less an excellent barrier to the encouragement of oppressions of the representative body, and it is the best expedient which can be devised in any government to secure the steady, upright and impartial administration of the laws."

If, may it please the Court, we have no lamp by which our feet are guided but the lamp of experience, and if we can judge of the future only by what we know of the past, experience in this State has shown to our people that political leaders of political organizations once gained power not only to loot the treasury of our metropolis, but to invade our courts of justice and write their decrees.

May not the time yet come when some political leader may acquire such ascendency, may be filled with such unmitigated rancor that he will be able not only to control a majority of the Assembly, but in some future Senate, may find complaisant sena-

tors in numbers sufficient to write his decrees if we depart one jot from the fundamental doctrine that where there is no official misconduct alleged, the Assembly has no jurisdiction?

Let me read to you from page 489 of the Archbald record. I read from Tucker on the Constitution, quoted, if the Court please, from the brief of the managers in that case. Lest I forget, let me say in passing that in the Archbald case the question was presented whether a judge of the Commerce Court could be impeached because of acts done by him as a district judge. No one suggested for a moment that he could be impeached for acts done before he became judge at all, and what wrote the managers even of that modified claim? That was a far less dangerous claim than that which is the logical result of the position here that the Assembly in its discretion may impeach for any act committed at any time, the managers wrote:

> "This proceeding seems to be unique in the annals of impeachment under our Constitution."

And they put in their brief the word "maladministration" which Mr. Mason (I think Mason is a misprint for Madison, but that is a small matter) originally proposed and which he displaced because of its vagueness for the words "other high crimes and misdemeanors was intended to embrace all official delinquency or maladministration by an officer of the government where it was criminal, that is, where the act was done with wilful purpose to violate a public duty."

And, in another place: "It must be criminal misbehavior and in purposed defiance of official duty."

Now, of course, there is no question here but what when you get a case of defiance of public duty it is impeachable, even though it may not amount to a violation of the Penal Code. Every act which has ever been made the basis of any impeachment was committed while the person impeached was in the possession of some office, either in a former term, or in some other office which was held to be immediately connected; and yet, may it please this Court, if it were a novel proposition, I could show to you here, I have the cases here, that the weight of authority is fairly against, and if not against it raises a great doubt on the proposition

whether an officer in one term may legitimately be impeached for offenses committed in a preceding term.

I now come to the proposition which can be fairly stated, I think, in this language:

"It was maladministration, or the neglect of official duty amounting to wilful misconduct in office over which the jurisdiction was understood to extend in the impeachment of Blount," quoted in the impeachment of Archbald at page 87. The managers said that it was a known thing, having a previous definite existence.

That being so, how does it happen that they who come here asking this Court to inflict this awful punishment upon this respondent, and to assert its right to deprive the State of the service of anybody against whom such judgment may be rendered, have not furnished any authority or statement from any textbook or decision that the power exists? And I repeat, we are not here in the interest of William Sulzer on this question. We have not got down to the personal question yet, may it please this Court. We are here resisting what Hamilton calls "the oppression of the representative body." We are here denouncing the usurpation of power exercised by seventy-nine members of the Assembly and if you do not stop it here, who can tell what may happen next, or what may be the next claim of power in some future time of political excitement, when a hostile majority may be in command of the lower house, and possibly in command of this Court?

I beg to call the attention of the Court to the very great decision of Lord Camden in the very celebrated case of Entick v. Carrington. And let me say in passing, may it please your Honors, that I heard only yesterday in this great court room the use of the word "technicality" disavowed by one of my honorable and learned friends, but inserted into the case by my other equally learned and honorable friend. It is new doctrine in the United States that resistance to usurpation is a technicality. If resistance to usurpation be a technicality, then the whole progress of English speaking people from arbitrary government to a government by constitutional limitations, has been one unbroken series of triumphant technicalities.

Let us come back to Lord Camden. In that case, may it please your Honors, the question was the right of one of the secretaries of state to issue warrants for the seizure of the private papers of private citizens, in order to suppress seditious libels. It was argued that the power was necessary to the state. This is the kind of argument that you always find back of the attempt to exercise tyrannical power.

Now, I say, it is always the argument made for the exercise of tyrannical power, that it is necessary because of some political exigency. What is the political exigency in the State of New York, if there be any? And we all know. What is the need of these three articles? They have five other articles here, may it please the Court, against which no complaint is made, for alleged misconduct in office that can be made and disposed of without much trouble. Why are you asked to give this Assembly this power, if there be no motive behind this but that which ought to lie behind ordinary impeachment?

What is said here by Lord Camden? It was admitted, may it please the Court, in that case that the power had been exercised without complaint. Said Lord Camden, in words which ought to be written over every door of every court, and I would like to inscribe them on the heart of every senator in this court room: "One should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books. If it is not to be found there, it is not law." We are not talking here of police powers or other matters where there is an expansive and expanding jurisdiction. We are talking of constitutional questions. We are talking of what it is that was meant. What was this ancient and definite thing which the men who founded this Constitution had in mind when they wrote it? We are talking of the same kind of thing that was claimed to exist, and on the claim for which Lord Camden put his stamp of disapproval. There is no escape. You must either say Lord Camden was wrong, or you must say he was right. It is only by following the method of Lord Camden that we can dispose or arrive at a just and accurate conclusion. What after all are we talking about in this matter? We are talking about what in the end is a question of fact. What as a matter of fact has this power

been understood to be? When you find out what it has been understood to be, then you know what it is. And by the way, it occurs to me in passing on this subject of usurpation of power by this Assembly, what shall be said of an assembly that does this thing? In 1881 they united with the Senate in passing the Act of Criminal Procedure. In that act they laid down the law. They say that they cannot amend the Constitution. I quite agree. But their interpretation of the Constitution is useful. They united in an act with the Senate, and said that impeachment shall be only for misconduct in office. This Assembly is not willing to be bound even by the law its predecessor wrote on our statute books, and in violation, in defiance of their public duty, with that impatience of constitutional restraint which marks so many nowadays, this Assembly has broken loose, attempted to break loose at any rate, from the limitations which, as a part of the Legislature, it set upon itself.

May it please the Court, we cannot shut our eyes to the fact that in this country today there is a large body of our fellow citizens led by popular and powerful leaders whose very political creed involves an impatience of constitutional restraint and who believe in rushing at once to some desired end in contempt of all obstacles, and in defiance of all legal obstacles. If the managers be right — for this act of the Assembly is but an unconscious expression of this so-called spirit of the times — if these managers who are acting for this Assembly be right, then should your Honors proceed to write at once the decree without regard to law, which you may think the popular demand may require.

Judge Van Cott was quoted here yesterday, and again I have to thank my learned friends upon the other side, for we have gone to the record of the Barnard case, and on page 164 we find the argument of Mr. Van Cott for the managers as follows:

> "I agree with my learned friend that the question is before you as a court, that it is a question of law, not of discretion."

No, may it please your Honors, this is not a power to impeach at will; this is not a discretion to charge at will. It is a matter

of law, and I was amazed to hear the remark made which practically intimated, What is the use of bothering about this thing? Any official who is once impeached is deprived of public usefulness. Now, may it please your Honors — I beg to say for a moment in closing — nothing has led me here but the conviction that this action of the Assembly is nothing more or less than an attempt to induce the State of New York to trample under foot its own fundamental law, in order that a present advantage may be gained in the restriction and repression of an individual unpopular with certain factions in the State. If that be so, then indeed all the time that we can give to it is not wasted.

In closing, I have again to express the sense of deep obligation under which I find myself, and know under which your Honors find yourselves, for the contribution which has been made to this discussion by my friend the former Honorable Chief Judge of our highest court. Our contention is, may it please the Court, and it must be, of course, acceptable to you all, that where you have a contemporaneous exposition by judicial and legislative acts followed by a constitutional convention, leaving the fundamental law unchanged, that is indubitable that that judicial and legislative interpretation was in accordance with the true meaning of the Constitution. Even in private contracts, I need not remind your Honors, the contemporaneo expositio is of the highest value.

Said Lord Sugden:

> "Tell me what the parties have done under a deed, and I will tell you what it means."

Tell me what the Legislature, what the judiciary committee, what the courts have said, under a constitution, and let that be followed by a constitutional convention, and let the language in the new constitution be unchanged, and I will tell you what the constitution means. Was not that the argument that was proposed in opposition to the motion to disqualify certain of our senators here? And how grave that question was. You all understand that I am not arguing against the decision that was made; the decision was indubitably, of course, correct, and yet, in holding it there was an apparent defiance of the great and funda-

mental right that no man should profit by his own vote in a court. And it was also apparently, at first sight, but of course it was not, in violation of the other great principle that no man should be exposed to judgment before any court where he had not enjoyed the "cold neutrality of an impartial judge."

Why was it that this Court felt itself bound to overrule the contention of respondent's counsel? And here it is that I find myself again under obligations, as I say, to my learned friend. Here is what the argument was. In speaking of the doctrine in the Dorn and Barnard cases, it was said as follows:

> "Now, when our constitutional conventions came to consider this subject, they were aware of these precedents, but did they amend the Constitution in this respect? Not at all. In the year 1904 our Constitution was revised, but the language of the Constitution on that subject remained the same as in 1846."

For this relief I thank you. The argument carried, justly, great weight with all who heard it, and those who heard it appreciated that in some measure at any rate it controlled the judgment of this Court. Let us now apply this argument to the claim that the power of the Assembly to impeach was extended, immeasurably, by the Constitutions of 1846 and 1894. I do not know that it has been read to you before. Yes, my friend former Justice Herrick did read to you the report of the committee of the Assembly in 1853, where that precise doctrine was set forth, that an impeachment would not lie for acts done before taking office. The convention in 1894 — adopting the language of my learned friend — had before it all the precedents in which it was either assumed, or held, that the power to impeach was limited to wilful misconduct in office. Did they amend the Constitution? Not at all. The language of the Constitution on that subject remained the same as in 1846.

But, may it please your Honors, we do not need that. What is the power to impeach? As I stated before, it is the power to accuse for wilful misconduct in office. The men who wrote the Constitution were seeking brevity and terseness. They were seeking the elimination of tautology. When you say the power to

impeach for wilful and corrupt misconduct in office, you are guilty of tautology. When you say the power to impeach alone, you mean, and everybody knows that you mean, or lawyers do, the power to accuse for wilful and corrupt misconduct in office.

It has come to this, that the elimination of tautology, that a triumph of terseness, is to be held by this Court to be the equivalent of a grant of unlimited power never claimed before, never suggested in the convention of 1846, or the convention of 1894, never sustained by any court.

One word and I am through. In regard to this doctrine of which we are speaking, that it has always had one meaning and has never been questioned, let me read to you the following sentence from the opinion of the learned Chief Judge, "The correctness of a legal principle like the excellence of the character of an individual may be as firmly established by its universal acceptance and the failure to question it as by favorable decisions when the subject is mooted."

May it please your Honors, I said that I felt it my duty, and it is not a pleasant one, but he is unfit to stand before this Court in defense of a great constitutional principle who dare not say it — there are certain members of this Court whose legal right to sit I do not challenge, I cannot challenge, but I appeal to each one of those four or five members of this Court, not only when they come to pass upon the guilt or innocence of this defendant on the question ultimately to be submitted to them on the final articles which are not challenged, but on the questions of law, one of which is now before them —

Mr. Parker.— I protest, if the Court please.

The President.— I think you may proceed.

Mr. Parker.— No counsel has a right to lecture a member of the Court who has a right to sit.

The President.— He has the right, I think, if he makes an appeal in a proper and respectful manner.

Mr. Fox.— I was quite sure your Honor would check me if I did not. Make no mistake —

The President.— Of course, it must be done in an entirely respectful manner. I have no doubt that counsel will do it in that manner.

Mr. Fox.— I thank the learned gentleman for his interruption. I have no purpose to lecture. I certainly have no purpose to threaten, but the Constitution is in your hands. You are the majority of this body and a majority vote may determine any question except the question of guilt. Some of you in the performance of your public duty, subject to no criticism in my mind, gentlemen, or in my heart, have expressed opinions on this subject; and all that I was proceeding to do when my learned friend saw fit to interrupt me, was to ask you to look into your hearts before you vote on the question whether you shall permit yourselves to approach the question of the guilt or innocence, whether you shall sustain the right of inquiry into these charges and see that in acting not only on this question but on the questions of fact, you are quite sure that nothing will affect your judgment, that nothing that you may feel on the questions of fact will affect your judgment on this question of law.

I know, gentlemen, we all know, that we are all human, and I know and you know that this is the greatest cause that has ever been submitted to any court in this State. You are the greatest court. See to it that you do not by your vote write into the Constitution of this State something that is not there, something which, if there, will vest the representative body with a power most disastrous in its consequences to our State, of whose fair fame we are all so jealous.

Let me put one question to you. Suppose this trial were taking place next year. Suppose this respondent had been renominated. Suppose the sittings of this Court should extend beyond election day and were reelected. If the Assembly had the right, you could then — I do not suppose you would, but your successors might, being less jealous of the Constitution than you, might write a decree by which you would debar the millions in this State from enjoying the public service of a man who again, on my hypothesis, they might have called to office. Are there not in such a power the seeds of revolution?

MEMORANDUM OF ELIHU ROOT, JR., ON THE AUTHORITIES

On the Motion to Dismiss Articles 1, 2 and 6

This is a constitutional court, deriving all its powers by delegation from the people under article 6, section 13 of the Constitution of this State. It has been contended that this section, containing as it does no definition of impeachable offenses, must be construed so as to grant to this Court, by implication, unlimited power to try public officers for acts done by them in private life, before taking office.

There may have been a time in history when such a contention would have been open to discussion and to determination on general principles as an original question. That time has long passed.

It is clear that the framers of the federal Constitution by the "high crimes and misdemeanors" of their impeachment provision meant only acts *in office,* though this is not expressed. Alexander Hamilton, in the 65th issue of the Federalist, said of the court of impeachment: "The subjects of its jurisdiction are those offenses which proceed from the misconduct of *public men,* or, in other words, from the *abuse or violation of some public trust.*" Since that was written there has been no case known to counsel where it has been even suggested that any federal officer could be impeached or removed for acts done while he held no office.

In 1807, in Kentucky, under a constitutional provision making clerks of court removable for "breach of good behavior," but not specifying whether such breaches might be prior to the taking of office, it was sought to remove a clerk for *bribery in procuring his own election.* The Court of Appeals of Kentucky sustained a demurrer on the ground that "proceedings under this section of the Constitution must be confined to misconduct in office." For over a hundred years this decision has stood unquestioned as the law of that state. (Commonwealth v. Barry, 3 Hardin 229, Appendix, p. 408.) And it should be remarked here that the "removal" cases have always been considered authorities in cases of impeachment and vice versa.

In 1840 the same question arose in New York in the case of People v. Henry W. Merritt, Special Justice, before the Court of Common Pleas of the city of New York. The following excerpt from the opinion of the court as delivered by Mr. Justice Daniel P. Ingraham is taken from the report published by Gould, Banks & Co., and found in Pamphlets, Trials, vol. 3, N. Y. C. Bar Assn. Library:

"The first demurrer to the first, second and third charges is founded upon the fact that the charges therein made were for acts done by him before his appointment as a special justice. It does not appear to the court in any way when the respondent was appointed to this office, except in the fourth charge, which alleges that he was appointed before February, 1839. If he was an officer at the time of the acts charged in the previous charges, it should have been so averred. I therefore conclude that at the different periods stated therein he was not a justice. This proceeding is, in respect to the mode of conducting it, somewhat analogous to impeachments and the rules governing those proceedings should generally be applied to the presentation of charges before the court against a justice. It is not necessary in all things to conform to those rules, as there is a greater discretion vested in the court by the provision of the Constitution which confers the power on the court. But at the same time these rules, which have been found to be the best calculated to control the trial of impeachments, will be found the best adapted to such a proceeding as the present.

"The Constitution confers upon the justice an office which cannot be taken from him, except in case of removal by the county court for causes to be particularly assigned by the judges. There may be cases where a person unworthy of the station is appointed. It may be done sometimes through ignorance, and it may also be done after full knowledge of the objections. But whether the objections are known or unknown to the appointing power, is a question with which, it appears to me, this court has nothing to do. It seemed to be conceded that, if the charges against an individual for acts before his appointment were known to the appointing power,

it would not be a good ground for his removal. Any other rule would render the power of the court in this matter, in effect, nugatory. If the court were to interfere and remove from office an individual, upon a charge against him of a crime, the existence of which charge was known to the power that appointed, such removal would be of no avail, if the same authority which originally appointed him could immediately restore the individual to office. And if the appointment was made with knowledge of the charge, it is fair to presume that he would be reappointed if removed therefrom. And it would be, also, impossible to distinguish between the two cases. Whether the charge was known or not, could only be ascertained by application to the appointing power. And such a proceeding, I cannot imagine, was ever contemplated by the framers of the Constitution. No case can be found that will warrant such a course of proceeding; but, on the contrary, every case to which the court has been referred, shows that the charges made were for acts done during the period of holding the office. If causes of removal were to be deemed sufficient for acts done before appointment, where is the line to be drawn as the boundary to limit the examination? If the court can go back two years in one case, they may go back five in another, and ten in another. And if the examination is only to be limited by the peculiar circumstances of the case under the investigation, the court might be required to review the conduct of an individual at any previous time which the complainant thought fit to select. . . .

"This court, after hearing counsel for the respondent and for the complainants in this matter upon the demurrers, filed to the charges therein, do order judgment for respondent upon all the demurrers, and that the order to show cause be dismissed."

This was a widely known case at the time. It was argued by Charles O'Connor and Francis B. Cutting on one side, and James R. Whiting on the other, before a very able court.

In 1853 the judiciary committee of the Assembly of New

York made a formal report to the Assembly on the power of impeachment in which they say:

> "That the person impeached must have been in office at the time of the commission of the offense, is clear from the theory of our government, viz.: that all power is with the people, who, if they saw fit, might elect a man to office guilty of every moral turpitude."

In 1863 the committee of the Assembly, examining charges of corruption against Ex-speaker Callicott, unanimously decided to receive no evidence of charges of corruption prior to his term as a member of the Legislature, plainly because they believed they had no jurisdiction to consider acts done out of office. (P. 200, Trial of Judge Prindle.)

In 1878, in the case of ex rel. Bancroft v. Weigant (14 Hun 546, 2d Dept.), Barnard, P. J., delivering the opinion of the court, said:

> "In March, 1878, the relator was removed from this office of marshal upon charges sustained by proof that Bancroft, the relator, had before his appointment, held an office of collector of taxes of the city of Newburgh, and had failed to account for and pay over the money collected by him to the city treasurer. The sole question, therefore, presented is whether proof of this default as collector of taxes establishes 'incapacity, misbehavior or neglect of duty,' as marshal of police. It seems quite clear that it does not. The 'incapacity, misbehavior or neglect of duty,' must be established against the relator in respect to the office of marshal."

The statute under which the proceeding was brought simply provides for "removal by the mayor for incapacity or misbehavior, or neglect of duty" without referring to the time of such occurrences. This was a square decision on the point.

In 1881 the Legislature enacted the Code of Criminal Procedure which in section 12 contained a clear legislative expression of

opinion against the power to impeach for acts committed prior to induction into office:

> "§ 12. Its jurisdiction. The Court for the Trial of Impeachments has power to try impeachments, when presented by the Assembly, of all civil officers of the State, except justices of the peace, justices of justices' courts, police justices, and their clerks, for wilful and corrupt misconduct *in office.*"

In 1887, in the case of Conant v. Grogan, 6 N. Y. St. 322 (Supreme Ct. Gen'l Term), Learned, P. J., said:

> "The court should never remove a public officer for acts done prior to his present term of office. To do otherwise would be to deprive the people of their right to elect their officers.
>
> "When people have elected a man to office it must be assumed that they did this with knowledge of his life and character, and they disregarded or forgave his faults or misconduct, if he had been guilty of any. It is not for the court, by reason of such faults or misconduct, to practically overrule the will of the people."

The fact that Judge Alton B. Parker, subsequently Chief Judge of the Court of Appeals, concurred in this opinion enhances its weight as an authority.

In 1894 in the case of Speed v. Common Council, 98 Mich. 360, the Supreme Court of Michigan said by way of dictum:

> ". . . the charges preferred, so far as they relate to the acts of Mr. Speed committed before his appointment to and induction into this office, are clearly beyond the jurisdiction of the respondents to determine. There is no provision in the Constitution nor in the laws which prevents a person from holding office for misconduct in another office which he held prior to the one to which he was elected or appointed. We have been unable to find any authority which justifies a removal for such previous misconduct. The misconduct for which an officer may be removed must be found

> in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office. There is no restriction upon the power of the people to elect, or the appointing power to appoint any citizen to office, notwithstanding his previous character, habits, or official misconduct."

As this stands unquestioned by any other case, it should be taken to represent the law of Michigan today.

It is to be noticed, moreover, that even bribery in procuring one's own election is not misconduct *in office* and is not a ground for removal. Commonwealth v. Barry (Ky.) (above); Commonwealth v. Shaver (Pa.); Cf. People v. Thornton.

There is *no* recorded case either in our own State or in any of our sister states, nor under the United States of America, where an officer has been removed by judicial process for acts done while not in office. Every recorded attempt has failed. There has never even been an *attempt* to remove an officer for such acts by impeachment. Never before in all the passionate and dramatic struggles of our history has any man had the hardihood to advance before a high court of impeachment the proposition that one can be impeached for acts done out of office.

To be sure, it has often been attempted to impeach or remove an officer for acts done in a *prior term* of office. This was done successfully by impeachment in Judge Barnard's case (Appendix, p. 413), in Judge Hubbell's case (Appendix, p. 414), and in Governor Butler's case (Appendix, p. 415). It was done by proceedings to remove in the case of Judge Prindle (Appendix, p. 425), of Judge McCann (Appendix, p. 426), of Iowa v. Welsh (Appendix, p. 426), and of State v. Bourgeois (Appendix, p. 423). It was attempted unsuccessfully by impeachment in the case of Judge Archbald (Appendix, p. 416), and by proceedings to remove in State v. Jersey City (Appendix, p. 409), State v. Common Council (Appendix, p. 409), and Thurston v. Clark (Appendix, p. 411). From the opinion of our own Assembly judiciary committee in 1853 to the opinion of the federal senators in the Archbald case, in 1912, there has been an

ardent and unsettled dispute as to the power of impeachment for acts done by an official during a *prior term* of the same or a similar office. But in all the cases on this latter point, cases mostly of large importance, prepared with the greatest industry and ingenuity by distinguished counsel, and tried before able and eminent judges, it was never suggested that the charges could be sustained on the ground that acts *done out of office* were impeachable. Always there is the assumption in the arguments and briefs of counsel and in the opinions of the senators and judges that the acts charged *must* be shown to have been done during tenure of the same or a closely similar office. The basis of decision is always, as the court says in Iowa v. Welsh (Appendix, p. 426), "Being his own successor, there is *no interregnum.*" Or in State v. Bourgeois (Appendix, p. 428): "There was by his election *no interruption in his official tenure. At no time was there an interregnum.*"

Is there not a weighty argument to be drawn from the tacit assumption of these latter cases?

In 1895 Foster in his textbook on the Constitution summarizes the contemporaneous belief of the bar when he says "An officer should not be impeached for an offence before his official term."

In 1894 the constitutional convention adopted and the people ratified the 13th section of the 6th article of the Constitution under which this court now acts. The words of that section were not new. They were part of the Constitution of 1846. For half a century they had stood as part of our fundamental law. The men who, in 1894, reenacted those words must have believed that they were continuing the law as it had been before. On the judiciary committee of that convention were men as learned in the law as any whom this State has produced. They lavished on the brief judiciary provisions of the Constitution the most profound study. Were they ignorant of this rule of law that an officer cannot be impeached for acts done out of office — this rule, never questioned, laid down with emphasis in every decided case, enunciated by our legislative committees, written into our statutes, promulgated by our elementary textbooks? And if they knew of the rule, can we believe that they meant to change it by reenacting the same old words?

Bowing to the great principles of construction that no law shall be deemed to impose a penalty or forfeiture except by clear expression or necessary implication, and that every law shall be read in the light of the knowledge and meaning of the men who wrote it, must we not hold that the law is now as it always has been, that no man can be impeached for acts done out of office?

APPENDIX

(Accompanying Mr. Root's memorandum)

I

There has never been an attempt in this country to *impeach* an officer for acts done by him while he held no office. There is, therefore, no authority on this point arising *in a case of impeachment.* That a public officer cannot be removed from office by judicial or quasi-judicial proceedings for acts done while not in office has been decided three times in the courts of the State of New York. People v. Henry W. Merritt (Special Justice, Court of Common Pleas, City of New York, 1840); Ex rel. Bancroft v. Weigant (14 Hun 546); Conant v. Grogan (6 N. Y. St. 322, Supreme Court Gen'l Term).

There is a dictum to the same effect in the Matter of Guden v. Dike (37 Misc. 390). (Page 403 of the Appendix.)

There has also been a legislative interpretation of the New York law to this effect. (Section 12, Code of Crim. Proc.)

There is also a dictum in an opinion of the judiciary committee of the Assembly delivered in 1853 to the same effect, and counsel believes that there was a decision to the same effect by the special committee of the Legislature investigating charges of corruption against Ex-speaker Callicott, in 1853. (See p. 200, Trial of Horace G. Prindle.)

There is no contrary authority in the State of New York except a dictum in the opinion of the Appellate Division in the Matter of Guden (71 A. D. 422) (Appendix, p. 403).

II

It has been decided once in the court of last resort of a sister state that a public officer cannot be removed by judicial proceedings for acts done while he held no office. Commonwealth v. Barry, 3 Hardin 229 (Ky.).

There are dicta to the same effect in Speed v. Common Council (98 Mich. 360); State v. Jersey City (25 N. J. Law 536); State ex rel. Gill (9 Wis. 254); Thurston v. Clark (107 Cal. 208); Iowa v. Welsh (109 Iowa 19).

There are several opinions of text writers to the same effect: Foster on The Constitution, vol. 1, p. 598; 29 Cyc. 1410; Harvard Law Review, June, 1913, pp. 702–4.

[Note: It has been twice held that the law of impeachment is applicable to cases of removal on judicial proceedings. State v. Bourgeois (45 La. Ann. 1350); Matter of Merritt (Court of Common Pleas, N. Y. 1840).]

III

That a public officer can be convicted *on impeachment* for acts *during a prior term in the same or a similar office* has been decided three times in the United States. Trial of Judge George G. Barnard N. Y., 1872). Trial of Judge Levi Hubbell (Wisconsin, 1853). Trial of David Butler, Governor of Nebraska (1871).

That he cannot be so convicted for such acts has been decided once in the United States. Trial of Robert W. Archbald (United States Senate, 1912). Compare, also, report of Assembly judiciary committee, 1853.

That an officer can be removed by judicial or quasi-judicial proceedings for acts done during a prior term in the same or a similar office has been decided at least five times in the United States. Matter of Judge Prindle (N. Y. Senate, 1872); Matter of Judge McCunn (N. Y. Senate, 1872); Iowa v. Welsh (109 Iowa 19); State v. Bourgeois (45 La. Ann. 1350).

The contrary has been held in cases of removal by judicial or quasi-judicial process twice in the United States. State ex rel. Gill v. Common Council (9 Wis. 254); Thurston v. Clark (107 Cal. 285). There is also a dictum to this effect in State v. Jersey City (25 N. J. Law 536).

1840. People v. Henry W. Merritt, Special Justice, before the Court of Common Pleas of the City of New York.

This was a distinguished case in which the State was represented by the district attorney, James R. Whiting, and the defendant by Charles O'Connor and Francis B. Cutting.

The following excerpt from the opinion of the court, as delivered by Mr. Justice Daniel P. Ingraham, is taken from the report published by Gould, Banks & Co., and found in Pamphlets, Trials, vol. 3, N. Y. C. Bar Assn. Library:

> "The first demurrer to the first, second and third charges is founded upon the fact that the charges therein made were for acts done by him before his appointment as a special justice. It does not appear to the court in any way when the respondent was appointed to this office, except in the fourth charge, which alleges that he was appointed before February, 1839. If he was an officer at the time of the acts charged in the previous charges, it should have been so averred. I, therefore, conclude that at the different periods stated therein he was not a justice. This proceeding is, in respect to the mode of conducting it, somewhat analogous to impeachments, and the rules governing those proceedings should generally be applied to the presentation of charges before the court against a justice. It is not necessary in all things to conform to those rules, as there is a greater discretion vested in the court by the provision of the Constitution, which confers the power on the court. But at the same time these rules, which have been found to be the best calculated to control the trial of impeachments, will be found the best adapted to such a proceeding as the present.
>
> "The Constitution confers upon the justice an office which cannot be taken from him, except in case of removal by the county court for causes to be particularly assigned by the judges. There may be cases where a person unworthy of the station is appointed. It may be done sometimes through ignorance, and it may also be done after full knowledge of the objections. But whether the objections are known or unknown to the appointing power, is a question with which it appears to me, this court has nothing to do. It seemed to be conceded that, if the charges against an individual for

acts done before his appointment were known to the appointing power, it would not be a good ground for his removal. Any other rule would render the power of the court in this matter, in effect, nugatory. If the court were to interfere and remove from office an individual, upon a charge against him of a crime, the existence of which charge was known to the power that appointed, such removal would be of no avail, if the same authority which originally appointed him could immediately restore the individual to office. And if the appointment was made with knowledge of the charge, it is fair to presume that he would be reappointed if removed therefrom. And it would be, also, impossible to distinguish between the two cases. Whether the charge was known or not, could only be ascertained by application to the appointing power. And such a proceeding, I cannot imagine, was ever contemplated by the framers of the Constitution. No case can be found that will warrant such a course of proceeding; but, on the contrary, every case to which the court has been referred, shows that the charges made were for acts done during the period of holding the office. If causes of removal were to be deemed sufficient for acts done before appointment, where is the line to be drawn as the boundary to limit the examination? If the court can go back two years in one case, they may go back five in another and ten in another. And if the examination is only to be limited by the peculiar circumstances of the case under the investigation, the court might be required to review the conduct of an individual at any previous time which the complainant thought fit to select. There is, also, another reason arising out of the decision of this case in the first instance, which satisfies me of the impropriety of the course proposed.

"If the court will receive charges, not verified and presented by the common council, merely on a resolution from them, without any examination on their part into the truth of the charges, it would open the door for the presentation of such charges whensoever a change in the members of that body should render the removal of such officers desirable; and if, in addition thereto, charges might be presented for

acts done before the appointment of the officer, and for which this court would remove the incumbent, the provision of the Constitution fixing the term of office would be of no avail.

. . . . . .

"This court having, after hearing counsel for the respondent and for the complainants in this matter upon the demurrers, filed to the charges therein, do order judgment for respondent upon all the demurrers, and that the order to show cause be discharged."

This holds squarely that an officer cannot be removed by judicial process for acts done while not in office.

1878. Ex rel. Bancroft v. Weigant, 14 Hun 546 (2d Dept.), Barnard, P. J., delivering the opinion of the court, said:

"In March, 1878, the relator was removed from this office of marshal upon charges sustained by proof that Bancroft, the relator, had before his appointment held an office of collector of taxes of the city of Newburgh, and had failed to account for and pay over the money collected by him to the city treasurer. The sole question, therefore, presented is whether proof of this default as collector of taxes establishes 'incapacity, misbehavior or neglect of duty,' as marshal of police. It seems quite clear that it does not. The 'incapacity, misbehavior or neglect of duty,' must be established against the relator in respect to the office of marshal."

The statute under which the proceeding was brought simply provides for "removal by the mayor for incapacity or misbehavior, or neglect of duty," without referring to the time of such occurrences.

This holds squarely that an officer cannot be removed by judicial process for acts done while not in office.

1887. Conant v. Grogan, 6 N. Y. St. 322 (Supreme Ct. Gen'l Term).

Learned, P. J.: "The court should never remove a public officer for acts done prior to his present term of office. To do

otherwise would be to deprive the people of their right to elect their officers.

"When people have elected a man to office it must be assumed that they did this with knowledge of his life and character, and they disregarded or forgave his faults or misconduct, if he had been guilty of any. It is not for the court, by reason of such faults or misconduct, to practically overrule the will of the people.

"We will not say that on an application like the present, evidence of acts done prior to the term of office might not sometimes be admissible, where such acts would tend to characterize other acts committed during the existing term. In civil and in criminal actions there are a few rather exceptional cases in which proof of other acts of a party may be received in order to characterize the act which is the ground for action or defense. The object is generally to show intent or motive.

"But that doctrine should be very cautiously applied in such a case as the present. The inquiry should be limited to acts done during the existing term of office, unless some light can be thrown on those acts from previous conduct."

It is to be noted particularly that this opinion was concurred in by Judge Parker, subsequently Chief Judge of the Court of Appeals and now counsel for the Assembly board of managers.

1902. Matter of Guden v. Dike, 37 Misc. 390 (Kings County Sp. Term, Kings Co.). Gaynor, J., stated that the acts complained of occurred before Guden's term of office and that they did not therefore constitute a ground for removal.

The Constitution provides, article 10, section 1: "The Governor may remove any officer in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity to be heard in his defense."

Judge Gaynor said:

"When the words of the clause of the Constitution in question are looked to closely, they are found to confer no such

power, but the contrary. They give the Governor the power to try and remove officials, but require as a condition precedent to his exercise of such power that 'charges' be first presented against them. The clause does not in so many words say that such charges shall be of acts or omissions in office. Nor does it say they may be of acts committed before the official came into the office. That it means acts or omissions in office, however, we all know. But on what does the claim rest that it means more than that, i. e., that it also means acts committed before the official came into the office, i. e., that his whole life is subject to attack and trial before the Governor? We all know that it means acts in office. To hold that it also means acts committed before the official came into office, would be to read into the clause something which is not there, and which would be most astonishing in this or any other free state if it were there; for it would allow an appeal from the people who elect their officials to the Governor on the question whether the officials of their choice should serve or not. The plain purpose of the provision is only to make the official responsible as an official, i. e., for his conduct in office, to the Governor, and not to make him responsible or answerable at all in his private character."

Section 12 of the Code of Criminal Procedure of the State of New York provides:

"Sec. 12. Its jurisdiction. The Court for the Trial of Impeachments has power to try impeachments, when presented by the Assembly, of all civil officers of the State, except justices of the peace, justices of justices' courts, police justices, and their clerks, for wilful and corrupt misconduct in office."

1902. Re Guden, 71 A. D. 422 (App. Div., 2d Dept.) opinion by Judge Bartlett (all concurring):

Article 1, section 10, of the Constitution of the State of New York provides:

"The Governor may remove any officer in this section mentioned within the term for which he shall have been

elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense."

The Governor removed a sheriff under this clause for procuring support during his campaign by promising to appoint his supporter as "sheriff's counsel."

The court held that the charges must be such as affect the usefulness of the officer. The court then said:

"But, assuming this to be so, it is said that those acts, in order to furnish the necessary constitutional ground for removal by the executive, must be alleged to have been committed and must have been committed after the beginning of the term of office; and, because the alleged misconduct of Guden occurred before his election, it has been held that it afforded no basis for the action of the Governor.

"In considering this question and in determining this appeal, it is necessary to refer to only one of the charges, to wit, the second of the amended and supplemental charges in the record before us. That charge is as follows: 'That in October, 1901, said Charles Guden illegally, corruptly and contrary to good morals, and with the object of procuring and furthering his election to the office of sheriff of Kings county at the ensuing November election, promised and agreed that in return for the political support and influence at such election of one Bert Reiss of the borough of Brooklyn, he, said Charles Guden, would, in the event of his election, appoint said Bert Reiss to the office or position of counsel to the sheriff of Kings county.'

"As to this charge, the Governor says, in his memorandum filed with the order of removal: 'I find from the testimony given before me that Charles Guden, while a candidate for the office he heads, made a corrupt promise to and agreement with Bert Reiss to appoint him counsel to the sheriff in consideration of his activity and influence in securing influence and votes for that office in the election of 1901.'

"None of the proof taken before the Governor has been placed before the court in this proceeding. In no point of view, therefore, can it be assumed that the evidence before

him was not sufficient to justify the finding that this charge was true. It will be observed that the accusation is not merely that Guden promised to appoint Reiss counsel to the sheriff, but that he did this *corruptly*. It amounts substantially to a charge that, induced thereto by some corrupt consideration, the candidate for sheriff promised and agreed with another person that, in the event of his election, he would administer his office in a certain way for the benefit of that person. If such an agreement were corruptly made, its impropriety is not dependent upon the character of the official act subsequently to be performed. Suppose, for example, the case of a county treasurer authorized by law to select a depository for the public moneys under his custody. If, prior to his election, such an officer agreed, for a money consideration, with the president of a particular institution to deposit the public moneys in that institution, there could be no question, I think, as to the impropriety of such an act, although in the absence of any agreement on the subject the institution might properly have been selected. Furthermore, it is to be observed that the corrupt agreement alleged in the particular charge now under consideration related not to a time preceding the election and qualification of the officer, but that it was impossible of execution until he should become vested with the title to the office. In other words, it was a corrupt agreement, the time of performing which was necessarily postponed to a period when he should become a public officer. In this respect the case differs, I think, from any of those cited by counsel or in the opinion below.

"In that opinion the precise question is stated to be 'whether the Governor had jurisdiction to entertain charges and remove from office for alleged acts of Guden committed before he entered into office, or whether his jurisdiction was limited to charges of acts committed by Guden after he came into office only.'

"Whatever the conclusion might be, if the acts committed before Guden entered into office had no direct relation to his subsequent official conduct, I am of the opinion that a cor-

> rupt promise, made before election, to exercise his official powers in a particular way, affords a sufficient basis in law for the removal of the officer by the Governor, under section 1 of article 10 of the Constitution. It seems to me that the relation of the promise to the subsequent official tenure is so close as to make the act of entering into such a corrupt agreement affect the usefulness of the officer as clearly and directly as could any misconduct committed wholly after the official term began.

The court sustained the removal.

This is an *obiter* dictum and not a holding. The decision was affirmed by the Court of Appeals in Re Guden, 171 N. Y. 529, on the ground that the action of the Governor was executive and was not subject to review. According to the opinion of the Court of Appeals, the question discussed in the Appellate Division did not arise at all. The remarks of the Appellate Division must, therefore, be taken as obiter.

It is also to be noticed that as the act charged constituted bribery, there was a breach of the oath of office, according to the Constitution, article 13, paragraph 1, which recites that nothing of value has been offered for a vote. It is on this ground that Lincoln in his "Constitutional History of New York," vol. 4, pp. 724-33, supports the decision of the Appellate Division. It is also true, as appears from the opinion of Judge O'Brien in the Court of Appeals, 171 N. Y. 537, that the corrupt bargain made prior to the election was *actually carried out after the respondent's induction into office.*

> "In one of the charges presented to him, and which appears in the record, it is, in substance, alleged that the sheriff abdicates his powers and duties with respect to the appointment of his subordinates to an irresponsible body of men called a 'patronage committee.' That is to say, he entered into an agreement with this committee to make such appointments of subordinates as it determined upon, and that a list of forty persons was furnished to him by this committee to be appointed as his subordinates, and that *he appointed them.* The

appointment of these persons under such circumstances was an official act relating to the powers and duties of his office."

1807. Commonwealth v. Barry, 3 Ky. Reps. (Hardin) 229.

This was a proceeding to remove Barry, a clerk of court, under article 4, section 10, of the Constitution of Kentucky, which provides of clerks that " They shall be removable for breach of good behavior, by the Court of Appeals only, who shall be judges of the fact, as well as the law. Two-thirds of the members present must concur in the sentence." The first two of the charges exhibited against Mr. Barry by the Attorney General charged him with attempting by bribery to procure a vote for himself for the office of clerk to the Ohio county court. The Attorney General demanded that process should issue on all the charges. Counsel appeared for Mr. Barry and stated that he had heard of the prosecution about to be brought against him, and that they desired to question the right of the prosecution to inquire into the misconduct of the defendant except in relation to his office. The court said:

" We could never think of putting an officer to the trouble and expense of defending himself upon a charge, while we were satisfied, if proved, it would not be a sufficient cause for removing him from office. We are of opinion that the proceeding under this section of the Constitution, must be confined to misconduct in office.

" The Constitution, article 6, section 4, provides that ' laws shall be made to exclude from office, and from suffrage, those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes and misdemeanors.' As far as the Legislature have acted, or may act, under this latter section of the Constitution, it would require a conviction under a regular prosecution for the crime charged, and the production of the record of conviction before this court would take up the subject. To determine that this court could, for every misconduct in private life committed by a clerk, remove him from office, would be putting every clerk in the arbitrary power of the court, and might be exercised to the worst of purposes. No process can issue upon the two first charges. We will take time to consider of the others."

1894. Speed v. Common Council, 98 Mich. 360.

Speed was appointed head of the law department of the city of Detroit (a statutory office). Subsequently the mayor lodged charges against Speed with the common council and asked for his removal.

The court said:

> ". . . the charges preferred, so far as they relate to the acts of Mr. Speed committed before his appointment to and induction into this office, are clearly beyond the jurisdiction of the respondents to determine. There is no provision in the constitution nor in the laws which prevents a person from holding office for misconduct in another office which he held prior to the one to which he was elected or appointed. We have been unable to find any authority which justifies a removal for such previous misconduct. The misconduct for which an officer may be removed must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office. There is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct."

This was an alternate holding, the alternate ground being that the officer was not removable.

1856. State v. Jersey City, 25 N. J. Law 536.

The relator was expelled from the common council of Jersey City for taking bribes. An election to fill the office for the remainder of the term was ordered and the relator was reelected. He then brought mandamus to compel the council to allow him to act as a councilman. Judgment in his favor on the ground that expulsion did not disqualify him for reelection.

There is a dictum in our favor:

> "The question whether Tyrrell, having been expelled from the council upon conviction for official corruption, and

having been reelected, can again be expelled for the same identical offense, is not properly before the court. If it was, we apprehend there could be no difficulty in deciding it. The council have no power to expel a member for acts committed previous to his election."

1859. State ex rel. Gill v. Common Council, 9 Wis. 254.

This case is chiefly interesting as containing an expression of opinion concerning an act committed *between* the relator's *appointment* and the *beginning of his term*.

"It only remains therefore to decide whether the return in this case sets forth that the relator was removed for 'due cause.' And we think it does not for the simple reason that it does not set forth for what cause he was removed. There are a number of charges, but the return admits that all except the last relate to acts or omissions of the relator during a prior term of office. Now, without examining those charges, to determine whether they would show good cause for removal, if occurring during the term when the removal was sought, which we think very doubtful, yet we think it a sufficient answer to them that they did not relate to anything occurring during that term. We do not say that in no case could acts done during a prior term justify a removal. Thus, if, after a treasurer was elected, it should be discovered that during his prior term he had committed a defalcation, and had been guilty of gross frauds in the management of his office, it might perhaps be just ground for removal. But where, as in this case, the charges show nothing more than a mere neglect of some formal duty, which the law may have required, involving no moral delinquency, and which, if violations of duty at all, must have been well known to the appointing power, we do not think where they relate to acts during a prior term of office, that they constitute due cause in law for the removal of an officer. For such offences, if offences at all, his reappointment should be regarded as a condonation. For notwithstanding such acts, it does not follow but that after his reappointment he may have fulfilled his duties with the strictest propriety.

"In relation to the last charge, the return avers that it related to acts subsequent to the reappointment in May, 1859. But as contended by the relator, this does not necessarily show that those acts did not occur during his prior term; because by the law his new term did not commence until a number of days after his appointment."

The language above quoted, although applying specifically to acts done during the prior term, constitutes by necessary implication a dictum to the effect that acts entirely out of office could not be made a basis for removal. The last brief paragraph above quoted is particularly interesting as showing the opinion of the court as to acts occurring between election and induction into office.

1895. Thurston v. Clark, 107 Cal. 285.

Section 772, California Penal Code, provided that any officer could be removed from office by the Superior Court if he were "guilty of charging and collecting illegal fees for services rendered, or to rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office."

Certain "specifications" of the "complaint" against such an officer, alleged acts done by him during a prior term in the same office.

The court held that a demurrer to these specifications should be sustained, saying:

". . . an officer cannot be removed from office for a violation of his duties while serving in another office, or in another term of the same office. Each term of an office is an entity separate and distinct from all other terms of the same office. If the defendant violated any duty imposed upon him as an incumbent of the office of sheriff during a former term, the law furnishes a mode or modes for his punishment; but to remove him from an office to which he has been subsequently elected is not the punishment for such a violation of duty prescribed by any law of this state."

The language above quoted, while applying specifically to acts done in a prior term, is to be taken as a dictum by implication that acts done before the respondent held any office at all could not *a fortiori* have been made a ground for removal.

State of Iowa v. Welsh, 199 Iowa 19.

The court said:

> "It is doubtless true that a removal cannot be had on account of misconduct in another office, but only so because such a provision may not be included among the statutory causes of removal. Speed v. Common Council, Detroit, 98 Mich. 360. This may also be said of offences committed previous to being inducted into the particular office. Commonwealth v. Shaver, 3 Watts & S. 338; Tyrrell v. Common Council, Jersey City, 25 N. J. Law 536."

1895. Foster (Roger) on the Constitution (vol. 1, p. 598):

> "It seems an officer should not be impeached for an offence committed before his official term."

29 Cyc. 1410:

> "Where removal may be made for cause only, the cause must have occurred during the present term of the officer. Misconduct prior to the present, even during a preceding term, will not justify a removal."

Wrisley Brown, assistant attorney general, of counsel for managers on the part of the House of Representatives in the Archbald impeachment, writing in the Harvard Law Review, June, 1913, p. 704, says of the doctrine that an officer can be impeached for acts preceding his current term:

> "Such a doctrine would probably be vicious in principle, for, if carried to an extreme, it might well develop an actual case of relentless vengeance suggesting the immortal story of Jean Valjean."

Removal cases as authority for impeachments

There is a general agreement that the common law governing removals and impeachments is the same. Thus, in State v. Bourgeois (45 La. Ann. 1350), a removal case, the court says:

> "The learned counsel for the defendant urge, however, that a suit under article 201 of the Constitution cannot be assimilated to proceedings by impeachment. The effect of the conviction may be different, but the laws applicable to the commission of the offence are the same."

In Matter of Merritt (N. Y.), a removal case, the court said:

> "This proceeding is, in respect to the mode of conducting it, somewhat analogous to impeachments, and the rules governing those proceedings should generally be applied to the presentation of charges before the court against a justice."

Foster in his work on the Constitution (p. 598) cites this same removal case as authority for the proposition that

> "An officer should not be *impeached* for an offence committed before his official term."

In all the great impeachment trials the removal cases have been cited and considered as authorities, and, as a matter of reason, the substantial similarity of the two classes of cases is apparent.

1872. Trial of George G. Barnard. In the Court of Impeachment of the State of New York.

On pages 147–48 of the record it appears that of the articles of impeachment preferred against Judge Barnard by the Assembly, articles 21, 22, 23, 24, 25, 30, 32, 33, 34, 35 and 36, referred to acts committed by Judge Barnard during a term of office as judge of the Supreme Court beginning January 1, 1861, and ending December 31, 1868. On January 1, 1869, he began a new term of office, during the course of which the proceedings for impeachment were brought. Judge Barnard demurred to the articles above referred to on the ground that the acts alleged more

than occurred during his prior term of office. Mr. Beach argues the demurrer for Judge Barnard from page 151 to page 164. His argument is followed by an extraordinarily able argument by Mr. Van Cott, one of the Assembly managers. Throughout the entire course of his very learned and thorough argument no case is cited in which impeachment was brought for acts committed while the defendant was a private citizen, and there is an assumption that the articles demurred to are to be sustained not because impeachment lies for acts out of office, but merely because the acts alleged occurred during a prior term of the same office.

On page 191 of the record it appears that a vote was taken on the pleas in question and that they were overruled by a vote of 23 to 9.

This case is distinguished from the principal case by the fact that the offenses alleged occurred not while the respondent was a private person, but while he was holding a prior term of the same office.

1853. Trial of impeachment of Judge Levi Hubbell in the Wisconsin Court for the Trial of Impeachments. Extract from the journal:

> "Tuesday, June 14.
>
> "Mr. Dunn introduced the following resolutions:
>
> "Resolved, That this court has the constitutional jurisdiction to try an impeachment preferred by the Honorable 'The Assembly of the State of Wisconsin.'
>
> "Resolved, That this court on the trial of the impeachment now pending, have jurisdiction to enquire into offences charged to have been committed as well during the former term of office of Levi Hubbell, judge of the Second Judicial Circuit of this state, as into offences charged to have been committed during the present term of his said office.
>
> "And the question being upon the adoption of said resolutions:
>
> "Mr. Smith called for a division,
>
> "Which was had,
>
> "And the question being upon the adoption of the first resolution

"It was decided in the affirmative,

"And the ayes and noes being required,

"Those who voted in the affirmative were

"Messrs. Alban, Allen, Bashford, Blair, Bovee, Bowen, Briggs, Cary, Dunn, Hunter, Lewis, McLane, Miller, Pickney, Prentice, Reed, Smith, Seaton, Stewart, Sterling, Vittum, Wakely, Whittlesey and Weil — 24.

"None voted in the negative.

"The question being upon the adoption of the second resolution,

"It was decided in the affirmative,

"And the ayes and noes being required,

"Those who voted in the affirmative were

"Messrs. Allen, Bashford, Blair, Bovee, Bowen, Briggs, Cary, Dunn, Hunter, Lewis, McLane, Miller, Pickney, Prentice, Seaton, Stewart, Vittum, Whittlesey and Weil — 19.

"Those who voted in the negative were

"Messrs. Alban, Reed, Smith, Sterling and Wakeley— 5."

1871. Impeachment of David Butler, Governor of Nebraska.

Eleven articles of impeachment were brought against Governor Butler.

Article 1 related to misappropriation of public funds during 1867 and 1869.

Article 2, receipt of bribes in return for executive favors, 1869–71.

Article 3, the corrupt procurement as Governor of the issue of treasury warrants.

Article 4, in 1869 the corrupt receipt of a deed of land to influence his conduct in locating a state asylum, as Governor.

Article 5, in 1869, as Governor, and member of the Board of Regents, recklessly making a construction contract for an excessive price.

Article 6, in 1871, deceiving the Legislature by false report made as Governor.

Article 7, in 1869, as Governor, unlawfully loaning public funds without security.

Article 8, as Governor, in 1869, appropriating to his own use moneys from the Board of Immigration.

Article 9, as Governor, in 1870, issuing to one railroad patents of land reserved by one Legislature to another.

Article 10, as Governor, in 1869, selling to private persons at private sale lots of land belonging to the State and appropriating the purchase money.

Article 11, as Governor, in 1869, the same offense as to the different lots of land.

The Governor does not appear to have demurred to any of these articles, nor in his answer to have raised the defense that a portion of them did not occur during his current term. Moreover, the case is plainly distinguished from ours in that, the offenses not occurring during the present term, all occurred during a prior term in the same office. The vote on the article was as follows:

Article	Guilty	Not Guilty
1	9	3
2	5	7
3	5	7
4	1	11
5	..	12
6	5	7
7	3	9
8	..	12
9	..	12
10	..	12
11	6	6

1912. Trial of impeachment of Judge Robert W. Archbald in the United States Senate.

Thirteen articles of impeachment were brought against Judge Archbald. The following table shows whether the offenses alleged in each article were committed during Judge Archbald's prior term as a member of the United States District Court or during

his current term as a member of the Commerce Court. It also shows the vote and result as to each article:

Art.	Relates to conduct in	Guilty	Not Guilty	Verdict
1	Commerce Court	68	5	Guilty
2	Commerce Court	46	25	Not Guilty
3	Commerce Court	60	11	Guilty
4	Commerce Court	52	20	Guilty
5	Commerce Court	66	6	Guilty
6	Commerce Court	24	45	Not Guilty
7	U. S. District Court	29	36	Not Guilty
8	U. S. District Court	22	42	Not Guilty
9	U. S. District Court	23	32	Not Guilty
10	U. S. District Court	1	65	Not Guilty
11	U. S. District Court	11	51	Not Guilty
12	U. S. District Court	19	46	Not Guilty
13	Commerce Ct. & U. S. Dist. Court	42	20	Guilty

The following expressions of opinion by the senators showing that the result was largely due to doubt as to the propriety of convicting Judge Archbald for acts during a prior term are taken from the record:

P. 1632. Senator Stone asks to be excused from voting on articles 7, 8, 9, 10, 11 and 12 because they "relate to charges of misbehavior alleged against the respondent while he was district judge."

Senator Swanson:

> "I have not been able to reach a conclusion satisfactory to myself as to whether charges specifying offenses prior to the appointment of the respondent as a circuit judge can be tried under this impeachment. Consequently I ask to be excused from voting on articles 7, 8 and 9."

P. 1634. Senator Smith asks to be excused from voting upon article 7 as he has

> "Not reached a conclusion as to whether these acts done prior to the occupancy of the defendant of a seat on the Commerce Court can now be the subject of impeachment."

P. 1634. Senator Borah filed the following statement:

> "In voting not guilty upon those counts which charge misconduct at a time when said R. W. Archbald was district

judge, an office which he no longer holds, I do so because of a doubt I entertain as to the law. I am not prepared to say we can not impeach a man for offenses or acts committed while holding an office which he no longer holds. But the legal proposition, to my mind, is involved in doubt. Furthermore, if we had a clear and undoubted right as a legal proposition to do so I would hesitate to establish the precedent except upon a peculiar and extraordinary necessity."

P. 1635. Senator Bryan filed the following statement:

"I am convinced that articles of impeachment lie only for conduct during the term of office then being filled; and that the 'good behavior' required by the Constitution relates to the future and not to the past; to what the officer does after, and not to what the citizen had done before, he is nominated and confirmed."

P. 1635. Senator Works filed a statement in which he said:

"I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to his present office. The Constitution provides, in express terms, that judges 'shall hold their offices during good behavior.' Therefore, if a judge has maintained his good behavior during that time he has done nothing to forfeit his office. The condition upon which he is entitled to continue in office is good behavior during his service, not before. Conversely, it is only bad behavior during the same time that can forfeit the office or warrant the impeachment. Neither can such misbehavior, committed before his appointment, warrant a judgment disqualifying him from holding office, because such a judgment can be rendered only on his impeachment, which cannot be had for such offenses. Such offenses might show his unfitness to hold office and properly prevent his appointment, but they cannot be cause for his impeachment."

P. 1636. Senator Smith and Senator Newlands ask to be excused from voting on

"each of the other articles where they involve acts prior to the respondent's appointment to the Commerce Court."

P. 1638. Senator Brandagee filed the following statement:

"I vote 'not guilty' on articles 7 to 12, inclusive, because I do not think that impeachment will lie for offenses alleged to have been committed by respondent while holding an office which he does not now hold and did not hold at the time the articles of impeachment were adopted by the House of Representatives."

P. 1647. The following are extracts from reasons filed by senators:

Senator Brandagee:

"I vote 'not guilty' on article 13 because it alleges offenses some of which are alleged to have been committed by the respondent while he was a judge of the United States District Court, which office he does not hold at present and did not hold at the time the articles were adopted by the House of Representatives; and, also, because it is impossible to separate the offenses alleged to have been committed as district judge from those alleged to have been committed as circuit judge, and because I do not think that all the allegations have been proven."

Senator DuPont:

"My vote of 'not guilty' upon the articles of impeachment against Judge R. W. Archbald, numbered 7, 8, 9, 10, 11, 12 and 13, was based, in the main, upon the fact that the offenses therein charged were alleged to have been committed prior to January 31, 1911, when he was not holding his present office. In my judgment, the legality of the impeachment, so far as such offenses are concerned, is questionable, and in any event a precedent fraught with danger is created."

Senator Owen:

"Impeachment is the exercise of political power and not the exercise of mere judicial authority under a criminal code. Impeachment is the only mode of removing from office those

persons proven to be unfit because of treason or high crime and misdemeanor.

"Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.

"A wise public policy forbids the precedent to be set that promotion in office of a criminal precludes his impeachment on the ground of his discovered high crimes and misdemeanors in a previous office from which he has just been promoted.

"For these reasons it is my judgment that articles 7, 8, 9, etc., insofar as they charge crimes committed by Robert W. Archbald while United States district judge, comprise impeachable offenses and may be alleged against him as judge of the Commerce Court."

P. 1648:

"Mr. Poindexter states as to articles 7, 8 and 9 that, although the offenses charged were committed while the respondent was district judge and before he was appointed circuit judge, yet, since the penalty for impeachable offenses is not only forfeiture of office, but disqualification to hold office thereafter, I am of the opinion that the offenses charged in these articles, although committed before respondent's appointment as circuit judge, nevertheless disqualify him, on impeachment therefor, from holding office as such circuit judge or as judge of the Commerce Court. There is no statute of limitation nor law of limitations in impeachment proceedings."

P. 1650. Opinion of Senator Root:

". . . I have no doubt that the respondent is liable to impeachment for acts done while he was a judge of the district court and that the Senate has jurisdiction to try him for such acts."

Senator Lodge concurs in this opinion.

1913. Wrisley Brown, assistant attorney general, of counsel for managers on the part of the House of Representatives in the Archbald impeachment, writing in the Harvard Law Review, June, 1913, pages 702–4, says:

> "There were thirteen articles exhibited against Judge Archbald. . . . Articles seven to twelve, inclusive, charged misconduct as a United States district judge, which office the respondent held immediately prior to his appointment as circuit judge. These charges related to the alleged use of his official influence to secure credit and other favors from parties having litigation in the court over which he presided; the acceptance of a purse from certain members of the bar of his court; a trip abroad at the expense of a magnate of large corporate interests; and the designation of a general railroad attorney to be jury commission. . . . The trial resulted in his conviction by an overwhelming vote on the first, third, fourth, fifth and thirteenth articles. . . .
>
> "All the articles charging offenses which were committed while the respondent held the office of United States district judge failed of conviction. The considerations which brought about this result can only be surmised, but it is likely that it was due to a cautious disinclination on the part of the Senate to establish the precedent that a civil officer may be impeached for offenses committed in an office other than that which he holds at the time of his impeachment. Such a doctrine would probably be vicious in principle, for, if carried to an extreme, it might well develop an actual case of relentless vengeance suggesting the immortal story of Jean Valjean."

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REPORT OF THE JUDICIARY COMMITTEE RELATIVE TO POWER OF IMPEACHMENT

Mr. Weeks, from the committee on the judiciary, to which was referred the resolution of the House directing said committee to inquire and report at the earliest moment:

First. Whether a person could be impeached who at the time of his impeachment was not a holder of an office, under the laws of this State.

Second. Whether a person could be impeached and deprived of his office for malconduct, or offences done or committed under a prior term of the same or any other office.

Reports:

That the committee have barely had time to give the matter referred to them that consideration which its importance demands; in the time, however, they have given it that attention, which has enabled them to arrive at a satisfactory conclusion in their own minds, without being able to give the reasons as fully to the House, as they could wish to have done, had time allowed.

The only clause in the Constitution relating to judgments upon impeachments, provides that judgments in such cases "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment and punishment according to law."

From this and from the theory upon which our government is based, the committee have come to the conclusion:

First. That no person can be impeached who was not at the time of the commission of the alleged offence, and at the time of the impeachment, holding some office under the laws of this State.

That the person impeached must have been in office at the time of the commission of the alleged offence, is clear from the theory of our government, viz.: that all power is with the people, who if they saw fit might elect a man to office guilty of every moral turpitude, and no court has the power to thwart their will, and say he shall not hold the office to which they have elected him; a contrary doctrine would subvert the spirit of our institutions.

It is equally clear from the terms of the Constitution, that the person must be in office at the time of the impeachment: this instrument provides but two modes of punishment, viz., removal from office, or removal and disqualification to hold office; in either mode of punishment the person must be in office, for removal is contemplated in both cases, which cannot be effected unless the person is in office.

The courts are the only tribunals that have jurisdiction over a delinquent, after his term of office has expired, to punish him for offences committed in the discharge of the duties of his office.

The committee have further come to the conclusion:

Second. That no person can be impeached and deprived of his present term of office, for offences alleged to have been committed during a prior term of the same or any other office.

Neither by the Constitution nor by our laws is there any period limited, in which an impeachment may be found; it is but fair, therefore, to infer, that the *intention* was to confine the time to the term of office during which the offences were alleged to have been committed, indeed, any other conclusion would lead to results, which could not be sustained, for who can say, but that the people knew of this malconduct, these offences, and elected the individual notwithstanding; true, an extreme case might be put of fraud committed on the last day of the term of an office, to which office the individual might be immediately reelected; yet, who could say this was not known to the people? How is the matter to be settled? The mere statement of the question shows the dilemma in which we would be placed at every election, if the tenure or stability of an office depneded upon a legal inquiry as to whether the people knew the characters of the individuals they had elected to office, and had exercised a proper discretion.

However much it may be desired to have men of high integrity and honesty fill our public offices of trust and honor, yet by our Constitution and the fundamental principles of our government, no particular scale of integrity, honesty or morality is fixed. No inquisition as to what character had been, can be held; it is enough that the people have willed the person should hold the office. And the courts which are but the mere creatures of the public, will have no power to interfere.

The Constitution provides, as we have seen, that a person cannot be impeached after he is out of office, then if the same person should be reelected to the same office, a year afterward, would the right of impeachment be revived? In fine, by his reelection, would he incur any other liabilities, or acquire any other rights than those incident to his present term of office? We think a moment's reflection would convince every person that it could not.

Again, could an officer be deprived of his present office by impeachment for malconduct, in another and different office, or even the same office, twenty years before his present term commenced? If not, could he after one year or one moment had elapsed? Where is the difference in the principle? The time is nothing; the question is, is he out of office; it matters not if he is the next moment inducted in.

The committee think it clear, in every light they have been able to view this matter, that the Constitution intended to confine impeachments to persons in office, and for offences committed during the term of office from which the person is sought to be removed. In pursuance of this conclusion, the committee recommend to the House the adoption of the following resolution:

Resolved, That the committee of investigation into the official conduct of State officers and of persons lately, but not now holding office, be instructed:

1. That a person whose term of office has expired, is not liable to impeachment for any misconduct under section 1, article 6 of the Constitution.

2. That a person holding an elective office, is not liable to be impeached under section 1, article 6 of the Constitution, for any misconduct before the commencement of his term, although such

misconduct occurred while he held the same or another office, under a previous election.

All which is respectfully submitted.

JAMES H. WEEKS, *Chairman*
C. R. INGALLS
ROBERT D. LIVINGSTON
O. H. HASTINGS
A. A. HENDEE
J. BURNET
Committee

Lincoln in his Constitutional History of New York, volume 4, page 606, says, concerning the Barnard case and the foregoing opinion:

> " The course adopted by the court in this case can scarcely be deemed an authority for an impeachment where all the alleged misconduct occurred during a previous term for the reason that some of the charges on which the judge was convicted relate to misconduct during his present term, and these charges were obviously within the jurisdiction of the court, and a conviction on them was sufficient to sustain its judgment. The opinion expressed by the Assembly judiciary committee in 1853 has not yet been overruled so far as it relates to the jurisdiction to impeach for misconduct wholly occurring during the previous official term."

1872. Proceedings in the Senate in relation to the removal of Horace G. Prindle, county judge and surrogate.

At the request of the Assembly, the Governor submitted to the Senate fifty-four charges against Judge Prindle, and requested his removal. Judge Prindle demurred to all the charges except the fourth on the ground that they did not state acts during his present term of office, " but alleged official misconduct which occurred during the prior and former terms of office of the respondent." After a lengthy argument by counsel the Senate, in secret session, voted to overrule the demurrer.

This case is distinguished from ours by the fact that the charges in question related to misconduct during a *prior term.*

1872. Matter of the removal of Judge John H. McCunn.

The Assembly investigated charges against John H. McCunn and requested the Governor to recommend to the Senate that the Senate remove him from his office as justice of the Superior Court of the city of New York. The Senate sat to hear testimony and determine this question.

Judge McCunn's first term as justice of the Superior Court extended from January 1, 1866, to December 31, 1869. His second term extended from January 1, 1870, until the date of his impeachment in 1872. Eight charges were preferred against him. Charges 3, 5, 6 and 7 related exclusively to acts committed during his first term. Charge 6 was held not proven. All the other charges were held to be proven, and it was unanimously resolved that he be removed from office. There was no attempt to charge him with any acts committed before he began his first term. The case is distinguished from ours by the fact that the acts charged occurred either during McCunn's current term of office or during a *prior term* of the same office.

1899. State of Iowa v. Welsh, 109 Iowa 19.

Action for removal of sheriff for misconduct. The state appealed from a judgment on a direct verdict for the defendant.

> "II. The defendant was reelected sheriff of Johnson county at the general election of 1898, and during his second term, commencing January 1st of the year following, this action for his removal was begun. On motion, the particular averments of official misconduct and neglect of duty during the first term were stricken from the petition on the ground that removals are only allowable for acts during the term being served. The statute contains no such limitation. The very object of removal is to rid the community of a corrupt, incapable or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving. Reelection does not condone the offense. Misconduct may not have been discovered prior to election, and, in any event, had not been established in the manner contemplated by the statute. The defendant was entitled to the office until his successor

was elected and qualified. Code, section 1265. Being his own successor, the identical officer continued through both terms. His disqualification to continue in the particular office results from the commission of some of the prohibited acts during his incumbency. State v. Bourgeois, 54 La. 1350 (14 South. Rep. 28); Blackenridge v. State, 27 Tex. App. 513 (11 S. W. Rep. 631). This has been the uniform rule in impeachment trials, where, coupled with removal from office, is the penalty of disqualification to hold any office of honor, trust or profit under the state. In New York, Judge Barnard was impeached during his second term for acts committed in that previous. The same was true of the impeachment of Judge Hubble, of Wisconsin, and Gov. Butler, of Nebraska. Whether the impeachment may take place after the expiration of the term or resignation is a mooted question. See arguments on the trial of Belknap before the United States Senate. The supreme court of Nebraska, in an able and exhaustive opinion by Mr. Justice Norval, held, in State v. Hill, 37 Neb. 80 (55 N. W. Rep. 794), that, as the primary object is removal from office, ex-officials cannot be impeached, saying: 'The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired, and he is no longer in office, that object is attained, and the reason of his impeachment no longer exists; but, if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.' We do not overlook Thurston v. Clark, 107 Cal. 285 (40 Pac. Rep. 435), where in referring to the previous case of Smith v. Ling, 68 Cal. 324 (9 Pac. Rep. 171), holding an action for removal could not be maintained after the expiration of the term, the court said: 'By parity of reasoning, an officer cannot . . . be removed from office for a violation of his duties while serving in another office, or in another term of the same office. Each term of office is an entirety, separate and distinct from all other terms of the same office.' It is doubtless true that a removal cannot be had on account of misconduct in another office, but only so because such a

provision may not be included among the statutory causes of removal. Speed v. Common Council of Detroit, 98 Mich. 360, 39 Am. St. 555 (57 N. W. Rep. 406). This may also be said of offenses committed previous to being inducted into the particular office. Com. v. Shaver, 3 Watts & S. 338; Tyrrell v. Common Council of Jersey City, 25 N. J. Law 536. For many purposes each term of office is separate and entire. This is especially true with respect to the obligation of sureties. But there is no reason for so holding as to the incumbent. *Being his own successor, there is no interregnum.* His qualification marks the only connection between his terms. The commission of any of the prohibited acts the day before quite as particularly stamps him as an improper person to be intrusted with the performance of the duties of his particular office, as though done the day after. The fact of guilt with respect to that office warrants the conclusion that he may no longer with safety be trusted in discharging his duties."

This case is also distinguished from the case at bar by the fact that the acts complained of were done during a *prior term* of the *same office.*

1893. State v. Bourgeois, 45 La. Ann. 1350.

Action to remove a sheriff under article 201 of the Constitution and act no. 135 of 1880.

Specifications 1st, 2d, 3d and 9th charged official malfeasance during the defendant's prior term in the same office. The court said, page 1354:

"The defendant has been uninterruptedly in office since the commission of the acts complained of.

"There was by his reelection *no interruption in his official tenure. At no time was there an interregnum.* He was by the constitution to continue in office until his successor was elected and qualified. He was his ow nsuccessor, the identical officer in both terms against whom charges are preferred."

Section 201 of the Constitution, above referred to, provided that officers might be removed for the causes specified in section

196. This section provided removal for "high crimes and misdemeanors, for nonfeasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct or habitual drunkenness."

The case is clearly distinguished from ours on the ground that when the acts complained of occurred the defendant was serving a prior term in the same office. The language shows that if this had not been the case, the decision would have been different. (Page 1354.)

The President.— My brothers, I have a very strong notion of how we should deal with the present motion toward the respondent, or, rather, how we should deal with the objections which the respondent has interposed to these articles of impeachment.

We should follow a course not infrequently adopted in usual ordinary judicial proceedings; in other words, reserve the determination of this question until the final decision of the case. That is often done, as everyone of you, whether members of the Court of Appeals or members of the Senate, knows, who has either practiced before courts or who has occupied judicial position. You know that it is not an unusual practice especially where, as in the present case, the court is not only the trier of the question of law but is also the trier of the question of fact.

There are reasons that make it peculiarly proper, it seems to me, to adopt that course in the present case. In the first place, in an ordinary judicial proceeding, a trial by the court, the court is required to separate as far as possible the questions of fact from those of law so if the decision is reviewed it may distinguish between what matters the court decided as matter of fact and what as matters of law. That is not possible under the procedure that takes place in a Court for the Trial of Impeachments. The final determination is by a vote of guilty or not guilty, and that of course requires a determination of the question of law as to whether the facts which appear to be proved justify the impeachment of the respondent or not. It is very difficult to separate one from the other, though it may be, if either the charges in this case were frivolous or if the objections in this case to the charges were frivolous, we might readily dispose of them. I wish not even to

intimate any opinion as to the merits further than to say that in my judgment you can not characterize either the charges or the objections as of that character. Not only this, but it has been almost the universal custom so far as I know, gentlemen, and so far as my reading and familiarity with the proceedings by impeachment goes, to decide the question as to whether the acts charged are impeachable offenses or not, on the final submission of the case to the Court. In many of the cases, the most prominent, dispute has not been so much as to the facts as to that very question. In the most momentous prosecution by impeachment of which the books give us any record, that of the President of the United States, Andrew Johnson, the turning point in that case, at least the dominant point in that case, was the question whether the removal of Mr. Stanton was a violation of the tenure of office act, and whether if it was a violation of the tenure of office act that act was or was not constitutional; the uniform current of authority previous to that time having been to the effect that the President under the Constitution had an unlimited power of removal though there was required the consent of the Senate to the appointment to office. The major part of the argument of the distinguished counsel in that case was addressed to those questions. Now, gentlemen, there is no subject, I may say, on which there has been more divergence of opinion than as to what constitute and what do not constitute impeachable offenses. On that question the greatest statesmen, the greatest publicists, the greatest advocates and text writers are not in accord but many times diametrically opposed one to the other. Therefore it seems to me that that constitutes a strong reason for the course that should be taken.

There is something else to be said too; if it were an original question, it seems to me not wise to decide this case piecemeal, to decide one-half today and one-half next week. What decision is made today or what is the vote of any member of this Court today would not be binding when you come to the final determination. Is it not wiser first for us not to commit ourselves even to any extent? It is not that I fear so much the fact of being inconsistent. The wisest men change their opinions, and as a judge I certainly should not be ashamed to acknowledge if I was

convinced that I was wrong at a later stage of the case, to acknowledge it and to vote the other way, but it seems to me it is much wiser, that the counsel will proceed much more easily, if they feel that all the members of the Court have an open mind on this question.

There is another reason, too. It is peculiar. The Court of Impeachment when you come to the final vote requires a vote of two-thirds. Under the provisions of the Penal Code a decision of this question that has been raised requires only the vote of the majority. Suppose a majority decide that the articles should be overruled and a minority greater than one-third decides the other way. How can it then be disposed of on the final argument? Now, this is not an imaginary case. It is a case that actually happened in the impeachment of Mr. Belknap, Secretary of State under General Grant, which the old members of the Court will remember, because it was a case that excited a great deal of public interest. Mr. Belknap having resigned, the question was whether that defeated the impeachment. A majority of the court held that it did not. They then proceeded to try, and in the final determination more than one-third voted to acquit him, and nearly all the members that voted to acquit put it on the question of law and not on the question of fact.

Lastly, there is another consideration. This is as I have already stated a matter of great importance, not only in this particular case but as a precedent on the construction of the Constitution, for what causes a public officer shall be removed from office. Now, I am frank to say for myself I should prefer to have an opportunity to reflect more on the arguments that have been adduced before us by the very eminent counsel on each side of this case. It would be very inconvenient to adjourn now to let us look up the authorities. Therefore, for the purpose of disposing of this case, I shall overrule these objections pro forma simply without meaning to express any opinion whatever on the merits, and if you agree with me that will be the case taken, but I hope some one of our number will ask for a vote on that disposition of the case.

Senator Wagner.— I move, in accordance with the opinion given by the President, that the final decision of this question be

left open until the submission of the case in its entirety, and at this time to pro forma overrule the objection.

The President.— All in favor will say Aye; opposed, No. I am uncertain. The clerk will call the roll.

Ayes — Senator Argetsinger, Judge Bartlett, Senators Blauvelt, Boylan, Brown, Bussey, Carroll, Carswell, Judge Chase, Senator Coats, Judges Collin, Cuddeback, Cullen, Senators Cullen, Emerson, Foley, Frawley, Godfrey, Griffin, Heacock, Healy, Heffernan, Hewitt, Judges Hiscock, Hogan, Senators McClelland, Malone, Judge Miller, Senators Murtaugh, Ormrod, Palmer, Patten, Pollock, Sage, Sanner, Simpson, Stivers, Sullivan, Thomas, Thompson, Torborg, Velte, Wagner, Walters, Wende, Judge Werner, Senators White, Whitney, Wilson — 49.

Noes — Senators Duhamel, Herrick, McKnight, O'Keefe, Peckham, Seeley, Wheeler — 7.

The President.— The objections to the sufficiency of the articles having been overruled, it is now incumbent for the respondent to answer.

Mr. Herrick.— May it please your Honor, Mr. President, I had the answer signed by the respondent but I do not find it here.

The President.— It is not necessary under the Code to have a formal answer.

Mr. Herrick.— No, but I wanted to get one signed by him. I had it. I will file this answer then. I will file the answer of the respondent. We had drawn them up in the alternative so that if we succeeded in our motion it would be to a portion of the articles and the other one would be to the whole of the articles, and that one I now file and request the clerk to read it.

The President.— Is this the answer you wish to interpose in the present state of the case?

Mr. Herrick.— Yes, sir; here is the original signed by the respondent which I ask to have read.

The President.— The clerk will read the answer.

The clerk read the answer as follows:

STATE OF NEW YORK

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

THE PEOPLE OF THE STATE OF NEW YORK, BY THE ASSEMBLY THEREOF *against* WILLIAM SULZER, As Governor	*Answer*

The above-named respondent, William Sulzer, in answer to the articles of impeachment preferred against him, answers and alleges as follows:

First. In answer to the first article of impeachment this respondent admits that he is the Governor of this State for the term beginning January 1, 1913, having been elected at the general election held on the 5th day of November, 1912, and admits that he made and filed in the office of the Secretary of State, a statement of moneys received, contributed or expended, as in said first article set forth and contained; but denies each and every other allegation, matter and fact therein set forth and contained.

And in further answer thereto alleges that he made the statement in said first article referred to in good faith, and that at the time of making and filing the same this respondent believed it to be a true and accurate account of the moneys paid out for his election expenses, and it was not intended by him to be false, or an evasion of, or in violation of, the statutes of the State.

Second. In answer to the second article of impeachment, this respondent admits that he is now the Governor of the State, having been elected thereto on the 5th day of November, 1912, as in said second article set forth, and that he filed a statement purporting to be a statement of all the moneys received, contributed or expended by him, as candidate for the office of Governor, as set forth in said second article; but denies each and every other allegation, matter and fact therein contained and set forth.

And this respondent, further answering the said second article of impeachment, alleges that he made the statement in good faith and that at the time of the making and swearing to the same he believes it to be a true and accurate statement, and that the same was not intended by him to be false or an evasion of, or in violation of, the statutes of the State.

Third. In answer to the third article of impeachment he admits that at the time therein alleged and set forth, he was, and now is the Governor of the State of New York, and denies each and every other allegation, matter and fact in said third article set forth and contained.

Fourth. In answer to the fourth article of impeachment, he admits that at the time alleged and set forth he was the Governor of the State of New York; and denies each and every other allegation, matter and fact in said fourth article set forth and contained.

Fifth. In answer to the fifth article of impeachment, he admits that at the time alleged and set forth, he was, and now is the Governor of the State of New York; and denies each and every other allegation, matter and fact in said fifth article set forth and contained.

Sixth. In answer to the sixth article of impeachment this respondent admits that he now is the Governor of the State of New York; that he was regularly nominated by the Democratic party therefor, and thereafter elected to such office, as alleged and set forth in said sixth article; but denies each and every other allegation, matter and fact therein contained and set forth.

Seventh. In answer to the seventh article of impeachment he admits that at the time alleged and set forth, he was and now is the Governor of the State of New York; and denies each and every other allegation, matter and fact in said seventh article set forth and contained.

Eighth. In answer to the eighth article of impeachment he admits that at the time alleged and set forth he was and now is the Governor of the State of New York; and denies each and every other allegation, matter and fact in said eighth article contained.

WHEREFORE this respondent asks that said articles of impeachment against him be dismissed.

(Signed) WILLIAM SULZER

The President.— Call your witnesses, gentlemen.

Mr. Brackett.—The opening of the case? The opening first of counsel on each side, following the rules of the Supreme Court?

The President.— Yes.

Mr. Herrick.— Mr. President, I am informed — I was engaged at the time — that there was some announcement made that both sides were to open at this time.

The President.—No, I do not understand so.

Mr. Parker.— That was the point made by Senator Brackett, that under the rules, under rule 29, there is an opening first on the part of the managers and then on the part of the defense.

The President.— It had escaped the attention of the Presiding Judge.

Mr. Brackett.— Rule 29 of the Supreme Court, not of these rules. These rules adopted the rules of the Supreme Court. Rule 29 of the Supreme Court provides that counsel for the plaintiff shall open first, and then counsel for the defense.

Mr. Herrick.— That applies, as I understand, only to civil cases, and not a criminal proceeding at all, an impeachment proceeding.

The President.— We will hear this gentleman first, and dispose of it afterwards.

Mr. Richards.— Presiding Judge and Members of the High Court of Impeachment: The technical objections and so-called constitutional questions have either been swept aside or reserved for further consideration by the Court, the question now is upon the merits as to whether William Sulzer is guilty or not guilty of certain offenses charged in the articles of impeachment, so that it now becomes my duty to outline briefly the facts in support of the articles charging the defendant, or respondent, with wilful and corrupt misconduct in office, and with high crimes and misdemeanors. High crimes and misdemeanors! High the office of William Sulzer, but low, we claim, are the crimes or offenses which

are charged against him, and which we shall show. Plain offenses, termed by the law as fraud, larceny, and perjury, the chief elements of the articles of impeachment. The election law of this State has shown a well-defined policy whereby the law takes hold of a candidate for Governor from the moment of his nomination and requires a compliance by him as Governor-elect, if he is elected, before he can take the oath of office and act as Governor.

The law provides in substance that $10,000 is the limit which a candidate for Governor can expend, and that after election he, as Governor-elect, shall make and file a statement over his own signature, backed by his oath, as to the financing of his campaign, and this, we contend, is in the nature of a condition precedent to his taking office as Governor.

The law provides that a candidate, within a certain period after election, shall file such verified statement, setting forth all receipts, expenditures, disbursements and liabilities made or incurred by him as a candidate, including the amount received, the name of the person from whom received, the date of its receipt and amount of every expenditure or disbursement exceeding $5, the name of the person or committee to whom it was made, with the date thereof, and all contributions made by such candidate.

The purpose of those provisions is clear, is known to all men in political life, and therefore well known to the respondent: to prevent the corrupt receipt of money, and the receipt of corrupt money; to prevent corrupt expenditure; to limit the amount which a candidate may expend, and therefore by implication to limit the amount which the candidate may receive. Its progressive policy has been to let the people of the State know whether there are any strings to a candidate, and who his backers are. In other words, that the electors of the State may know whether or not under the guise of campaign contributions money is paid to a candidate to influence later official action, so that when a man takes office his official acts can be scrutinized, weighed and judged in the light of the interests, political or financial, that were behind him during his campaign.

With these provisions in force, what did William Sulzer, the respondent, do? He was nominated on October 2, 1912, and we propose to show that almost immediately thereafter he began to solicit and obtain large sums of money for campaign purposes.

We shall show that he was busier in getting money and in trying to get it than he was in getting votes. He went at his campaign for money with system, with cool deliberation and cunning schemes to conceal what he got. Five days after he was nominated he made a public statement that he would have no financial managers or campaign collectors, yet at that moment his private secretary was running a secret campaign account, and the respondent already had working for him collectors scouring the city and State for contributions. We expect to show that he first preferred currency, which has no ear marks, and next checks to bearer or cash; next checks to the order of someone other than himself, and last checks to his own order, if the others were not possible.

He had more than one "bagman," to use an expression which I believe the respondent is fond of. He had a bag himself which was as open to a $10,000 contribution as to a $2 one. We shall prove to the satisfaction of this Court, we believe, instances of his request that checks should be made to the order of someone other than himself; that he preferred cash to the checks, and that when some of his collectors came in with checks he asked them in the future to cash those checks and bring him the cash.

He did more than collect and hold these funds. He intended to keep them. He had no thought of returning them to the contributors, for it will clearly appear that he used and intended to use these contributions in the purchase of stocks and for margins on stock transactions.

The respondent had many ways of getting money, and many ways of concealing it. He had first the account of Louis A. Sarecky, his private secretary, in the Mutual Alliance Trust Company. There was a personal account of the respondent in the Farmers Loan & Trust Company. There was a speculative account on margins in the brokerage house of Harris & Fuller. There was also a stock account or a transaction account in the office of Boyer, Griswold & Company, brokers, and another in the office of another brokerage firm, Fuller & Gray.

During the period of October and November, 1912, we shall show that into and out of the Sarecky account went practically $12,000, $7,000 more than the respondent reported.

We shall show that into the Farmers Loan and Trust Company account went over $15,000 more.

We shall show that into the account of Harris & Fuller went $10,000. To Boyer & Griswold went $12,025, and to Fuller & Gray went $17,337.50. The documentary evidence in this case will show that of these amounts $40,000 was in cash.

We shall show beyond peradventure the respondent's knowledge of and participation in the receipt and deposits of these moneys, not only by transactions and conversations with witnesses who are disinterested, but by his own signature to deposit slips and checks.

When evidence of these charges first became public, the respondent claimed that when they were made he was away campaigning, and that the contributions were paid to committees or agents, and for the purpose of demonstrating the falsity of that claim in advance, I shall briefly state the facts with regard to the whereabouts of the respondent and his knowledge of the transactions in question.

On October 4, 1912, after his nomination, the respondent returned from Syracuse to New York City where he remained uninterruptedly until October 17, 1912, and during that period of thirteen days his collections in cash and checks deposited with the firms and the banks that I have described, amounted to over $27,000.

On October 5th, a check for $500 was sent him by Mr. Abram I. Elkus, and on that same day another one for $1,000 was handed him by Henry Morganthau, both of which were personally endorsed by him and deposited in the Farmers Loan & Trust Company with a slip filled out in his own handwriting. On October 9th, a check was sent by William F. McCombs for $500, which check was deposited in the Sarecky account. On October 10th, the day he appeared at the National Democratic Club and accepted the nomination for Governor, he afterwards visited the Manhattan Club, and he got many checks, some from members of the latter club. On that date he got from John Lynn, $500; Lyman A. Spalding, $100; Theodore W. Myers, $1,000; E. C. Benedict, $250, and many others, whom I shall not now name.

He showed fine discrimination as to the disposition of these

checks of October 10th. Some were deposited by Sarecky and reported in the statement; some were deposited by Sarecky and not reported; and others were used by the respondent to purchase Big Four stock from the firm of Boyer, Griswold & Company, six days later.

On October 14th he received a check from Jacob H. Schiff for $2,500 to the order of Sarecky.

Across the corner of the check is written, "Mr. Schiff's contribution to Wm. Sulzer's campaign expenses," placed there by Mr. Schiff just before it was delivered to the investigating committee, as a voluntary statement by Mr. Schiff of the purpose of the check, in lieu of testifying before that committee.

On October 16th, when the respondent was still in the city, came the first transaction in Big Four stock during the campaign, when $12,025 was paid for 200 shares; $7,125 in cash, the following checks:

Theodore W. Myers	$1,000
John Lynn	500
L. A. Spalding	100
E. F. O'Dwyer	100
John W. Cox	300
Frank V. Strauss Co	1,000
John T. Dooling	1,000
Aggregating	$4,000

and a check of William Sulzer for $900 to make the exact amount, were used by his friend Frederick L. Colwell to buy these 200 shares, a stock in which Sulzer had long been interested.

The checks were all certified, and the check of the respondent for $900 was charged to his account in the Farmers Loan & Trust Company on the date in question. On October 16th, after banking hours, there was handed to the respondent in his office a check for $2,000 to the order of cash by a friend who will testify, and I will refer to this check later.

On October 18th and 19th, the respondent went on a short trip up the Hudson as far as Troy, and returned. On Sunday,

October 20th, he spent at his home, 175 Second avenue, New York City, and Frederick L. Colwell was a visitor. The following day, October 21st, Colwell began to purchase more Big Four stock, this time under the guise of account No. 500, from Fuller & Gray, with whom he had desk room. Our evidence will show that this, too, was Sulzer's account.

From October 21st to October 30th inclusive, the respondent took a long trip up State, returning to New York City in the early evening of October 30th, and it is interesting to note the evidence from Fuller & Gray's books as to the dates of payment in currency to Fuller & Gray. With the exception of two comparatively small payments, the first 200 shares of Big Four stock were bought with cash furnished on October 31st, the day after the defendant returned to New York City, and we find on the back of the $2,000 check I have just mentioned the endorsement of Frederick L. Colwell when he turned it into cash — the same check received by the respondent at his office after banking hours on the 16th day of October. The total cash paid for these 200 shares was $11,825.

On November 4th, the day before election, account No. 500 shows 100 more shares of Big Four stock, paid for on November 6th, the day after election, with $5,512.50 in cash.

We come now to the secrecy surrounding the delivery of the Big Four stock purchased on account No. 500. Colwell had desk room in the New York office of Fuller & Gray. Fuller & Gray had two other offices, one in Brooklyn and one in Yonkers; and when the stock was ready to be delivered the Brooklyn office was telephoned to by the New York office to be ready to make delivery at 3.15 p. m. The Brooklyn office then sent a messenger to get the stock from Harris & Fuller in New York. The Brooklyn office then telephoned Coe, a clerk in the Yonkers office. Coe from the Yonkers office was ordered to go to Brooklyn, and he delivered the stock neither in the New York office nor in the Brooklyn office, but to Colwell at the National Nassau Bank, a block away from the Brooklyn office. The only record of this delivery was a receipt from Coe — none from Colwell.

Meanwhile, on November 13th, the time had come upon the respondent to make the statement required of him as Governor-elect.

I am not going to read the details of that statement, but I just want to call again the Court's attention to the language of the oath:

> " State of New York, City and County of New York, ss.: William Sulzer, being duly sworn, says, that he is the person who signed the foregoing statement; that said statement is in all respects true, and that the same is a full and detailed statement of all moneys received, contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election. Signed, William Sulzer. Sworn to before me this 13th day of November, 1912.
>
> ALFRED J. WOLFF,
> *Commissioner of Deeds, No. 72, New York City.*"

And that statement, to which the oath was attached, showed that he rpeorted 68 comparatively small contributions, only one of $500, and none over $500, and aggregating $5,460, and no more. And in reporting those 68 contributors, while the 68 are estimable men, fairly well known to some of the citizens of the State, there was not a name on the list that would carry meaning to any elector that might read that statement for the purpose of knowing who had been his financial supporters in the campaign. There is no report of any contribution from either Mr. Jacob H. Schiff, or Mr. E. C. Benedict, or from the banker Myers, or from Mr. Morgenthau, or from Mr. McCombs, nor from wealthy men identified with the brewing and liquor interests. And we shall ask the Court to infer, when our proof is given, without reference to the question of actual knowledge, that the omission of the names of distinguished and powerful men from that list was not by accident, but by design.

In connection with this branch of the charges presented by the Assembly, although taken up in articles 3, 4 and 5, I desire to outline briefly the efforts made by the respondent while Governor, to prevent the revelation of the misuse of the funds which we say will be indicated by this evidence. His secretary, Sarecky, refused to answer questions before the joint legislative committee, unless represented by counsel, one of those counsel who sits at the respondent's table; and we expect to show why and how Sarecky's refusal was obtained.

It will also appear that in case of other contributors, the respondent asked them to refuse to testify as to their contributions, and asked them to conceal the fact of their contributions.

As to Colwell, we shall show that when he was first subpoenaed before the legislative investigating committee, he appeared but refused to answer; that when subpoenaed for a later hearing, he did not appear at all. And we shall present evidence that the respondent on the date of the last hearing, August 8, 1913, got into communication with Mr. Colwell with the result that Colwell telephoned to his home to have his bag packed and to be met with that bag on the north-bound station at Yonkers; that Colwell boarded the train at that station at Yonkers on his way north; that he has never been seen in his home or in his office and although we have for weeks diligently sought him he cannot be found by us either in this State or elsewhere.

As to the articles charging corrupt use of the power of veto. I now take up for consideration the offenses charged in article 7, the corrupt bargaining by the respondent in office as Governor, of his power as Governor.

We shall show that he punished legislators who opposed him by vetoing legislation enacted for the public welfare, and traded executive approval of bills for votes for his direct primary measure, in which he had a personal political interest.

Assemblyman Sweet, of Oswego, had passed by both houses of the Legislature a bill providing for the construction of a bridge at Minetto in Oswego county, to take the place of a bridge that had been torn down or removed by reason of the construction of the barge canal. It was a bridge which was required, as the evidence will show, by the demands of the neighborhood. It had the written approval before the Governor of the Superintendent of Public Works. It was approved by the Department of Efficiency and Economy, to whom the Governor had left the question of its approval. And when Assemblyman Sweet told the Governor that he was there in the interest of that bill, the respondent replied:

"Assemblyman, how did you vote on my primary bill?"

When the assemblyman replied, "I voted against it," the respondent said, "How are you going to vote in extra session?" The

assemblyman replied, "I am going to vote the sentiment and in the interest of my district."

The respondent, the Governor, then told him to see Mr. Valentine Taylor, his personal counsel, and smooth him the right way, "and bring your bill to me, and remember, Assemblyman, I take good care of my friends."

Assemblyman Sweet did not evince any desire or intention on his part of voting for the direct primary measure, and Assemblyman Sweet's bill was vetoed.

In another case, involving the expenditure of $190,000 from the general funds of the State for a highway in the county of Greene, the evidence will show and will tend to prove that the respondent as Governor traded his approval of this measure for a change in Assemblyman Patrie's vote from one against the Governor's bill to a vote in its favor.

The President.— You may suspend now, the hour for adjournment having arrived. Crier, close Court.

Thereupon, at 12.30 o'clock p. m., the Court took a recess until 2 p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2 o'clock p. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Richards.— At the recess I was speaking of the evidence with regard to a certain bargaining of votes in the matter of the Catskill or Greene highway.

In another case — and I will just repeat the last sentence so as to get the connection — in another case involving the expenditure of $190,000 from the general funds of the State for a highway in the county of Greene, the evidence will tend to prove that the respondent, as Governor, traded his approval of this measure for a change in Assemblyman Patrie's vote from one against the Governor's bill to a vote in its favor. From the evidence as to conversation leading up to the ultimate signing of the bill and the

voting by Assemblyman Patrie for the Governor's measure, taken into consideration with the fact that the Highway Department in a written report opposed the approval of the bill, no one can escape the inference that the Governor was willing to, and did, approve the expenditure of $190,000 of the taxpayers' money in consideration for a single vote on his primary bill.

Another instance we will show is that of a highway in the counties of Essex and Warren, where in a practically similar situation, the respondent, as Governor, after having told Assemblyman Prime of Essex that his motto was: "You for me, and me for you," approved the highway measure and Assemblyman Prime, who had not voted at all at the regular session of the Legislature, voted at the extraordinary session in favor of the Governor's bill.

As to article 8, what I have said in relation to his dealings on Wall street indicate in a small measure the extent to which he was personally interested in the rise and fall of securities on the Stock Exchange. We expect to show that he continued to speculate in stocks after he became Governor and that while so interested he caused to be introduced into the Legislature and advocated the adoption of legislation vitally affecting the rise and fall of securities on said exchange, and we shall leave it to this Court to say whether his act as Governor in fathering such legislation was not influenced by his personal interest in the fluctuation of securities affected by that very legislation.

May it please the Court, it is not my duty as counsel in opening the case to argue the effect or force of the evidence to be adduced, but I am confident that when this Court has heard the witnesses and has seen the documentary proof to sustain the charges against the respondent, this Court cannot escape the conclusion that William Sulzer has been guilty of wilful and corrupt misconduct in office and of high crimes and misdemeanors, and that his remaining in the high office which he holds would be a menace to, and subversive of, the best interests of the people of this State.

The President.— I understand the counsel wish to address the Court as to the question of the respondent's opening.

Mr. Stanchfield.— We desire to be heard if the Presiding Judge please. The board of managers take the position here

and now with reference to the procedure governing this body, that the rules which we have adopted are controlling; in other words, to plagiarize a remark of counsel on the other side, the world has moved since many of the present members of the Court of Appeals entered that tribunal, and the rules of the Supreme Court under which this trial is being conducted prescribe as follows:

> "In the trial of civil causes unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and except by special permission of the court no other opening by either party shall thereafter be permitted."

The reason that actuates the board of managers in taking this position is twofold in its character, first, literally speaking, it is in accordance with the rules that govern this trial; in the second place, it would very materially tend to expedite this trial. That argument is offered in the interest of time. It is needless to add to it other than to say that if a succinct and terse outline were here presented of the contention upon the facts which the respondent desired to interpose upon this trial, it would most materially abbreviate it. We challenge emphatically the proposistion that this is a criminal trial. We take the position, and insist upon it, that it is an action to expel the respondent from the office which he now holds, a civil proceeding to detach him from political life, clothed and surrounded by the rules and presumptions that obtain in civil causes, and in no other. That position was advanced — I will not take your time to go into it in detail — in the Johnson trial, to which your attention has been called, and I am using almost the exact language of both Mr. Sumner and Story in his work upon constitutional law, when I make the statement that it is practically a proceeding of ouster. We contend further that the rules with reference to the quantum of evidence necessary to render a verdict of guilty in this case are controlled by the principles that environ and surround the trial of civil causes, and that we are required to produce here to convince the mind of this tribunal simply a fair preponderance of evidence and no more.

The President.— Mr. Stanchfield, I doubt very much the wisdom of entering upon a discussion of such a broad question on simply such a minor matter as the question of whether the opening of counsel for respondent shall be made now or later.

Mr. Stanchfield.— The reason for adducing this argument, as we see it, at this time, is to show the imperative necessity to enforce the rule adopted by this Court. In other words, this: We have the right to use the argument in our summary of this case, assuming for the purpose of it, that the respondent does not take the witness stand; and it is with all those reasons in view, the degree of evidence, the right to comment upon his failure to take the stand, that this question, I repeat, from the standpoint of the board of managers, is of sufficient importance to require, in the opinion of collective counsel, this statement.

The President.— As appears by the vote that was taken before recess, the desire of the majority of the Court is to reserve the questions that enter into the merits of the case and form large and important factors. We should not while ruling commit ourselves to the question whether it is necessary to prove this case beyond a reasonable doubt, or by a mere preponderance of proof, or the other question whether the absence of the party from the State, if he should be absent, cannot be commented on to his disadvantage.

The Presiding Judge still thinks that those questions should be left to the final submission of the cause and not on a question of this kind, which, though having a bearing, compared to the great importance of the issue which we are to pass on, is comparatively a small matter.

Mr. Stanchfield.— I do not know, if the Presiding Judge please, whether I made myself clear or not. I was adducing these different reasons as an argument why the rules should be enforced that the respondent should be compelled at this time to open his case.

The President.— Well, it is within the discretion of the Court to give permission to go back to the old, even if this is to be considered as a strictly civil case. The notion of the Presiding Judge

is that in this case it will be much wiser to follow the old practice, and avoid at this time any discussion of the question of the necessity or the quantity of proof that is requisite to prove the offenses as charged, or any questions that enter into the merits of the case.

Mr. Kresel.— Shall we call our witnesses?

The President.— If no member of the Court challenges, that will be the disposition, and you may call your witnesses.

Mr. Kresel.— The Secretary of State.

The Clerk.— Mr. Secretary of State, you do solemnly swear that the evidence which you shall give upon this hearing upon certain articles of impeachment preferred against William Sulzer, as Governor of this State, shall be the truth, the whole truth and nothing but the truth, so help you God.

The Witness.— I do.

MITCHELL MAY, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Now, Mr. May, are you the Secretary of State of the State of New York? A. I am.

Q. And have you been such since the 1st of January, 1913? A. I have.

Q. Have you produced, in obedience to a subpoena, the original record of the nomination of William Sulzer as Governor of the State by the Democratic party, which is on file in your office? A. I have.

Q. Will you produce it, please? A. (Witness produces paper).

Mr. Kresel.— I offer in evidence, if the Court please, this original certificate made by the presiding officer of the convention of the Democratic party, held at the city of Syracuse, on the 1st day of October, 1912, certifying, among other things, that William Sulzer was nominated by that convention for the office of Governor of the State of New York.

The President.— If there is no objection it will be admitted.

Mr. Kresel.— Now, right here, may I ask the Presiding Judge, whether it is necessary to mark the original document?

The President.— I suppose it ought to be, but it does seem to the Presiding Judge that counsel might make admissions as to facts that are not disputed, and get to the real marrow of the case.

Mr. Fox.— It was for that purpose, may it please the Court, that I rose rather precipitately in order that we might be saved this sort of thing, and I have no doubt whatever that Mr. Stanchfield and myself can agree to save a lot of time. If the learned counsel will ask me what they would like to have us admit in the way of preliminary proof, I am quite willing to admit whatever we can.

Mr. Kresel.— Let us take this first. It is admitted, I understand, on behalf of the respondent, that he was the regular candidate of the Democratic party for the office of Governor of the State of New York, having been nominated for such office at the convention of the Democratic party held at the city of Syracuse on the 1st day of October, 1912.

Mr. Fox.— That is admitted, as I understand it, in the answer.

Mr. Kresel.—And that he continued such candidate of such party until the 5th day of November, 1912, when he was elected Governor of the State of New York?

Mr. Marshall.— We concede that he was nominated at the convention beginning on the 1st day of October, 1912, and that he was in fact nominated on October 3, 1912, at that convention.

The President.—And he never declined the nomination.

Mr. Marshall.— That he accepted the nomination and was duly elected at the election held in November, 1912, and on the 1st day of January, 1913, took his official oath of office and entered upon the performance of his duties as Governor of the State of New York.

Mr. Stanchfield.—And that he has not resigned?

Mr. Marshall.—And that he has never resigned.

Mr. Kresel.— Will it also be conceded that the respondent, William Sulzer, has acted as Governor since the 1st day of January, 1913, and until the 13th day of August, 1913?

Mr. Marshall.— It is so admitted.

By Mr. Kresel:

Q. Now, Mr. Secretary, have you produced the original oath of office signed and taken by William Sulzer upon his induction into the office of Governor? A. I have.

Mr. Marshall.— We have admitted it.

Mr. Kresel.— I know, but I want to offer the original oath in evidence. May that be marked?

Mr. Marshall.— We have already conceded the fact. It seems unnecessary to lumber the record.

The President.— The Chair does not understand why it is insisted on but that will have to be left to counsel, only expressing the wish that time shall not be consumed on unnecessary matters that nobody denies.

Mr. Kresel.— We understand.

(The oath of office offered in evidence was received in evidence and marked as Exhibit M–1.)

Q. Mr. May, was this original oath which is now marked Exhibit M-1 signed by William Sulzer in your presence? A. It was.

Q. And you swore him to it? A. I did.

Q. As Secretary of State? A. I did.

Mr. Marshall.— No cross-examination.

Mr. Kresel.— The clerk of the Assembly.

GEORGE R. VAN NAMEE, a witness called in behaif of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Van Namee, are you the clerk of the Assembly of the State of New York? A. I am.

Q. And were you such during the month of August, 1913? A. I was.

Q. Have you produced the original journal of the Assembly for the legislative days of August 11th and August 12th, 1913? A. I have.

Q. Will you let me have the one of August 11th? (Witness produces journal.)

Q. I do not find, Mr. Van Namee, in what you have produced the report of what was known as the Frawley committee. Have you that? A. Yes, as indicated there (indicating).

Q. Will you point that out, please? A. "Mr. Yard from the joint legislative investigating committee submitted the following report, Appendix 27."

Q. On the 11th of August, 1912, did Assemblyman Yard from the joint legislative investigating committee present a certain report? A. He did.

Q. Was that report adopted by the Assembly?

Mr. Marshall.— I object to that as immaterial.

Mr. Kresel.— It is only introductory. I do not propose to offer the report, I simply want to connect it with a resolution subsequently offered and adopted.

Mr. Marshall.— I do not wish to make any technical objections. I demand they shall merely lay a foundation.

Q. What is the answer? A. It was.

Q. Subsequent to the adoption of that report, did Assemblyman Levy offer a certain resolution? A. He did.

Q. Is this the resolution which I now show you from your journal, the resolution that you are speaking of? A. That is the original resolution.

Q. And that was offered on the 11th of August? A. Yes, sir.

Mr. Kresel.— I now offer the resolution of impeachment offered by Assemblyman Levy and adopted by the Assembly.

Mr. Marshall.— No objection.

Mr. Kresel.— I desire to read this resolution.

"Mr. Levy offered for the consideration of the House a resolution in words following:

"WHEREAS, the joint legislative investigating committee has filed a report in the Assembly on the 11th day of August, 1913, together with testimony annexed thereto, showing or tending to show that William Sulzer, Governor of the State of New York, made a false and fraudulent report to the Secretary of State, under his oath, as required by law, that the total contributions in aid of his campaign as candidate for the office of Governor were $5,460 and no more, and, whereas, in truth and in fact the amount was greatly in excess of said sum to the personal knowledge of said Sulzer; and such report further showing or tending to show, that he converted to his own private use, contributions given in aid of his said election for the purchase of securities or other private uses; that he engaged in stock market speculations at a time when he was Governor and vigorously pressing legislation against the New York Stock Exchange which would affect the business of and prices on the exchange; that he used the power of his office as Governor to suppress and withhold the truth, to prevent the production of evidence in relation to the investigation of campaign contributions and violations of the law in respect thereto, by ordering and directing witnesses, some of whom were employees of the State, to act in contempt of the joint legislative investigating committee, and that further he used his office as Governor in rewarding or attempting to reward such witness or witnesses by securing or influencing their appointment or promotion in the State government; that as Governor, the said William Sulzer has punished legislators who disagreed or differed with him in legislation enacted in the public interests and public welfare, and has traded executive approval of bills for support of his direct primary and other measures in which he was personally interested; that as Governor, he wilfully and corruptly made false public statements advising and directing citizens to suppress evidence in reference to his unlawful use of contributions made to him for campaign pur-

poses, and whereas he has otherwise corruptly and unlawfully acted or omitted to act,

"Therefore, be it resolved that William Sulzer, Governor of the State of New York be and hereby is impeached for wilful and corrupt conduct in office and for high crimes and misdemeanors."

(The resolution offered in evidence was received in evidence and marked managers' Exhibit M-2.)

Q. Mr. Van Namee, was this resolution of Assemblyman Levy put to a vote in the Assembly? A. It was.

Q. And was it adopted? A. It was.

Q. How many votes were recorded in favor of the resolution? A. I will have to refer to the journal.

Q. I think you will find it on the next day? A. Affirmative, 64; negative 30.

Q. No, you will find the vote on the resolution the following day. That one you just gave us was on a different matter. A. I believe I have not the journal here that has the morning session of the 12th.

Mr. Kresel.— The witness says he has omitted to bring that section of the journal.

The President.— Let the witness stand aside until he gets that. You can call another witness.

Mr. Kresel.— Mr. Secretary of State, I desire to call you for a minute.

MITCHELL MAY recalled.

By Mr. Kresel:

Q. Have you produced, Mr. Secretary, the original statement of campaign receipts and expenditures filed in the office of Secretary of State by William Sulzer who was a candidate for Governor? A. I have.

Q. May I have it please? A. Yes. (Witness produces same.)

Mr. Kresel.— With the Court's permission, I will offer in evidence this original statement.

The President.— Show it to your opponents.

Mr. Marshall.— There is no objection. I do wish to reserve the question as to the materiality and competency of any proof which relates to this oath or to this affidavit on the grounds which we urged so fully this morning and yesterday with regard to the motion to strike out articles 1, 2 and 6.

The President.— That is returning to the very questions we have reserved.

Mr. Marshall.— We have no further objection than that.

The President.— I will make the ruling now that all rights as to these points are reserved, except formal objections.

(The original statement of campaign receipts and expenditures was offered in evidence and received and marked M-3.)

Mr. Marshall.— In order to avoid a repetition of any objection of this same character hereafter, I wish to have it understood that we reserve generally our objection to all testimony which bears upon this affidavit or any of the matters which are therein referred to, or which are made subject to articles 1, 2 and 6 of the impeachment articles, and I understand your Honors reserve your decision upon that.

The President.— That will be the decision of the Court unless it is challenged by some member.

By Mr. Kresel:

Q. Mr. Secretary, have you made a search in the files of the office of the Secretary of State for any other reports filed by any committees or individuals with reference to the campaign contributions and expenditures in connection with the election of William Sulzer as Governor of the State of New York? A. I have caused such a search to be made.

Q. And have you produced any other statements made by any such political committee or individual with reference to the election of William Sulzer as Governor of the State of New York?

Mr. Marshall.— That is objected to as immaterial. We are not bound by what was done or was not done by other people or other committees.

The President.— I do not suppose you are, Mr. Marshall, but can he not show the negative, if that is the fact?

Mr. Kresel.— We feel that we ought to prove that nobody else made any statement or filed any statement, or made any report with regard to the contributions which were made to Mr. Sulzer.

Mr. Marshall.— But it may be proper to show what, if any, reports are on file or are not on file. We are not bound by the conclusion which is to be deduced from the fact that other people did not file any report.

The President.— No, but can he not prove that these expenditures were not covered by any other reports?

Mr. Marshall.— We can show whether or not there is any other report, leaving the question of the materiality to be determined.

The President.— He can testify he has searched through his office and these are the only reports, and put them in evidence, and then a comparison would show what they are, and there might possibly be evidenced beyond that, but it seems to me it is hardly worth while to go into that. If you are going to claim that these contributions, the special charges of these articles, may have been covered by other reports, then I think the prosecution should be allowed to prove it. If you are not going to make any such claim, then I do not see the necessity.

Mr. Marshall.— My contention, so far as that is concerned, Your Honor, is that we cannot say. We have no knowledge as to whether any other report bearing upon the subject of contributions has ever been filed by anybody in the office. We state, however, in connection with that whether or not that was done is a matter over which we have no control, and with respect to the doing or not doing of which we have no responsibility, and therefore it is incompetent.

The President.— I think you may prove it, but you must prove it under the objection, if objection is made, what reports he had.

Mr. Kresel.— I am going to do that.

The President.— But it seems rather a waste of time.

Mr. Kresel.— Will the stenographer repeat the question.

(The stenographer thereupon repeated the question as follows: Q. And have you produced any other statements made by any such political committee or individual with reference to the election of William Sulzer as Governor of the State of New York?)

A. I have.

Q. May I have it, please? (Witness passes paper to counsel.)

The President.— Now, the point is, is that the only one?

The Witness.— That is the only one.

The President.— Besides the one that was made by the Governor himself?

The Witness.— Yes, sir.

Mr. Kresel.— I now offer in evidence, if your Honor please, this statement which was filed by the William Sulzer Progressive League of New York, signed by Leon Weinstock, as treasurer, dated November 11, 1912, and filed in the office of the Secretary of State on the 16th of November, 1912. Is there any objection?

Mr. Marshall.— Subject to the same general proposition.

The President.— It will be admitted and marked in evidence.

(The statement which was offered in evidence was received in evidence and marked Exhibit M-4.)

Judge Werner.— Will you please state the contents of that paper?

Mr. Kresel.— Yes, I intend to. The statement filed by the William Sulzer Progressive League, which is now managers' Exhibit 4, shows the receipt of $450, and shows expenditures of $451.15. The statement filed by the respondent William Sulzer shows receipts of $4,560, which are items set out in full, giving the date when the contribution was received, the name of the contributor, and amount, totaling $5,460, and shows expenditures, likewise itemized with dates and name and purpose, amounting to $7,724.09.

Judge Bartlett.— Is that the one referred to in the first article?

Mr. Kresel.— That is the one, sir.

Judge Bartlett.— As containing a statement of the contributions by 68?

Mr. Kresel.— Sixty-eight contributors.

The President.— Then you want to make the further statement, of course, that the report filed by the respondent covers none of the contributions, or at least none of those contributions here named, that are made the subject of the charges of the articles, nor are they named in the other.

Mr. Kresel.— Exactly.

Mr. Marshall.— We will be able, your Honor, to arrive at a statement which will cover that point without wearying the Court.

The President.— If you find anything, the Court will give you an opportunity to call attention to it.

Mr. Marshall.—We have no objection to that.

Mr. Kresel.— That is all, Mr. Secretary.

Mr. Marshall.— Just a moment; I would like to ask a few questions.

Cross-examination by Mr. Marshall:

Q. Mr. Secretary of State, have you produced all the reports which relate in any way to the election of the Governor of the State of New York which were filed in the office of the Secretary of State in connection with the election held in November, 1912? A. So far as I know, all have been produced.

Q. Is there any report from the Democratic State Committee filed in the office of the Secretary of State? A. There is.

Q. Have you produced that? A. I have not.

Q. Is there any report there filed by what may be called, briefly, the Democratic County Committee of the county of New York? A. I think there is one on file.

Q. Have you that here? A. I have not.

Q. Are there any other reports which concern the subject of receipt or expenditures of money in connection with the election of candidates on the Democratic State ticket in November, 1912? A. Are there any others on file?

Q. Besides those which have now been named, namely, the State Committee, the Democratic County Committee and the two reports which have been put in evidence? A. There are reports in the office of those who were elected.

The President.— Then there are reports from every county, are there not?

The Witness.— Yes, your Honor.

Q. Then, you will therefore —

Mr. Marshall.— I will not ask that.

The Witness.— I have only produced those I was subpoenaed to produce.

Q. You were not asked to produce the reports of the Democratic State Committee, the Democratic County Committee of New York, or the Democratic County Committees of any county of the State beside New York? A. I was not.

Mr. Marshall.— That is all.

Mr. Kresel.—That is all. Now, Mr. Van Namee.

Senator Thompson.— Can the members of the Court have access to those exhibits after they are admitted in evidence?

The President.— Certainly.

Mr. Kresel.—We have them right here. Shall we pass them around?

The President.— Yes. If the witness will please remain in possession of these exhibits and produce them any time any member of the Court wants to look at them, that will be satisfactory.

Mr. Marshall.— I would like to ask Mr. May another question.

MITCHELL MAY resumed the stand.

Cross-examination continued by Mr. Marshall:

Q. Mr. May, will you kindly state whether or not there was also filed in the Secretary of State's office, in connection with the election of 1912, the statement with regard to receipts and expenditures of money of what is colloquially termed the general committee of Tammany Hall, or whatever the name of that organization may be? A. I know of no paper of my own personal knowledge being on file under that designation.

Q. You know of such an organization, I mean, by that name?

Mr. Stanchfield.— I object to that as incompetent.

The President.—Well, it is only to get at the report.

Mr. Stanchfield.—There is no report.

The President.—That is what he wants to find out.

Mr. Stanchfield.—That is what the witness says.

Q. Do you mean to be understood as saying that there is no report on file, or you know of no report by such a committee? A. I know of no such report.

Q. But you do know of these other reports that I have referred to? A. I know that they are on file, as called for by law.

Q. Do you know whether there is any report on file which emanates from an organization generally called Tammany Hall? A. I do not.

Q. Have you looked? A. I have not looked.

The President.— Have you any recollection?

The Witness.— That name has not come under my knowledge officially.

The President.— Has it in any manner?

The Witness.— Yes, sir, I know that there is —

The President (interrupting).— Oh, no; but I mean as far as reports are concerned.

The Witness.— No, sir, I know of no such report.

(Witness excused.)

Mr. Kresel.— Mr. Van Namee.

GEORGE R. VAN NAMEE recalled.

Direct examination by Mr. Kresel:

Q. The last question to you, Mr. Van Namee, was to state the vote that was cast in favor and against the resolution impeaching William Sulzer. A. Those in favor 79, those opposed 45.

Q. And on that day how many members of the Assembly were there that had been duly elected to that house? A. At present?

Q. No; how many were there, how many members were there of the Assembly, not those present? A. 150.

Mr. Marshall.— Just a moment. The Constitution provides for the number.

The President.— Yes, it is 150. Now, had any died, so far as you knew?

The Witness.— One.

The President.— Who?

The Witness.— Mr. Kennedy, in Queens, resigned.

Mr. Marshall.— My point in regard to that, your Honor, is that there must be a majority of all the members of the Assembly, whether dead or not.

The President.— This is only to get the facts.

Q. Now, then, Mr. Van Namee, following the adoption of the resolution of impeachment, was there another resolution offered by Assemblyman Levy to appoint a committee to inform the Senate of the impeachment? A. There was.

Q. And have you that original resolution? I mean in your journal. A. The next step was the adoption of articles of impeachment, not the presentation to the Senate.

Q. Well, then, we will take that up. Was there a resolution offered for articles of impeachment? A. There was.

Q. And who offered that? A. Mr. Levy, from the select committee appointed to prepare the articles.

Q. Very well, then. Prior to that time there had been a resolution passed appointing a select committee to prepare articles, is that correct? A. There had.

Q. And have you there the original articles of impeachment that were prepared and sent to the House by this select committee? A. I have.

Q. And were these articles of impeachment adopted by a vote of the Assembly? A. They were.

Q. And how many Assemblymen voted in favor of their adoption and how many against? A. In the affirmative 79; in the negative 29.

Mr. Kresel.— With the Presiding Judge's permission I do not propose to read these articles unless I am directed so to do.

The President.— They may be marked in evidence. I suppose they are the same as printed and presented to the Court.

Mr. Marshall.— We will so concede.

Mr. Kresel.— May we have them marked, then?

The President.— Have them marked.

(Articles of impeachment offered in evidence received and marked Exhibit M-5.)

Q. Now, were there managers appointed by the Assembly to prosecute this impeachment? A. There were.

Q. And will you state from the record in your journal who the managers were that were appointed? A. The record is as follows: "Mr. Speaker appointed as managers on the part of the Assembly to conduct the impeachment trial of William Sulzer, Messrs. Levy of New York, McMahon of the Bronx, Greenberg of New York, Gillen of Kings, Ward of New York, Fitzgerald of Erie, Madden of Westchester, T. K. Smith of Onondaga, and Schnirel of Ontario."

Q. Was there subsequently to that a resolution adopted by the Assembly defining the powers and the duties of the managers? A. There was.

Q. Will you read that resolution please? Just point it out to me and maybe you will not have to read it.

Mr. Marshall.— I do not object to it.

Mr. Kresel.— I will let you see it.

Mr. Marshall.— I do not ask to see it; you need not show it to me.

The Witness.— (Indicating). That is the one right there.

Mr. Kresel.— I offer in evidence a resolution offered by Mr. Levy and adopted by the Assembly on the 12th day of August, 1913, with regard to the powers of the management of the impeachment. You say there is no question about that?

Mr. Marshall.—No.

(Resolution offered in evidence received and marked Exhibit M-6.)

Mr. Kresel.— That is all.

Cross-examination by Mr. Marshall:

Q. At what time on August 11th, 1913, did the Assembly convene?

Mr. Kresel.— I submit, if your honor please, that that is immaterial.

The President.— Possibly it is, but the question has been raised and it is not the intention of the Presiding Judge unless directed otherwise by the Court to rule out any evidence that the parties lay any stress on unless it is something plainly immaterial or bringing in the names or acts of persons who are not parties to the litigation and have no business to be introduced.

A. 8.30 p. m. on Monday, August 11th.

Q. When before that had the Assembly been in session? A. I cannot tell you of my own knowledge.

Q. Was it not on or about the 23d of July, 1913? A. Yes, I think so.

Q. You say that Mr. Yard presented a report of an investigating committee? A. Yes, sir.

Q. Have you that report before you? A. I have, sir.

Q. Was that report for the first time presented at the meeting of the Assembly on August 11th, 1913? A. Yes.

Q. Was it printed? A. It was.

Q. And was it in the form of the document which you hold? A. It was, and a copy on the desk of each member of the Assembly.

Q. How many printed pages did that report embody? A. 131.

Q. Was that the entire report that was presented at that time? A. That was the report presented by the investigating committee.

Q. Had the investigating committee taken evidence other than that which is submitted in the report? A. That is something I have no knowledge of.

The President.— The Court is still inclined to adhere to the declaration made, but is this worth while?

Mr. Marshall.— I want to show the circumstances under which these resolutions were passed.

The President.—What is the relevancy of those circumstances?

Mr. Marshall.—As indicating the method of action, the procedure, the way the vote was taken, the time when these resolutions were passed, the opportunity for debate and discussion and understanding and even of reading the testimony and the report which was followed by the passage of the articles of impeachment.

The President.— How is that material? How can the Court pass on their procedure which was within their power and their right? They control their procedure and order of business and the propriety of their action.

Mr. Marshall.— But they have gone into all these steps. They considered every one of these steps material, and these questions which I am putting, which will be very few in number, will indicate the entire situation. In other words, they have given us one part of a photograph and we want to fill out the skeleton so as to have an entire and perfect photograph of that which occurred in the Assembly room, which is covered by these questions. I will not ask any question which does not entirely relate to the questions which were put on direct examination to this witness.

Mr. Marshall.— May I have the last question read by the stenographer?

(The stenographer read the last question as follows: "Q. Had the investigating committee taken evidence other than that which is printed in that report?")

Mr. Kresel.— To that question I object as entirely immaterial.

The President.— The Presiding Judge will exclude the evidence.

Q. You say that subsequent to the presentation of that report, Mr. Levy, of the Assembly, presented a resolution which has been marked Exhibit M-2? A. Yes, sir.

Q. When was that presented; at what time in the evening of August 11, 1913?

Mr. Kresel.— I submit, if your Honor please, that that is immaterial.

The President.— Exclude it.

Mr. Marshall.— I do not wish to ask questions merely for the purpose of putting them on the record. I merely desire to indicate what the line of investigation is.

Q. When was that resolution of Mr. Levy that you have referred to and which has been introduced in evidence voted upon? A. At a session on August 12, 1913.

Q. Was there a vote taken upon that resolution on August 11, 1913? A. There was not.

Q. At what time on August 12th was a vote taken on that resolution?

Mr. Kresel.— Objected to as immaterial.

The President.— Sustained.

Q. Was it passed on August 12th?

Mr. Kresel.— The witness has already so stated.

The President.— If you really intend to challenge the fact that it was passed, then of course the Court will allow you to do so, but if it is merely to go into the question of the propriety of the Assembly's act and what hour they adopted the resolution and with what speed they proceeded this Court does not sit here to pass on the acts or the manners of the Assembly.

Mr. Marshall.— I am not asking it for the purpose of sitting in review upon the manners of another tribunal. It is merely for the purpose of getting the exact fact as to when this resolution was passed.

Q. When was it passed; on what date? A. It was passed at the night session of August 12th.

Q. When did that begin?

Mr. Kresel.— I object to that again.

The President.— Sustained. That is sustained unless counsel intends to make the statement that it was not passed.

Mr. Marshall.— I can only tell that by the —

The President.— The Court has too much regard for counsel to think he would under the guise of asking one question endeavor to get at another point - -

Mr. Marshall.— I would not make any statement of that sort, your Honor.

Q. You have stated that the resolution was passed by a vote of 79 to 45? A. Yes, sir.

Mr. Kresel.— 29 wasn't it?

Mr. Marshall.— That was the articles.

The Witness.— That was the articles, 29. The resolution was 79 to 45. The articles had less.

Q. Then there were absent 26 members of the Assembly at that time?

Mr. Kresel.— That is objected to as immaterial.

Mr. Marshall.— That is a matter of calculation.

Mr. Kresel.— Then you do not have to ask the witness.

Q. I want to know who was absent; there were 26 absent at that time?

Mr. Kresel.— I object to that again.

Mr. Marshall.— I think it is a matter of calculation.

The President.— They were either absent or not voting anyhow.

Mr. Marshall.— Of course in connection with this we cannot reserve the right to take evidence in connection with a question which has been now determined; of course I did desire to prove that there were absentees, and also with regard to the giving of notice. I imagine that that matter has now, however, been determined so that I will not prove it.

The President.— There is no provision, is there, for giving notice?

Mr. Marshall.— That of course depends upon the nature of the proceeding. My contention the other day was if it was a legislative act it did not require it but if considered a judicial act notice was necessary.

The President.— It has been disposed of.

Mr. Marshall.— Your Honor's ruling makes it improper for me to press the further questions that I desired to ask. I desired merely to go into the details and show the circumstances under

which these resolutions were passed, the hour of the day or night when they were passed and the circumstances.

Q. Was there any additional report printed by the Assembly which was received on the 12th of August, 1913?

Mr. Kresel.— I object to that as immaterial.

(No ruling.)

A. The only report ever submitted to the Assembly by the Frawley committee was the report submitted on August 11th.

Q. Was there another report submitted on the 12th or a partial report? A. I have no knowledge as to the Frawley committee report. The Assembly received only one report from the Frawley committee.

Q. Was there another document of testimony in connection with the action of the Frawley committee presented or published or printed on the 12th of August, 1913? A. The Assembly received no report.

Q. Was there testimony presented? A. No testimony was presented.

Q. And printed? A. As clerk of the Assembly I only received one report; no other report was ever presented.

Q. I am not asking you about a report now; I am asking you about testimony of the so-called Frawley committee. Was any testimony in addition to that which is appended to the report which you have referred to in your testimony today, presented or printed subsequent to the 11th of August, 1913? A. The committee may have printed another report but it was not presented.

Mr. Marshall.— Nothing further.

Mr. Kresel.— Mr. McCabe.

PATRICK E. MCCABE, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. McCabe, during the month of August, 1913, were you the clerk of the Senate of the State of New York? A. I was.

Q. Did you keep the journal of the Senate during that month? A. I did.

Q. As clerk? A. As clerk.

Q. On the 13th of August, 1913, did a committee from the Assembly of the State of New York appear in the Senate chamber, while the Senate was in session, and there acquaint the Senate with the fact that William Sulzer, the Governor of the State, had been impeached by the Assembly? A. It did.

Q. I show you this paper, and ask you whether that is the original journal of the Senate for August 13, 1913, containing an account of the appearance of this committee and the delivery of the message from the Assembly? A. It is.

The President.— That is unnecessary. They have not objected to your proving it by oral testimony.

Mr. Kresel.— I offer that part of the journal in evidence. I shall not stop to read it. I just want to have it marked.

(The journal was offered in evidence, and the part referred to was received in evidence and marked Exhibit M-7.)

Q. On the same day, did the managers of the Assembly appear and deliver to the president of the Senate articles of impeachment adopted by the Assembly in the impeachment of William Sulzer? A. They did.

Q. And have you there the articles so presented? A. Yes.

Q. Upon the presentation of the articles, did the president of the Senate make any announcement? A. He did.

Q. Will you read that, if you have it in the journal? A. Yes.

Q. It is very short, three or four lines. A. (Reading) The president announced that the Court of Impeachment would be summoned to meet at the Capitol in the city of Albany on Thursday, September 18, 1913, at 12 o'clock noon.

Q. On the following day, August 14, 1913, did you personally serve upon William Sulzer a copy of the articles of impeachment so delivered by the Assembly to the Senate, together with a summons issued by the president of the Senate? A. I did.

Q. I show you this paper, and ask you whether that is an exact copy of the articles and summons so delivered by you to the Governor? A. It is.

Q. Where did you serve that paper on him? A. In the executive chamber.

Q. In the city of Albany? A. Yes; the Capitol in the city of Albany.

Q. On the 14th of August, 1913; is that correct? A. Yes, sir.

Mr. Kresel.— I offer in evidence the copy with proof of service.

(The copy of the articles of impeachment offered in evidence was received in evidence as Exhibit M-8.)

Cross-examination by Mr. Hinman:

Q. Were you present in the Senate chamber on the day when these articles of impeachment against this respondent were presented to the Senate? A. I was.

Q. What, if anything, in the way of papers and documents, other than the articles of impeachment themselves, were presented to the Senate on that day? A. I do not recollect.

Q. Do you recall whether or not at the time when these articles of impeachment against this respondent were presented to the Senate, there was presented a printed copy of the report of the so-called Frawley investigating committee which had attached to it the printed evidence of testimony which had been taken before that committee?

Mr. Kresel.— I object to that question as absolutely immaterial.

The President.— How is it material?

Mr. Hinman.—Let me suggest this. These articles of impeachment, as you have noted, are what I would say wide open; that is, there are no specifications, no bill of particulars. Now, with this report that was presented on the 11th of August to the Assembly, was a part of the testimony taken before the Frawley committee. There was, as a matter of fact, and I have seen further evidence, that that was printed the following day, with testimony of witnesses who were examined before the Frawley committee in the same way as were witnesses whose evidence appears in the papers attached to the report of the Frawley committee. It seems to me that respondent is entitled to have testimony which is printed in pamphlet form on the 12th of Au-

gust by the Assembly. If it is a part of the record here we are entitled to a copy of it.

The President.—I do not see that it is relevant. On its presentation to the Senate of articles of impeachment, it is made the duty of the president of the Senate to summon the senators and members of the Court of Appeals to attend what might be called a convocation of the Court of Impeachment at a certain date and place, and how is it material at all what took place, except that jurisdiction was conferred on the president of the Senate by the necessary preliminary step, to wit, the presentation to the Senate of the articles of impeachment?

Mr. Hinman.—If your Honor please, I do not put it on that ground at all. Our position is that in a proceeding of this kind this respondent in this case is entitled, as a party in another case would be entitled, to the papers which are a part of the proceeding. This ought to be an open and fair investigation of the facts, and that testimony was a part of this record, and we are entitled, because of the fact that they were public records, to have exhibited to us the papers exhibited as they were.

The President.—It is excluded.

Mr. Kresel.—I desire to prove that this Court—

Mr. Marshall.—We admit this Court was properly called.

Mr. Kressel.—Mr. Wolff.

ALFRED J. WOLFF, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Wolff, you live in the city of New York? A. I do.

Q. Are you a member of the bar? A. I am.

Q. Admitted to practice in the courts of record? A. Yes, sir.

Q. Have you an office at 115 Broadway, in the city of New York? A. I have.

Q. Are you associated with the firm of House, Grossman & Vorhaus? A. I am.

Q. And were you associated with that office on the 13th of November, 1912? A. I was.

Q. Do you know William Sulzer, the Governor of the State? A. I do.

Q. Did you know him on the 13th of November, 1912? A. I did.

Q. Had you known him prior to that time? A. I had.

Q. For how long a time? A. Several years.

Q. Did Mr. Sulzer, on the 13th of November, 1912 —

The President.— What has preceded this was merely an introductory. Now, be careful not to ask leading questions.

Q. Did Mr. Sulzer have an office at 115 Broadway on the 13th of November, 1912? A. He did.

Q. And do you know on what floor of that building his office was located? A. Ninth floor.

Q. And was that the same floor on which your office is located? A. Yes, sir.

Q. Do you remember meeting Mr. Sulzer on the 13th of November, 1912? A. I do.

Q. Where did you see him? A. In his private office, in his suite.

Q. At 115 Broadway? A. 115 Broadway.

Q. City and county of New York? A. Yes, sir.

Q. State to the Court the circumstances which called you to his office? A. One of the clerks in Governor Sulzer's office came in and asked me whether I would step in and take the Governor's affidavit, and I went in.

Q. On the 13th of November, 1912, were you a commissioner of deeds in the city of New York? A. I was.

Q. When, prior to that date, had you been appointed such commissioner of deeds? A. January, 1911.

Q. And your appointment was for how long? A. Approximately two years.

Q. Now then, pursuant to this message, did you go into the office of William Sulzer? A. I did.

Q. State what happened there? A. I went into Governor Sulzer's private office, and he had a paper which I know now is the affidavit of expenses and subscribed —

Q. Look at this paper, Exhibit M-3, and state whether on the 13th of November, 1912, you saw that paper. A. I did see it.

The President.— You need not mind about leading, because this is a formal matter.

Mr. Kresel.— May I do that?

The President.—Yes, you can get right to the point.

Q. State what happened when you got into the office of Mr. Sulzer. You say you saw that paper there? A. I did.

Q. What was the conversation? A. The Governor signed the paper.

Q. In your presence? A. In my presence.

Q. You saw him sign it? A. I did. I then asked whether he swore to the contents of the affidavit, and he said he did.

Q. Did you read over the affidavit? A. I did; not word for word, but in general substance.

Q. State what you asked him? A. I asked him did he swear that the statement was true, and a full and detailed statement of the moneys received and contributed, or expended by him directly or indirectly in the campaign.

Q. What response did Mr. Sulzer make? A. He said that he did.

Q. Will you say that you saw him sign? A. Yes, sir.

Q. How many times did you see him sign on that paper? A. Twice.

Q. Did he sign the affidavit, and did he also sign the statement? A. He did.

Q. Both in your presence? A. Yes.

Q. And what did you then do? A. I then administered the oath to him.

Q. After administering the oath what did you do? A. Then I signed my name as commissioner of deeds, and it appears on the paper.

Q. And is the signature "Alfred J. Wolff," your signature? A. It is.

Mr. Kresel.—That is all.

Cross-examination by Mr. Hinman:

Q. What is your age? A. I am 29; I was 29 in September.

Q. Where do you live? A. 157 West 119th street, New York City.

Q. How long have you lived in New York City? A. All my life.

Q. How long has it been since you were admitted to the bar? A. 1905.

Q. In whose office were you at the time you were admitted? A. House, Grossman & Vorhaus.

Q. You say you are associated with that firm, in what capacity? A. Managing attorney.

Q. Is that the title you have, managing attorney for the firm? A. Yes, sir.

Q. Were your duties to manage the business of the firm? A. Yes, sir.

Q. How long have you managed the business of that firm? A. The last five years.

Q. How long had you been a commissioner of deeds on November 13, 1912? A. I think that was the middle of my second term; I am not quite positive of that but I believe it was the middle of my second term.

Q. Had you been in the habit, during your entire term as commissioner of deeds, of taking acknowledgments and affidavits? A. Yes, sir.

Q. How many affidavits and acknowledgments had you taken during your term or terms as commissioner of deeds in the city of New York prior to November 13, 1912? A. I couldn't give the figure.

Q. Is it a matter of very common occurrence? A. Yes.

Q. Taking them frequently and daily? A. Oh, yes, yes.

Q. When were you appointed commissioner of deeds the last time preceding November, 1912? A. January, 1911, I believe it was.

Q. Was that appointment in writing? A. Well, none other than the usual card that is sent to a commissioner to call at the county clerk's office and sign the oath.

Q. Have you that card? A. I have not.

Q. You looked for it? A. No, I have not.

Q. Have you been to the office of the county clerk to ascertain when that appointment was made? A. No.

Q. Have you investigated or examined at all for the purpose of ascertaining when the appointment was made? A. No, I have not.

Mr. Kresel.— Wait a minute. I object to that unless the counsel will state that he questions the fact that this man was a commissioner of deeds on the 13th of November, 1912. I submit that all this is immaterial.

Mr. Hinman.— I will state now, if the counsel wants it and the Court thinks it proper —

Mr. Kresel.— (Interrupting.) Certainly.

The President.— I think you may proceed.

Q. In what way do you fix now, and are you able to fix now, the date when you were appointed commissioner of deeds? A. By the fact that I renewed my commission or made an application for my reappointment on January of this year, and I was reappointed; and I made it because I knew that my former term expired.

Q. Expired at what time? A. About January, 1913; and it being for two years, I then concluded that it must have begun January, 1911.

Q. Have you any recollection now as to the month and year when you were first appointed commissioner of deeds? A. None other than I have said.

The President.— He said that was the middle of his second term.

Mr. Hinman.— I know; he has made two statements, if your Honor please, in that respect.

Q. Have you any recollection now as to the month and year when you were first appointed a commissioner of deeds in and for the city of New York? A. Only as I have said before; January, 1911, is my recollection.

Q. That was your first term? A. No, the second term.

Q. Wait a minute, if I may be permitted, and follow my question. Have you any recollection now as to the month and year in which you were first appointed a commissioner of deeds in and for the city of New York? A. My recollection is January, 1909.

Q. On what do you base that recollection? A. On the fact or opinion that I took this affidavit during my second term and that term was for two years —

Q. (Interrupting.) Is your testimony in that respect based upon anything except the opinion which you have now expressed? A. None whatsoever.

Q. So you have no recollection whatsoever as to the month and year in which you were first appointed? A. None whatsoever.

Q. And so you have no recollection now as to the month and year in which your first term expired? A. No.

Q. And so you have no recollection now as to whether or not you were a commissioner of deeds in November, 1912, except what you have stated here? A. None other than what I have stated, and the fact, of course, that I know that I swore — I signed and filed my oath in the city clerk's office and filed a certificate in the county clerk's office.

Q. I understand. But you have known, have you not, of notaries and commissioners taking the acknowledgments in any case, of its being done in the office, the commissioner or notary forgetting that his term had expired, and then discovering that he took one during a vacancy, in the office? A. I have no knowledge but I can see how it can happen, yes.

Q. Do you recall what day of the week it was that you took this affidavit of William Sulzer? A. I do not.

Q. Do you remember what time of the day it was? A. My impression is it was in the afternoon.

Q. What time in the afternoon? A. About 3 or 4 o'clock in the afternoon.

Q. What were you doing at the particular time that that matter came up? A. Walking across the main hall of our office when Governor Sulzer's clerk came in and spoke to me.

Q. What was the name of the clerk? A. I can't give you the name, but he is still in the office there.

Q. How long had you known his being in Governor Sulzer's office, this clerk? A. Oh, I think more than a year or so.

Q. Before that? A. Before that time, yes, sir.

Q. And had you known his name? A. No, I never inquired; he was an office boy there.

Q. No, did you not inquire? Had you learned his name? A. No.

Q. Do you know it now? A. No, I do not.

Q. Where was Governor Sulzer's office located at that time with reference to your office? A. It was toward the west of the building; our suite occupies the front of the building, which is Broadway, and his is to the right, toward the west, about the center of the floor, a little further down than the center of the floor.

Q. Is it a long hall? A. Yes, it is.

Q. You are at the front end of the hall, that is, the Broadway end of the hall and the Governor's office was in the rear end? A. Yes.

Q. What did — did this clerk of the Governor have with him when he came into your office, any paper? A. He did not.

Q. You are sure about it? A. Yes, I am sure.

Q. When, subsequent to that date, did this question of your taking of his acknowledgment first come up and was first called to your attention? A. Only at the time the accounts of the impeachment proceedings that I saw it published in the papers.

Q. When was that? A. I have no recollection of the date.

Q. Had you ever taken Governor Sulzer's acknowledgment before? A. I had.

Q. And have you taken it since? A. I believe I did take it since.

Q. And had you taken acknowledgments and affidavits for other people in Governor Sulzer's office before and since? A. Oh, yes.

Q. It was a matter of frequent occurrence? A. Oh, yes.

Q. So that there was nothing unusual about their asking you to take the acknowledgment? A. None whatsoever.

Q. Simply a daily routine matter? A. Yes, sir; a matter of courtesy between the two offices.

Q. Were you in the habit of taking acknowledgments from other people on that floor, and affidavits? A. Affidavits more frequently than acknowledgments.

Q. So I take it that from November, 1912, down until June or July or August of this year, a period of seven or eight months your attention never had been called to the taking of that affidavit? A. None other than the accounts I read in the paper, and then when I was subpoenaed before the board of managers.

Q. When did the matter first come up?

The President.—Was it in the spring, or two or three months later?

The Witness.— It was in the — I think it was toward the summer.

Q. The summer of 1913? A. Yes.

Mr. Marshall.— July or August.

Q. So that from the time you took the affidavit of Governor Sulzer in November, 1912, the matter was never called to your attention, and you thought nothing about it until the summer of 1913? A. That is a fact.

Q. Who talked with you about the matter of taking this affidavit since? A. Why, a good many people spoke to me —

Q. (Interrupting.) Name some of them. A. The people of the office spoke about it being published and then the other person was Mr. Kresel, in his office.

Q. When did you talk with Mr. Kresel in his office about it? A. That was, I believe, the Saturday preceding the commencement, either Friday or Saturday, I believe; about a week or so before this trial was commenced.

Q. Whom do you remember of having talked with about that affidavit, or your having taken that affidavit, before you spoke to Mr. Kresel a week before this trial commenced? A. None other than the people in the office.

Q. In your own office? A. That is all.

Q. Did they know that you had taken the affidavit? A. Yes, after it was published they saw it and they spoke about it.

Q. When was it published that you had taken the affidavit? A. In the summer.

Q. Did you ever see it in a newspaper that you had taken the affidavit? A. Yes.

Q. Name the newspaper in which you saw the statement that Alfred Wolff had taken the affidavit? A. In the Times particularly.

Q. When did you see it in the Times? A. I can't say.

Q. Can you give us the week or the month? A. This summer.

Q. When did you talk about it in the office? Was there any one in the office, after you had seen it in the newspaper, was there any one in the office who remembered that you had taken it? A. None further than they knew that from seeing it in the paper.

Q. Was your recollection, when you saw it in the newspaper, fresh about all the details of taking the affidavit? A. Yes.

Q. Perfectly? A. Perfectly.

Q. As to every detail? A. Yes.

Q. Why are you so sure that the clerk who came into your office did not bring a paper with him or have it in his hand? A. None other than I knew that it was signed in my presence in the office.

The President.— You are asking for a reason; he has a right to give his own reason.

Mr. Hinman.— I beg your pardon; surely.

The President.— Whether it is good or bad.

Q. Do you want to state anything further? A. Nothing further than I recall it, that he did not have any paper; that is my recollection.

Q. Can you be positive about it? A. Positive so far as my recollection serves me.

Q. May you be mistaken in that respect? A. I may.

Q. Did you accompany the clerk directly from the office back to Governor Sulzer's room? A. Yes, sir.

Q. Walked back together? A. Yes, sir.

Q. Whom did you see in the office of Governor Sulzer when you went in that day? A. Five or six people.

Mr. Kresel.— I submit, your Honors, that this is going far away from the issue.

The President.— I cannot say so.

Mr. Kresel.— Is it the claim of the other side —

The President.—They may challenge him, that he administered it. Proceed.

Q. Whom do you remember —

Mr. Hinman.— I withdraw that a moment.

Q. How long had you had your offices on that floor? A. I believe since 1906 or 1907.

Q. And how long had Governor Sulzer had his office on the same floor in that same suite of rooms? A. Well, I believe two or three years at least. I am not positive; that is my recollection.

Q. But you went in there that day to take his affidavit. Whom did you see in the office besides Governor Sulzer? A. There were five or six people in his private office.

Q. In Governor Sulzer's private office? A. Yes.

Q. Name one of them? A. I believe Mr. Sarecky was one of them, but I am not positive of that.

Q. How long had you known Sarecky? A. I had seen him around about two years or so, since they were in the building.

Q. Sarecky was there? A. That is my impression.

Q. And did you know any other person in those five or six people that were in Governor Sulzer's private room beside him? A. No.

Q. Can you describe a person that you saw there besides the Governor and Sarecky? A. No, I cannot.

Q. Can you give us any idea how any one of them looked? A. I cannot.

Q. Can you tell me now what the Governor was doing when you went in there? A. Sitting at his desk.

Q. Doing what? A. I can't say; I don't recall.

Q. Describe the desk at which he sat? A. It was a roll top desk.

Q. Where did it stand? A. Against the side of the room.

Q. Which side? A. The westerly side.

Q. As you entered the room, as you enter the door in his room, did it stand at the right or left hand? A. The left hand.

Q. As you walked through the door in the private room? A. Yes.

Q. Which way did it face the desk; did the desk face you as you entered his private room, or was the back towards you, or the end? A. Why, the back was against the wall.

Q. This roll top desk stood with the back against the wall, so that the Governor as he sat there at the desk that day was facing the wall? A. Yes, that is my recollection.

Q. And what particular work was he engaged in doing? A. I cannot say except that I recall he was sitting at the desk.

Q. What were any other people or where was any other person that day in the room when you went in there? A. I can't say.

Q. Were those five or six people who were in his room at that time, standing or sitting? A. I can't recall.

Q. Not one of them, as to whether they were standing or sitting? A. No.

Q. What was any one of those five or six persons doing? A. I can't recall.

Q. Did you speak to them? A. No.

Q. Did you speak to Mr. Sarecky? A. I did not.

Q. Did you say anything to anyone except what was said to Governor Sulzer? A. No.

Q. Where did you sign your name to the affidavit? A. Right there at the desk.

Q. At whose desk? A. At the Governor's desk.

Q. What? A. At the Governor's desk.

Q. Standing or sitting? A. Standing.

Q. What pen did you get? A. I can't recall.

Q. Did you have —

The President.— Did you have your own pen or get —

The Witness (Interrupting).— I used the pen from his office.

Q. What kind of a pen did you use? A. I can't say.

Q. Did he hand you the pen or did you pick it up off the desk? A. I can't say.

Q. Did you use the same pen with which he did the signing? A. I can't say.

Q. His name appears on the affidavit written in two places? A. It does.

Q. Did you use the same pen and dip it in the same ink well that he used, the same pen that he used in signing his name? A. I can't say.

Q. Have you any recollection about it? A. No.

Q. Do you recall whether you used the ink well? A. No, I do not.

Q. Did you use a fountain pen? A. I didn't use my own; I have none.

Q. Where did you go, into his private office directly from the hall, or into a reception room? A. A small anteroom.

Q. So that you entered in his office first into an anteroom? A. Yes.

Q. And then in his private office? A. Yes.

Q. Whom did you see in the anteroom when you went to enter the Governor's private room? A. I don't recall having seen anybody.

Q. Not a soul? A. Not that I recall.

Q. A stenographer or secretary? A. I don't recall seeing anybody.

Q. As you passed from the entrance room or anteroom into the Governor's private room, did you turn to the left or the right? A. I turned to the right.

Q. That is, as you stood, as you walked from the hall into the Governor's entrance room, you went to the right? A. Yes.

Q. You are perfectly clear about that? A. That is my best recollection.

Q. What papers, if any, did you see on the Governor's desk that day when you signed this affidavit? A. I can't say.

Q. Were there any papers or books or documents on his desk? A. I can't say.

Q. What furnishings were in the room that day besides the desk? A. I took no notice.

Q. Not of anything? A. Nothing.

Q. Do you know whether there were any other desks there? A. I cannot say.

Q. Any safes in that room? A. I can't say.

Q. Any book cases? A. I can't say.

Q. Any mail bags? A. I can't say.

Q. Did you see anything that you are able to describe there that day except the Governor and his desk? A. None other than the people in the room.

Q. Can you describe one of those? A. None.

Q. Now, what do you say — let me ask you. Where was this paper, this affidavit, when you saw it first? A. In the Governor's possession.

Q. What do you mean by that? A. He had it in front of him.

Q. What do you mean by he had it? A. On the desk in front of him.

Q. You mean it lay on the desk in front of him? A. Yes, sir.

Q. Did you observe as to the particular position in which it lay? A. I did not, no.

Q. Did you pick it up in your hand? A. Afterwards, after the Governor signed it and I swore him to it.

Q. You raised it from the desk? A. Yes.

Q. Did you observe in what form it was folded when you took it off the desk? A. No.

Q. You have no recollection about that? A. No.

Q. You don't know now what position it was in, as to being folded, when you picked it off the desk? A. No.

Q. Or when you laid it down for him to sign? A. No.

Q. Did he sign it before you picked it up? A. Yes.

Q. Who indicated where he should sign it? A. Nobody.

Q. Did he say anything about that? A. No, he did not.

Q. Which signature did he write first, the one at the top or the one at the bottom? A. The one at the top.

Q. Signed them both in your presence? A. Yes, sir.

Q. And then you picked it up and what did you say you said to him? A. I asked him — I read off the substance of the affidavit.

Q. Did you read the substance of the affidavit or did you read the affidavit? A. I believe the substance of the affidavit.

Q. Well, now, just tell us what substance, using your own recollection, you read to him that day? A. I asked him whether he swore to the contents of that affidavit, was the truth, and then I read off certain phrases out of the affidavit as printed there, and he said he did.

Q. After you asked him whether he swore to it, what reply did he make? A. He said he did.

Q. And after he had sworn to that in that way you read some of this — A. (Interrupting.) No, that was all, in one; I asked him whether he swore to the contents of the affidavit and then I read off clauses of the affidavit to him —

Q. (Interrupting.) Now, then, what clauses?

Mr. Kresel.— Let him finish.

Mr. Hinman.— I beg your pardon. I thought he had finished.

The Witness.— Then he said he did. I then signed my name as a commissioner of deeds.

Q. What clauses in this affidavit did you read? A. I cannot tell you without looking at it.

Q. Give me your best recollection as to what clauses of the affidavit you read?

The President.— That is incompetent. He says he cannot without looking at it.

Mr. Hinman.— I wanted to see if he had any recollection about it.

Q. Have you any recollection about it? A. Not without looking at it. I do not recall the substance of the affidavit. As I recall it, I read off to him everything except these words, which says that he is the person who signed the foregoing statement. The rest I read off to him.

By the President:

Q. Repeat again what you said. You say you read everything except the words which say he is the person who signed the foregoing statement? A. The rest I read off to him.

By Mr. Hinman:

Q. Why did you read all the affidavit except that one thing? A. Because he signed the statement before me, and I saw him sign it.

Q. Do you make it a universal rule to read to affiants the contents of affidavits that they sign? A. I do.

Q. Always? A. Oh, yes.

Q. Never administered an affidavit or took an oath yet where you did not do that? A. Not where there is a particular certificate or form attached to the affidavit. If it is the ordinary affidavit with the words "Sworn to before me," I merely then swear them, but where it has a particular form of certificate, I then read off the certificate to them.

Q. Do you notice that this has the regular certificate at the end, "Sworn to before me this 12th day of November, 1912," attached to it? A. It has that ending, but it has also another part of the certificate.

Q. Did you ever see an affidavit that did not have that ending, and that commenced as this does, with the venue? A. Yes.

Q. Do you mean to tell me that every affidavit that you ever administered in your life, as a commissioner of deeds which ended with these words, "Subscribed and sworn to before me this 13th day of November," you read over to the affiant, before you sign the certificate? A. I say if it has a particular certificate of that kind on it, I do.

The President.— Hasn't this gone about far enough?

Mr. Hinman.— May be.

The President.— The Court wants to give you every opportunity to test the witness, but still there is really a fair limit.

Mr. Hinman.— I recognize that.

Mr. Kressel.— We have not been objecting because of your Honor's ruling.

Mr. Hinman.— If I may be permitted to go on.

Q. Have you ever taken in affidavits the statement of campaign expenses, before? A. Not to my knowledge.

Q. Taken any since? A. No.

Q. Do you always read affidavits that you take?

The President.— He has already told you that.

Mr. Hinman.— I withdraw it.

The President.— He says where he has an ordinary affidavit he does not, but simply swears; where there is a special form he does.

Q. Then let me ask you, do you always read affidavits that you subscribe your name to, in order to ascertain whether there is any special provision in them or not? A. No.

Q. Why did you do it this time? A. Because there it has a printed form of affidavit. I am accustomed to taking affidavits of legal proceedings and actions, the ordinary affidavit, which just ends with "Sworn to before me," but here was one with a certificate attached in a printed form which brought it directly to my knowledge.

The President.— I think you have gone over that, and explained it sufficiently. I think you will have to proceed to another point.

Q. You stated that you administered the oath? A. Yes.

Q. What do you mean by you administered the oath? A. By that I mean asking the Governor whether he swore to it.

Q. Did you do anything other than that in connection with the taking of the oath? A. Not other than what I have previously testified to.

Q. Did you observe whether in Governor Sulzer's private room there was a door that entered from the hall directly into the private room or not? A. I did not notice.

Q. And you do not know now? A. No, I never looked to see.

Mr. Kresel.— Is that all?

Mr. Hinman.—That is all.

Mr. Kresel.— Mr. Schiff.

Mr. Kresel.— May I call the Court's attention at this time, Mr. Stanchfield has called my attention to it, that in the defendant's answer he admits swearing to this affidavit.

The President.—Then it was hardly worth while for you to offer the witness, and we could have saved a great deal of time. It is a pity you did not make the discovery first.

JACOB H. SCHIFF, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Are you a member of the firm of Kuhn, Loeb & Company? A. I am.

Q. Bankers? A. Yes, sir.

Q. In the city of New York? A. Yes, sir.

Q. Do you know Governor Sulzer? A. I do.

Q. Did you know Governor Sulzer before he became Governor? A. I did.

Q. And for how long a period of time had you known him before he became Governor? A. I have known him for many years, I do not remember how long.

Q. Do you remember when Mr. Sulzer was nominated for Governor?

The President.— The occurrence or the time?

Q. Do you remember his nomination as Governor? A. I do.

Q. And did you send him a message of congratulation? A. I congratulated him by letter.

Q. Very well. Now, after sending him that letter, did you hear from Mr. Sulzer? A. I did.

Q. How; by letter or by telephone? A. He came to my office.

Q. Do you remember the exact date when it was that he came to your office? A. I do not.

Q. Do you remember the month? A. I think it must have been in late September or early October.

Q. Of what year? A. 1912.

Q. Now, will you state to the Court, as far as you can recall, the substance of your conversation with him at that time? A. Governor Sulzer came into my office and he discussed the general political situation. He said he was gratified that he was going to have my support. I asked him whether there was anything

special I could do for him, and he said "Are you going to contribute to my campaign fund?" I said "Yes, I shall be willing to do so," and he said "How much will you contribute?" I said "$2,500." He replied "Can you make it any more?" I then said to him "No, that is about as much as I care to give you." Then he said "All right, please make your check to the order of Louis A. Sarecky"— I believe is the name. That was the conversation I had with him.

Q. Well, subsequently was there a check for $2,500 drawn? A. I gave order to the cashier to draw a check for $2,500 to said order.

Q. Now please look at this check (showing check) and state whether that is the check, with the exception of the notation on the face of it, which we shall explain in a minute? A. This is a check of my firm, Kuhn, Loeb & Co., drawn to the order of Louis A. Sarecky for $2,500, drawn on October 16, 1912.

Q. With the date of the check in mind, can you now state whether this talk that you had with Mr. Sulzer was on or about that date? A. It was exactly on the same day; of that I am positive.

Q. Now, then, I ask you, Mr. Schiff, whether that check sent to Mr. Sarecky was afterward paid by your bank and the check returned to you? A. That was the case.

Q. Now, then, Mr. Schiff, I notice a memorandum on the face of the check which reads: "Mr. Schiff's contribution toward William Sulzer's campaign expenses." Was that memorandum on the face of the check when it was drawn and sent to Mr. Sarecky or Mr. Sulzer? A. It was not.

Q. When was that memorandum put on there and under what circumstances? A. Some time ago, I suppose some two months ago or thereabouts, I had a call from Mr. Richards, who came to me —

Mr. Marshall.— I object to the conversation between the witness and Mr. Richards as immaterial.

The President.— It is sufficient if you will say that was made by yourself, or that it was made after the return of the check to you through the bank, after it had been charged and paid.

The Witness.— That was made by myself when the check was delivered to Mr. Richards, about two months ago.

Mr. Kresel.— Now, if your Honor please, I offer this check in evidence.

The President.— If there is no objection, it will be admitted.

Mr. Marshall.— With the exception of the notation.

Mr. Kresel.— Of course that notation is not part of the check.

(Check offered in evidence, admitted and marked Exhibit M-9.)

Mr. Kresel.— I want to state I have had photographs made of various exhibits which we propose to offer, and this now being admitted as an exhibit, I desire permission of the Court to have photographs of that check passed around to members of the Court, so they may have copies.

The President.— You have photographed it without that addition?

Mr. Kresel.— No, the addition is on it; I could not possibly do it otherwise.

The President.— If there is no objection that may be done.

Mr. Marshall.— We do not care anything about it.

Mr. Kresel.— I have already supplied members of the Court with folders in which these photographs can be inserted.

The President.— Only be careful not to hand members of the Court anything until they have been admitted in evidence.

Mr. Kresel.— I certainly shall not do that.

By Senator Griffin:

Q. First, to whom was that check just testified to handed or was it handed to anybody representing Governor Sulzer? A. When the check was originally made it was no doubt handed to Mr. Sarecky, I do not know in which way, whether it was sent him or whether he called for it; that is a detail of office work of which I do not know anything.

Q. Is there anybody in your office who can testify to these details? A. I have made inquiry in the office, but nobody can remember the circumstances, whether it was sent or whether it had been called for. I think that now after some seven or eight or nine months, it would be very difficult to ascertain that.

Cross-examination by Mr. Marshall:

Q. Mr. Schiff, your relations with Mr. Sulzer were friendly? A. Very much so.

Q. And had been for some time? A. Yes, sir.

Q. And you sent him a friendly letter of congratulation? A. I did.

Q. And he subsequently called at your office in relation to those congratulations? A. He did.

Q. And in the course of the conversation you offered to give him a check of $2,500? A. I did.

Q. Now, did you, in that conversation or at any time, impose any limitations or condition upon the use which was to be made of that money by him?

Mr. Kresel.— I object to that question.

Mr. Marshall.— They charge larceny in this case.

The President.— If the objection is made to the form of the question, it is good. Is the objection made to the form?

Mr. Kresel.— Yes, if your Honor please.

The President.— Now, was anything said about the purpose?

Q. Was anything said in that conversation as to the use which was to be made of that check or the proceeds of that check by Mr. Sulzer? A. There was nothing said.

Q. Did you intend that that should be used for any specific purpose?

Mr. Kresel.— To that I object. His intent is not in question here.

Mr. Marshall.— They charge larceny.

Mr. Kresel.— The conversation which was had between the parties has already been given to the Court. As to the intent that may be drawn from that, that is a matter for the Court.

The President.— A thing that is taken with the consent of the party could hardly amount to larceny. I think I will allow the question.

Mr. Marshall.— Your Honor has ruled in my favor, but your Honor will recollect one of the counts in one of the articles is that this money was received as a bailee and wrongfully misappropriated.

The President.— You are right. The article says guilty of larceny. It may make no difference. It possibly cannot make a difference, but I imagine if I were sitting in a criminal prosecution I should have to charge the petit jury that if the owner consented to the use of the money or check given, consented to its use in any manner by the party to whom it was delivered, that would not constitute larceny.

Mr. Stanchfield.— Yes, but if your Honor please, the witness has already stated that when Governor Sulzer called upon him he talked with him with reference to contributing to his campaign fund, and he asked Mr. Schiff how much he would be willing to contribute, and Mr. Schiff told him $2,500, and Mr. Sulzer asked him whether he could not give more, and Mr. Schiff said that was all he cared to give.

The President.— Read the question.

(The question was read by the stenographer as follows:

"Q. Was anything said in that conversation as to the use which was to be made of that check, or the proceeds of that check, by Mr. Sulzer? A. There was nothing said.

"Q. Did you intend that that should be used for any specific purpose?")

The Witness.— When I used the expression "campaign funds," it was a very general expression. I certainly had no objection whatsoever, and I think it was the general intent and purpose

of the conversation that Governor Sulzer could use this $2,500 for whatever he would please.

Mr. Marshall.— That is all.

By Mr. Kresel:

Q. Mr. Schiff, in addition to the conversation that you have already related here between Mr. Sulzer and yourself, was there anything else said between you? A. At that time?

Q. Yes. A. No.

Q. Or at any other time between you with reference to this $2,500 contribution? A. No.

Q. Mr. Schiff, when you put on the face of this check the memorandum which now appears there, to wit, "Mr. Schiff's contribution towards William Sulzer's campaign expenses," did you not then intend, and was it not your intention when you gave your check on October 16, 1912, that that $2,500 should be used by Mr. Sulzer for his campaign expenses?

Mr. Marshall.— I object to that as incompetent and improper, and an attempt to discredit his own witness.

The President.— It is not to discredit, he cannot impeach his own witness, but he has a right to do that. He is practically your witness on this point.

Mr. Marshall.— No.

The President.— Yes, you have asked that question.

The Witness.— This is the check of my firm, and not my individual check, and when I gave it out of my hands to Mr. Richards, I put this notation so as to identify the check. I have already said that by the expression "campaign fund" or "campaign expenses" I mean something very general. It is simply an expression which I used when I gave the check, and which I put on it for its identification.

Q. Mr. Schiff, when you say that it was a general expression, do you mean anything else but that you did not intend to restrict Mr. Sulzer in the use of this money just so long as he used it

for campaign purposes; isn't that what you mean? A. That is a question of how my mind ran.

Q. We are to inquire into it. A. If I searched my mind, I would say to you that Governor Sulzer could have had this $2,500 at any time and for any purpose, and if I had been very careful, I would not have probably used the words "campaign expenses," because I really meant that he should have the free use of it.

Q. Did you intend, Mr. Schiff, that he might use it for any purpose whatsoever? A. For any legitimate purpose.

Q. Do you mean by that, Mr. Schiff, any legitimate purpose connected with his campaign to be elected governor? A. It is very difficult after eight months to state exactly what was in my mind, but so much is certain, that at that time I intended to aid Governor Sulzer personally by giving him this $2,500 for campaign expenses, in the first instance, or otherwise, as he deemed fit.

Mr. Kresel.— That is all, unless there are any questions by the Court.

Senator Thompson.— I would like to ask the witness if at the time he gave this check, he believed Governor Sulzer was to be elected?

The Witness.— I had very little doubt of it.

Mr. Kresel.— Mr. Morgenthau.

HENRY MORGENTHAU, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Morgenthau, you are now the Ambassador of the United States to Turkey? A. Yes, sir.

Q. And you are a lawyer by profession? A. Yes, sir.

Q. Do you know Governor Sulzer? A. I do.

Q. During the campaign of 1912, were you active in the national campaign on the Democratic side? A. I was.

Q. And did you hold office in that movement? A. I did.

Q. What was your office? A. I was the chairman of the finance committee of the national committee.

Q. Do you remember seeing Mr. Sulzer shortly after his nomination for Governor? A. I do.

Q. Where was it you saw him? A. At my office at the Democratic national headquarters, 200 Fifth avenue.

Q. City of New York? A. In the city of New York.

Q. Do you remember the exact date? A. I do, after having refreshed my memory, October 5th.

Q. 1912? A. 1912.

Q. You had some conversation with him then, did you? A. I did.

Q. Please state, as far as your recollection will serve you, what conversation you had with him. A. Governor Sulzer came to my office and told me that he wanted to thank me for what I had done to help him in bringing about his nomination, and expressed the wish and the hope that I would be of some use to him after he was elected.

We talked about the general situation, and while talking I either made out a check myself or had my clerk make out a check for $1,000, and I signed it and handed it to the Governor. He said to me, "I didn't expect that from you. I don't want it, because you are doing so much for the national committee." I said, however, I did want to help him and gave him the check and he took it. The whole conversation was less than three or four minutes.

Q. Is this the check which you gave him? A. Yes, sir, this is the check.

Q. Was this check subsequently paid? A. Yes, sir.

Q. And the voucher returned to you by your bank? A. Yes, sir.

Mr. Kresel.— I offer the check in evidence.

The President.— Admitted.

(The check offered in evidence was received in evidence and marked as Exhibit M-10.)

Mr. Kresel.— You may examine.

Cross-examination by Mr. Marshall:

Q. Mr. Morgenthau, how long have you known Governor Sulzer? A. Oh, for many, many years, possibly twenty.

Q. You knew him well and intimately? A. Yes, I knew him well.

Q. And your relations were of a friendly character? A. They were.

Q. Was there anything said in that conversation that you have narrated as to the use to which he was to put the $1,000? A. There was nothing said.

Q. Did you in any way intend to limit him as to the use that he was to make of the $1,000?

Mr. Kresel.—To that I object.

The President.— I suppose that follows the previous ruling. You may examine the witness.

The Witness.— I did not.

By Mr. Kresel:

Q. Mr. Morgenthau, had you given Mr. Sulzer any money before that? A. No, sir.

Q. Didn't you give it to him because he was the nominee of the Democratic party for Governor? A. Certainly.

Q. Didn't you give it in order to help him along to become Governor of the State of New York?

Mr. Marshall.— I object to that as leading and improper.

The President.— That is legitimate in answer to the testimony you got from the witness.

The Witness.—At the time I felt positive he would be Governor. It was simply to help him. I was foolishly generous, and thought I would give it to him.

Q. You knew that as candidate for Governor he would have to pay certain expenses in the running of his campaign? A. Yes, sir.

Q. Was it your intention, in giving him this $1,000 to help him pay those expenses? A. That is inferential. I don't want —

Q. We are dealing now with intentions. The Court has permitted it, and I am asking you whether that was your intention? A. I really could not tell you what my intentions were. I felt I wanted to help him. I sat there as chairman of the finance committee, was handling the funds, and he came in and it flattered me to think he wanted my help, in the future, and I wanted to help him.

Q. Help him in what? A. In his election, in his canvass.

Mr. Kresel.— That is all, Mr. Morgenthau.

Senator Coats.— I would like to ask Mr. Morgenthau if Mr. Sulzer had not been candidate for Governor, if he would have given the $1,000 as spontaneously as he did?

The Witness.— Certainly not.

(Witness excused.)

Mr. Kresel.— Mr. Godwin.

THOMAS M. GODWIN, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Godwin, what is your occupation? A. I am the paying teller of the Farmers Loan & Trust Company.

Q. How long have you been the paying teller in that institution? A. About four years.

Q. During those four years, has William Sulzer, who is now Governor of the State, had an account in your institution? A. He has.

Q. Now I want to show you managers' Exhibit 10, and another paper, which I ask to be marked for identification simply.

(The paper offered in evidence was received in evidence and marked as Exhibit M-11 for identification.)

Q. I show you managers' Exhibit 10, and managers' Exhibit 11 for identification, and ask you whether those two checks were deposited in your institution to the credit of William Sulzer? A. They were.

Q. And on what dates, please? A. On October 8, 1912.
Q. Both of them? A. Both of them.

The President.— Is the witness, Mr. Morgenthau, still in Court?

Mr. Kresel.— He has gone. If your Honor desires to have him recalled, I will recall him.

The President.— It is not worth the time of bringing him back from New York.

Mr. Brackett.— He is in the city. He did not have time to go more than down the hill.

Mr. Kresel.— I will try to have him back.

Q. I also show you this paper, which I ask to be marked for identification.

(Paper offered in evidence was received in evidence and marked as Exhibit M-12 for identification.)

Q. This is managers' Exhibit 12 for identification, and I ask you what this paper is? A. This is a slip used in making deposits with the Farmers Loan & Trust Company in the account of William Sulzer.
Q. Of what date? A. October 8, 1912.
Q. October 8, 1912. During the four years you have been paying teller at the institution, have you had occasion to pass upon the validity or the correctness of the signature of William Sulzer in that account? A. I have.
Q. And in that manner have you become familiar with William Sulzer's signature? A. I have.
Q. Can you tell the Court about how many times you have seen the signature of William Sulzer?

The President.— Is the competency of this witness to pass on the signature challenged?

Mr. Marshall.— I do not think so, your Honor.

The President.—Then proceed.

Q. I show you again managers' Exhibit 10 and managers'

Exhibits 11 and 12 for identification, and ask you to state whether on managers' Exhibit 10 the endorsement "William Sulzer" is the signature of William Sulzer, and whether on Exhibit 11 for identification the endorsement "William Sulzer" is the signature of William Sulzer, and whether all the handwriting on managers' Exhibit 12 for identification, is in the handwriting of William Sulzer? A. I believe these signatures to be the signatures of William Sulzer.

The President.— How about the handwriting, all the handwriting.

Mr. Kresel.— I am speaking of a deposit slip.

The Witness.— I believe the handwriting of the name "William Sulzer" is in Mr. Sulzer's own handwriting.

Q. What do you say about these figures on that paper? A. In my opinion they are also in the handwriting of William Sulzer.

Q. I show you again the deposit slips which you have just identified, and ask you to point out the entry there of the deposit of these two checks, Exhibit 10 and Exhibit 11 for identification.

The President.— What is your answer, witness?

The Witness.— The third and fourth items upon the list of checks and cash upon the slip are the items in question.

Q. That is, the third item is an entry of a check of what amount? A. The third item is an entry of a check for $1,000 drawn upon the Guaranty Trust Company.

Q. And that is the Morgenthau check which is now Exhibit 10, is that correct? A. Yes, sir.

Q. Now, the fourth item? A. The fourth item is a check for $500 drawn upon the Plaza branch of the Union Trust Company of New York.

Q. And is that the check which is now marked Exhibit 11 for identification? A. Yes, sir, it is.

Mr. Kresel.— Mark these two checks for identification.

(The checks referred to were marked Exhibits 13 and 14 for identification, respectively.)

Q. These are now marked managers' Exhibits 13 and 14 for identification. I ask you to examine the indorsement on the back of these two checks, and state whether or not in your opinion those are the indorsements of William Sulzer? A. This is a check for $500, drawn upon the Guaranty Trust Company of New York, to the order of William Sulzer. This check did not pass through the Farmers Loan & Trust Company, and I would prefer not to pass upon the indorsement.

The President.— Well, if the counsel asks you, you should answer to the best of your knowledge. If you think that you cannot tell, why of course you should not tell. If you can tell, no matter where the check went, you should answer.

Mr. Kresel.— I think it is due, if your Honor please, to the witness to state why he takes this position.

Q. Is it because you are instructed by your institution to give no testimony other than such as relates to checks passing through your institution?

Mr. Kresel.— I don't want to have the witness appear as contumacious.

The President.— Then you may withdraw the question.

Mr. Kresel.— I want to press the question.

The President.— Then he will have to answer you, despite any instruction he may have received from the bank or trust company.

The Witness.— I must answer the question?

The President.— Yes, answer the question.

Mr. Marshall.— I may have misunderstood the witness, but I understood him to say he could not answer.

The President.— What is the reason you decline to pass upon it? Is it because you are not familiar with the signature or cannot tell it, or because of some instructions you have received from the trust company of which you are a paying teller?

The Witness.— It is because of instructions that I have received.

The President.— Those instructions do not give you the privilege of declining to answer the question. If you are capable of judging you must answer the question of counsel, regardless of any instructions. Instructions of even the greatest corporation could hardly limit the duty of a witness.

Mr. Brackett.— May the question be now read again?

(The stenographer read the question as follows: "Q. I ask you to examine the indorsements on the back of these two checks, and state whether or not in your opinion those are the indorsements of William Sulzer?")

The Witness.— I would like to compare these signatures.

The President.— Yes.

Mr. Marshall.— May I look at these two checks?

(Mr. Marshall examines checks.)

The Witness.— These signatures look similar to those which I have just identified.

The President.— But what is your judgment, witness? Of course, it is not an exact science. In your judgment is it the signature of William Sulzer or not; your best judgment?

The Witness.— Your Honor, it is rather difficult to determine that. I don't feel competent to pass upon those signatures after an examination.

Q. Now, Mr. Godwin, will you give the Court the benefit of your best judgment as to whether those two signatures are the signatures of William Sulzer? A. Have I not already answered that question in the previous one that you gave me?

The President.— You can answer. You can say they are or are not, or you can say you have no judgment on the subject.

The Witness.— I have no judgment on the subject.

The President.— That is an answer.

Q. Now, I show you seven more deposit slips of the Farmers Loan & Trust Company, which will be marked for identification in rotation:

(Seven deposit slips marked Exhibits M–15, M–16, M–17, M–18, M–19, M–20 and M–21 for identification.)

Senator Emerson.— I would like to know whether the witness stated he was the receiving or the paying teller.

The Witness.— The paying teller.

By Senator Emerson:

Q. Do you have anything to do with receiving the deposits; do you receive the deposits? A. I do not.

Senator Griffin.— I wanted to ask or inquire if these exhibits, being checks of the Farmers Loan & Trust Company, Exhibits 15 to 21, inclusive, are the ones with reference to which Mr. Kresel has asked the witness to identify the alleged signature of William Sulzer?

The President.— On their backs, the endorsements?

Senator Griffin.— The endorsements.

The President.—Are they?

Mr. Kresel.— No; Exhibits 15 to 21 are deposit slips. What Senator Griffin is referring to is Exhibits 13 and 14. Those are the two checks about which the witness says he cannot give an opinion.

Senator Griffin.— Exhibits 13 and 14 are the two checks?

Mr. Kresel.— Yes.

Senator Griffin.— And those other numbers, 15 to 21, are the deposit slips?

Mr. Kresel.— Yes.

Senator Griffin.— And the checks are Exhibits 13 and 14?

Mr. Kresel.— Yes.

The President.— Is the statement of the counsel sufficient, Senator?

Senator Griffin.— Yes, sir.

Mr. Brackett.— Will your Honor permit me to make a suggestion simply for expidition?

The President.— Yes.

Mr. Brackett.— I discovered in such a trial once that if the members of the Court having general questions will wait until after the examination and cross-examination it will expedite matters very much. Of course there may be passing matters that should be asked.

The President.— There may be some things that they may forget if they wait until then. I do not think there will be any disposition on the part of any of the senators to abuse their privilege in that respect.

By Mr. Kresel:

Q. Now, Mr. Godwin, I show you Exhibits 15 to 21 for identification and ask you whether these are deposit slips in the Farmers Loan & Trust Company to the account of William Sulzer?

Senator Emerson.— I would like to know whether the paying teller can pass on the competency of what the receiving teller receives.

The President.— That I cannot tell you. You will have to ask the witness.

The Witness.— These are slips used in making deposits with the Farmers Loan & Trust Company in the account of William Sulzer.

Q. Now, will you examine the handwriting on each one of these deposit slips and state whether in your opinion the handwriting thereon is that of William Sulzer? A. In my opinion the handwriting upon these deposit slips is that of William Sulzer.

Q. I show you a paper, Mr. Godwin, and ask you whether that is a correct transcript of the account of William Sulzer with the Farmers Loan & Trust Company, beginning with September 5, 1912, and ending with January 1, 1913? A. I cannot say as to this statement without comparison, but I have here a statement of the account of William Sulzer from September 3, 1912, until September 20, 1913.

Mr. Kresel.— Very well, I will use that.

The President.— Why not use the one the witness knows about?

Mr. Kresel.— Certainly. I want to have that marked for identification.

(Statement referred to marked Exhibit M-22 for identification.)

Q. I also show you a letter which I will ask to have marked for identification.

(Letter referred to marked Exhibit M-23 for identification.)

Q. I ask you to state whether the signature to that is in your opinion the signature of William Sulzer? A. I am unable to form an opinion upon that signature.

Mr. Kresel.— That is all.

Mr. Hinman.— May I inquire whether that paper you are just receiving has been marked for identification?

Mr. Brackett.— It is not yet in evidence but it has been marked for identification.

Senator Coats.— Mr. President, I would like to have the witness take up the various checks concerning which he is unable to give an opinion in the order of their numbers and state the difference or differences between them and those which he has positively identified.

The President.— He wants to know why you are not equally able to give your judgment on those checks that you say you have no judgment on with those which you have already testified in your judgment were in the handwriting of William Sulzer. Is that the point of the question?

Senator Coats.— To explain what the difference is between those he has identified and those he cannot identify.

Mr. Kresel.— May it be made plain to the witness that he is not bound by any instructions which the Trust Company gave him?

The President.— The Court has already told him that.

Mr. Kresel.— I will give him the checks in order that he may be able to answer the question.

Mr. Hinman.— The President does not clearly understand the proposition of Senator Coats, which is to have the witness take and examine the checks and point out the differences.

The President.— Yes. It was on account of my defect of hearing that I did not get that point.

Mr. Hinman.— On that proposition you will observe the witness has not qualified as an expert and that is an expert proposition.

The President.— I do not think so.

Mr. Hinman.— We do not care about it. We do not make any question about it.

Senator Griffin.— I desire simply to make a suggestion that the numbers of the exhibits that the witness is now examining be announced.

The President.— Yes, that may be done.

Mr. Kresel.— May I step up there to do that?

Mr. Brackett.—As he announces his opinion as to each but not in advance.

Mr. Kresel.— He is now examining Exhibit 10 in evidence, and Exhibits 11, 13 and 14 for identification. Exhibit 10 in evidence and Exhibit 11 for identification he has identified the endorsements to be that of William Sulzer.

The President.— Read the question of Senator Coats to the witness, stenographer.

(The stenographer thereupon repeated the question of Senator Coats as follows: "I would like to have the witness take up the various checks concerning which he is unable to give an opinion in the order of their numbers, and state the difference or differences between them and those which he has positively identified.")

The Witness.— In the check signed "Lyman A. Spaulding" on the Fulton Trust Company of New York, the signature is generally irregular as compared with the one which I have identified. There is sufficient general variation in it to cause me to say that I have no opinion upon the matter; referring to Exhibit 13. With reference to the check for $500, drawn upon the Guaranty Trust Company to the order of William Sulzer, there are slight variations in the signature which I would find it rather difficult to point out except to someone who was looking at the signatures with me. It varies slightly from the other signature which I have identified, and causes me also to answer on this question that I have no judgment upon the signature.

Mr. Hinman.— May I be permitted to have the witness state who drew the check? We can follow it better than by number.

Mr. Bracket.—May I make a suggestion? Mr. Morgenthau has returned here, and it is possible, your Honor, to ask him the question tonight before adjournment, and thereby save his time, whereas this witness has to be here tomorrow anyway.

The President.—Will you step aside for a moment, witness. Mr. Morgenthau, take the stand.

HENERY MORGENTHAU recalled.

By the President:

Q. It may be that you have answered the question which I wish to put to you. If so, I did not get it. Whose money was it that this check for $1,000 was which was given to the respondent here; was it your individual money or the money you held in your possession as one of the campaign committee? A. It was my individual money.

By Senator Thompson:

Q. I think the witness stated that at the time that he gave this check. What did you say in reference to your idea as to whether William Sulzer was to be elected Governor? A. I felt sure of his election.

Q. Do you mind stating then why you gave this money? A. Not at all. As I said, it was one of those generous impulses which occasionally prompt me to do things.

Q. Was it for the purpose of creating a better standing or a more intimate relation between yourself and William Sulzer after he should have been elected Governor, knowing that he would be elected? A. No, sir.

THOMAS M. GODWIN, recalled.

The President.— Senator Coats, is your question answered?

Senator Coats.—Yes, sir.

By Senator Blauvelt:

Q. I would like to ask whether as paying teller of the Trust Company if a check bearing the signature which you have refused to identify was presented to you for payment would you pay on that signature?

The Witness.— Must I answer that question, your Honor?

The President.— I think you may answer that, yes.

The Witness.— You have reference to the signature on both these checks?

Q. Either one. A. On the check signed "Lyman A. Spalding" upon the Fulton Trust Company, which is marked Exhibit 13, the signature bears sufficient irregularity to my eye to warrant my investigating it before paying it.

By the President:

Q. Now, as to the other check. A. I cannot make out the signature upon this check drawn upon the Guaranty Trust Company for $500, and marked Exhibit 14; it looks more like the

signature of William Sulzer with which I am familiar. Yet upon closer examination I think if it were presented to me upon a check for payment I would have reference to the files of the company to compare the signature with that on file.

The President.— That hardly answers the question.

Q. Can't you say whether you think you would pay it or not; just be frank and tell us? A. No, your Honor. I think I would look it up before I paid it.

The President.— That is enough.

By Senator Pollock:

Q. I would like to ask of the witness if he has a standard taken from the files of the Farmers Loan & Trust Company with him now, and if he has, to compare Exhibit 14 with the standard and just give us his opinion? A. I have the signature card of William Sulzer as filed with the Farmers Loan & Trust Company with me. (Examining card.) I would like to state that this signature was filed with the Trust Company on May 28, 1900, and that the general signature of William Sulzer as appearing upon the checks presented to me for payment vary slightly from that which is on file.

By the President:

Q. Have you any other on file than that which you have in your hand? A. Yes, sir.

Q. Have you got that here? A. No, sir.

Q. Why didn't you bring that? A. That is a slip pasted in a signature book.

By Senator Wagner:

Q. How many checks endorsed by William Sulzer passed through your hands, approximately, between September of last year and September of this year? A. Checks drawn upon other institutions?

Q. How many times did you pass upon the signature of William Sulzer during that time? A. I am unable to say positively.

Q. I don't want you to say positively, approximately? A. About 50, I should say.

Q. About 50? A. I should say so.

Q. Did you have to investigate any of them? A. I do not recall.

Q. Your recollection is that you passed every one of them without an investigation? A. To the best of my knowledge, yes.

Q. Will you tell me who in the bank asked you not to testify as to any signature except those that went through your bank? A. No one in the bank instructed me not to do so.

Q. I understood you to answer that you were instructed not to pass upon signatures except those that passed through your bank, the bank in which you are employed? A. Through the Trust Company's counsel.

Q. The Trust Company's counsel? A. Yes, sir.

Q. What is his name? A. Horan — James F. Horan.

The President.— Witness, the Court instructs you that that advice was entirely erroneous and improper. An appeal is made to your conscience and your honesty. You ought to answer frankly and truly if you have a judgment on this, whether it is Mr. Sulzer's signature or not, utterly regardless of any advice that was given to you which I tell you was entirely improper. Now, you can answer or not.

The Witness.— Your Honor, in view of your previous instructions I have been so answering the questions.

By Senator Wagner:

Q. Will you tell the Court exactly what this attorney, Mr. Horan, told you? A. Mr. Horan, what he told me?

Q. Yes. A. Mr. Horan gave to me a copy of a letter which he had written to Mr. Stanchfield covering this point, wherein it was stated that he did not feel—perhaps I had better quote from the letter.

Q. Can't you tell the Court what Mr. Horan told you? A. I cannot give you his words, no, sir.

Q. No, I mean the substance of his instructions. A. The substance of his instructions were that the relations between the

Farmers Loan & Trust Company and its depositors was one of a confidential nature, and that the company did not feel justified in having me testify as an expert upon matters which did not affect the Trust Company, or transactions not had in the Trust Company.

By Mr. Kresel:

Q. Those instructions were given you by Mr. Horan before he wrote to Mr. Stanchfield, were they not? A. No.

The President.— We will pursue this matter further tomorrow. Just announce for all witnesses to be present tomorrow.

The Clerk.— All witnesses are excused until tomorrow morning at 10 o'clock.

Thereupon, at 5 p. m. the Court declared a recess until 10 a. m. Thursday, September 25, 1913.

EXHIBITS MARKED IN EVIDENCE DURING TODAY'S PROCEEDINGS

EXHIBIT M-1.

(Stamped)
STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE.
Filed January 1, 1913
MITCHELL MAY,
Secretary of State.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of Governor according to the best of my ability.

And I do further solemnly swear that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a

consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote.

WM. SULZER.

Sworn and subscribed before me
this 1st day of January, 1913.

MITCHELL MAY,
Secretary of State.

EXHIBIT M-2.

(Exhibit M-2 will be found on page 451 of the printed proceedings.)

EXHIBIT M-3.

STATEMENT OF RECEIPTS AND EXPENDITURES OF A CANDIDATE FOR POLITICAL OFFICE.

Sections 750 and 776 of the Penal Law:

Section 750. Definitions. The words "election" or "town meeting," as used in any of the sections of this article, excepting section seven hundred and fifty-one, shall be deemed to apply to and include all general and special elections, municipal elections, town meetings, and primary elections and conventions, and proceedings for the nomination of candidates by petition under the election law. The word "candidate" as used and candidates for any office to be voted for under the election law, as well as candidates for nomination by petition under the election law.

Sec. 776. Failure to file candidate's statement of expenses. Every candidate who is voted for at any public election held within this State shall, within ten days after such election, file as hereinafter provided an itemized statement showing in detail all the moneys contributed or expended by him, directly or indirectly, by himself or through any other person, in aid of his election. Such statement shall give the names of the various persons who

received such moneys, the specific nature of each item and the purpose for which it was expended or contributed. There shall be attached to such statement an affidavit subscribed and sworn to by such candidate, setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys so contributed or expended by him, directly or indirectly by himself or through any other person, in aid of his election. Candidates for offices to be filled by the electors of the entire State, or any division or district thereof greater than a county, shall file their statements in the office of the Secretary of State. The candidates for town, village and city offices, excepting in the city of New York, shall file their statements in the office of the town, village or city clerk, respectively, and in cities wherein there is no city clerk, with the clerk of the common council of the city wherein the election occurs. Candidates for all other offices, including all offices in the city and county of New York, shall file their statements in the office of the clerk of the county wherein the election occurs, unless the county has a commissioner of elections, in which case candidates shall file their statements in the office of such commissioner of elections.

Any candidate for office who refuses or neglects to file a statement as prescribed in this section shall be guilty of a misdemeanor. A county clerk or commissioner of elections with whom a candidate's statement of expenses is filed, shall, within 20 days after the election, file a certified copy thereof with the Secretary of State.

I, Wm. Sulzer, residing at 175 Second avenue, county of New York, N. Y., do hereby make and file the following itemized statement of all moneys received, contributed or expended by me directly or indirectly, by myself or through any other person, as the candidate of the democratic party for the office of Governor of the State of New York in connection with the general election held in the State of New York on the fifth day of November, 1912.

Receipts

Date	Name of contributor	Amount
Sept. 23.	Herbert Friedenwald	$10 00
Sept. 2.	Hugo Gutfreund	10 00
Sept. 3.	Hugh Martin	50 00
Sept. 3.	Philip Mathews	100 00
Sept. 3.	J. Bittner	50 00
Sept. 3.	Luke D. Stapleton	50 00
Sept. 3.	S. R. Ellison	25 00
Sept. 3.	John F. Wallace	100 00
Sept. 3.	Harold I. Spielberg	25 00
Sept. 3.	Lawson Purdy	100 00
Sept. 3.	Andrew G. Vogt	100 00
Sept. 3.	Thomas F. Martin	25 00
Sept. 4.	W. D. Mann	50 00
Sept. 4.	William H. Todd	50 00
Sept. 4.	Ben Doblin	5 00
Sept. 5.	Gallagher & Co.	25 00
Sept. 8.	Charles Brandt, Jr.	25 00
Sept. 7.	C. B. Norman	100 00
Sept. 3.	S. T. Armstrong	50 00
Sept. 10.	M. J. Elias	100 00
Sept. 9.	P. H. Nolan	50 00
Sept. 7.	J. E. Nolan	50 00
Sept. 9.	Peter McDonnell	250 00
Sept. 7.	Jose Hennessy	25 00
Sept. 9.	George L. Wingate	50 00
Sept. 8.	Jas. C. McEachen	100 00
Sept. 10.	Hugh Daly	25 00
Sept. 11.	Frederick C. Penfield	200 00
Sept. 11.	John R. Dos Passos	100 00
Sept. 8.	Jas. A. McCafferty	50 00
Sept. 10.	William Barthman	50 00
Sept. 11.	John F. Nagle	50 00
Sept. 14.	Thomas Willis	25 00
Sept. 16.	Nath. H. Levi	25 00

Date	Name of contributor	Amount
Sept. 14.	Hugh Haupt	$10 00
Sept. 15.	Nelson Smith	100 00
Sept. 15.	J. W. Armstrong	10 00
Sept. 15.	A. F. Schaeffer	40 00
Sept. 16.	James F. Hurley	50 00
Sept. 15.	George W. Neville	50 00
Sept. 16.	David Gerber	150 00
Sept. 15.	William F. Carroll	10 00
Sept. 14.	Willis B. Dowd	15 00
Sept. 10.	Macgrane Coxe	200 00
Sept. 10.	Mr. Bauman	50 00
Sept. 19.	William W. Penney	50 00
Sept. 14.	Louis Conlan	110 00
Sept. 19.	Leo Schlesinger	200 00
Sept. 19.	E. Neufeld	250 00
Sept. 18.	R. J. Cuddihy	50 00
Sept. 21.	Charles Friel	10 00
Sept. 21.	Wm. H. Miller	250 00
Sept. 21.	Roger Foster	250 00
Sept. 23.	W. E. Curtis	100 00
Sept. 26.	John D. Judson	100 00
Sept. 23.	John M. Gardner	200 00
Sept. 25.	C. H. Underzagt	25 00
Sept. 23.	Charles Thorley	100 00
Sept. 24.	Henry Block	100 00
Sept. 29.	M. F. O'Donoghue	10 00
Sept. 30.	John B. Gray	50 00
Nov. 1.	Louis F. Doyle	100 00
Nov. 1.	B. D. Dugundji	20 00
Nov. 2.	Joseph W. Kay	250 00
Nov. 2.	Isaac Purdy	250 00
Nov. 2.	John Standfast	5 00
Nov. 2.	O. J. Gude	100 00
Nov. 4.	J. Jacobs	500 00
		$5,460 00

Expenditures

Date	To whom paid	Amount
From Oct. 1 to Nov. 5.	Post Office Department, stamps, etc.	$1,635 65
From Oct. 1 to Nov. 5.	Western Union & Postal Telegraph Company	52 33
From Oct. 1 to Nov. 5.	Henri Rogowski, printing	2,947 95
From Oct. 1 to Nov. 5.	Public Printer, Washington, D. C.	660 80
From Oct. 1 to Nov. 5.	Sam Bruckheimer, and assistant, stenographic work.	244 00
From Oct. 1 to Nov. 5.	Whitehead & Hoag, campaign buttons	970 05
From Oct. 1 to Nov. 5.	Seiter & Kappes, lithographs.	133 00
From Oct. 1 to Nov. 5.	The Hartley Company, lithographs	150 00
From Oct. 1 to Nov. 5.	Expressage, Adams, American and U. S. Ex. Co.	68 81
From Oct. 1 to Nov. 5.	Trow's Addressing Company	861 50
Total		$7,724 09

(Signed) WM. SULZER.

Dated November 13, 1912.

STATE OF NEW YORK
CITY AND COUNTY OF NEW YORK } *ss.:*

WILLIAM SULZER, being duly sworn, says that he is the person who signed the foregoing statement, that said statement is in all respects true and that the same is a full and detailed statement of all moneys received, contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election.

(Candidate sign here) WM. SULZER

Sworn to before me this 13th day
of November, 1912.
ALFRED J. WOLFF,
Commissioner of Deeds No. 72, New York City.

(Endorsed)

STATEMENT OF CANDIDATE FOR POLITICAL OFFICE

By WILLIAM SULZER

Candidate of the Democratic Party, for the Office of Governor, of the State of New York

STATE OF NEW YORK

OFFICE OF SECRETARY OF STATE

Filed November 14, 1912

EDWARD LAZANSKY
Secretary of State

EXHIBIT M–4

STATEMENT OF TREASURER OF POLITICAL COMMITTEE. SECTION 546 OF THE ELECTION LAW

Section 546. Statement of campaign receipts and payments. The treasurer of every political committee, which, or any officer, member or agent of which, in connection with any election receives, expends or disburses any money or its equivalent or incurs any liability to pay money or its equivalent shall, within twenty days after such election, file a statement setting forth all the receipts, expenditures, disbursements and liabilities of the committee, and of every officer, member and other person in its behalf. In each case it shall include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement, the name of the person or committee to whom it was made, and the date thereof; and unless such expenditure or disbursement shall have been made to another political committee, it shall state clearly the purpose of such expenditure or disbursement. Expenditures and disbursements in sums under five dollars need not be specifically accounted for by separate items, except in the case of payments made for account of or to political workers, watchers or messengers. The statement to be filed by a candidate or other person not a treasurer shall be in like form as that hereinbefore provided for, but in statements filed by a candidate there shall also be included all contributions made by him.

WILLIAM SULZER PROGRESSIVE LEAGUE PARTY

NEW YORK COUNTY

NEW YORK CITY

To the Secretary of State, Albany, N. Y.:

Pursuant to the provisions of section 546 of the election law, I, Leon C. Weinstock, treasurer of the committee, representing the William Sulzer Progressive League Party in the county of New York, do hereby report that the following is a statement of all moneys received, expended, disbursed or liabilities incurred by said committee and of every officer, member or other person in its behalf in connection with the general election held in the county of New York on the fifth day of November, 1912, viz.:

Receipts

Date of receipt. 1912	Name of person or committee from whom received; when from committee, give name of, and of person through whom received	Amount received
Oct. 16.	Samuel A. Potter	$15 00
	William Bagley	5 00
	Peter Geoheghan	10 00
	Bernard Nolan	10 00
	John H. Wuest	5 00
	Henry Friedman	10 00
	Fred Ackerman	5 00
Oct. 17.	M. A. Schulman	10 00
	A. S. Aaronstamm	10 00
	Aug. Janssen	125 00
	J. Oshlag	25 00
Oct. 18.	Leo Greenebaum	25 00
Oct. 19.	Jacob Hellerstein	25 00
	Robt. Hatch	10 00
Oct. 25.	M. B. Fertig	25 00
	A. G. Imhof	15 00
	L. C. Weinstock	50 00
Nov. 1.	Jefferson M. Levy	40 00
Nov. 4.	Ben. Friedman	10 00
	B. Sueskind	10 00
Nov. 4.	Abe Levy	10 00
	Total	$450 00

Expenditures, disbursements and liabilities

Date of payment. 1912	Name of person or committee to whom made; when committee, give name of and of person through whom made	Amount	Purpose of expenditure
Oct. 16.	Meyer Wolff ...	$5 00	Postal cards.
Oct. 20.	Meyer Wolff ...	26 80	Stamps.
Oct. 20.	Meyer Wolff ...	9 25	Stationery.
Oct. 20.	Jos. J. Roth....	17 50	Distribution of literature, etc.
Oct. 20.	R. Grossman ...	35 00	Signs.
Oct. 20.	J. Kupatt	4 45	Electric wiring on sign.
Oct. 25.	R. Grossman ...	23 00	Signs.
Oct. 29.	Man. Slide Co..	17 50	Lantern slides.
Oct. 29.	Meyer Wolff ...	5 00	Stationery, etc.
Oct. 25.	Edwd. Ernst ...	7 00	Distribution of literature.
Oct. 25.	Alex. Patrick ..	5 00	Distribution of literature.
Oct. 31.	Jos. J. Roth....	17 00	Distribution of literature.
Nov. 2.	Edward Ernst .	16 50	Distribution of literature.
Nov. 2.	Alex. Patrick ..	16 50	Distribution of literature.
Nov. 2.	Meyer Wolff ...	2 10	Stationery.
Nov. 6.	Joseph J. Roth.	33 00	Distribution of literature.
Nov. 6.	Stamps, M. Wolff	3 20	Stamps.
Nov. 5.	Jos. J. Roth....	5 00	Decorating and distributing literature, Seward Park meeting.
Nov. 2.	Alex. Patrick ..	2 00	Stationery, etc.
Nov. 2.	Jos. J. Roth....	17 00	Expenses, etc., distribution of literature.
Nov. 6.	Meyer Wolff Assc	100 00	Rent and electricity.
Nov. 6.	Morris Levine ..	22 50	Automobile hire.
Nov. 6.	R. Rosenthal ..	4 00	Wagon hire.
Nov. 6.	R. Grossman ...	10 50	Signs.

Date of payment. 1912	Name of person or committee to whom made; when committee, give name of and of person through whom made	Amount	Purpose of expenditure
Nov. 6.	Royal Press ...	$5 75	Printing.
Nov. 6.	Ed. Ernst, Jos. J. Roth, A. Patrick & H. Lang..	31 60	Distribution literature, etc., help Seward Park meeting.
Nov. 6.	Meyer Wolff	5 00	Flags, etc., Seward Park meeting.
		$451 15	

Dated, November 11, 1912.

(Signed) LEON C. WEINSTOCK
Treasurer

(Endorsed)
NEW YORK COUNTY,
NEW YORK CITY,
WILLIAM SULZER PROGRESSIVE LEAGUE,
By L. C. Weinstock (Treas.)
STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE,
FILED NOV. 16, 1912.
Edwd. Lazansky,
Secretary of State.

EXHIBIT M–5.

(Exhibit M–5 is the articles of impeachment, which appear at pages 46–56.)

EXHIBIT M–6.

Resolved, that the managers on the part of the Assembly in the matter of the impeachment of William Sulzer, Governor of the State of New York be and hereby are authorized to appoint

a clerk and messenger, to be paid for their services to a rate to be fixed by the speaker and the clerk of the Assembly, payable from the contingent fund of the assembly during the time that they are employed, and that the said managers shall have power to employ counsel and to have all the powers of a legislative committee.

EXHIBIT M–7.

(Stamp)
SENATE JOURNAL.
AUG. 13, 1913.
PAGE 2.

The following committee, Messrs. Van Woert, Cole and Bradley, from the Assembly appeared in the Senate chamber and delivered the following message:

Mr. President:

In obedience to the order of the Assembly, we appear before you in the name of the Assembly of the State of New York and all the people of the State of New York: We do impeach William Sulzer, Governor of the State of New York, of wilful and corrupt misconduct in office and for high crimes and misdemeanors and we do further inform the Senate that the Assembly will, in due time, exhibit articles of impeachment against him and make good the same and in their name we demand that the Senate shall take order for the appearance of said William Sulzer to answer said impeachment.

Ordered that said message be received.

EXHIBIT M–8.

STATE OF NEW YORK
COUNTY OF ALBANY } *ss:*

PATRICK E. MCCABE, being duly sworn, deposes and says:

I reside at Albany, N. Y. I am now and at all the times hereinafter mentioned have been the clerk of the Senate of the State of New York. On the 14th day of August, 1913, pursuant to

instructions of the President pro tem. of the Senate, I personally served upon William Sulzer, Governor of the State of New York, at his office in the executive chamber in the Capitol at Albany, State of New York, articles of impeachment, of which the annexed is a true copy, by leaving such articles of impeachment with said William Sulzer at said time and place.

PATRICK E. MCCABE

Sworn to before me this
11th day of September, 1913.
SIDNEY I. Ross.

(Seal) Notary Public. Certificate Filed in Albany Co.
SIDNEY I. Ross,
Notary Public,
Chenango Co., N. Y.

THE STATE OF NEW YORK, *ss:*

The Senate of the State of New York to William Sulzer, greeting:

Whereas the Assembly of the State of New York did, on the thirteenth day of August, one thousand nine hundred and thirteen, exhibit to the Senate articles of impeachment against you, the said William Sulzer, in the words following:

(Here appear the articles of impeachment which will be found at pages 46–56.)

And demand that you, the said William Sulzer, 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 William Sulzer, are therefore summoned to be and appear before the Court for the Trial of Impeachments of the State of New York, at the Senate chamber in the Capitol at Albany, N. Y., on the eighteenth day of September, one thousand nine hundred and thirteen, at twelve o'clock noon, then and there to answer to the said articles of impeachment, and then and

there to abide by, obey, and perform such orders, directions and judgments as the Court for the Trial of Impeachments shall make in the premises according to the Constitution and laws of the State of New York.

Hereof you are not to fail.

Witness the Hon. Robert F. Wagner, President of the Senate of the State of New York, at the city of Albany, this thirteenth day of August, in the year of our Lord one thousand nine hundred and thirteen.

ROBERT F. WAGNER
President of the Senate

EXHIBIT M–9.

No. 119755. KUHN, LOEB & Co.,

New York, Oct. 14, 1912

(1) NATIONAL BANK OF COMMERCE IN NEW YORK
Pay to the order of Louis A. Sarecky, two thousand five hundred dollars, $2,500/00.

P. P. KUHN, LOEB & Co.
KUHN, LOEB & Co.

(On face of check in handwriting): Mr. Schiff's contribution toward Wm. Sulzer's campaign expenses.

(Endorsed):
Louis A. Sarecky.
Pay to the order of The National Bank of Commerce.
Oct. 15, 1912.
The Mutual Alliance Trust Co. of New York.
(11)Nat. Bank of Commerce in N. Y.
Paid.
Oct. 15, 1912.
Second Teller.

EXHIBIT M–10.

No. 1344. *New York, 10/5, 1912*

GUARANTY TRUST COMPANY OF NEW YORK

28 NASSAU STREET.

Pay to the order of William Sulzer one thousand and no/100 dollars, payable through the New York Clearing House,

H. MORGENTHAU

$1,000.00.

(Endorsed):

William Sulzer.

Pay the National City Bank of New York, or order.

The Farmers Loan & Trust Company,

Augustus V. Heely, Vice-Pres. & Secy.

Received payment through the New York Clearing House, October 8, 1912.

Prior endorsements guaranteed.

The National City Bank of New York, A. Kavanagh, cashier.

THURSDAY, SEPTEMBER 25, 1913

SENATE CHAMBER

ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 a. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Brackett.—With the permission of the Court, I desire to move, if your Honor will refer to the printed record on page 489, to strike out on behalf of the managers the answer appearing in the lower part of the page, as entirely incompetent and improper. If your Honor will look nearer the top of the page, the ruling was that if the owner consented to the use of money for a specific or for general purposes, that in that case larceny cannot be predicated upon it in case it was diverted from the specific purpose for which we contend it was contributed.

Judge Werner.—You mean the answer beginning, "When I used the expression campaign funds?"

Mr. Brackett.—Yes. Now, the specific ground of the motion is just this: That while, as your Honor ruled, we concede, and not only concede but claim, it is entirely correct if the witness did consent, that the Presiding Judge did not by that ruling at all give any indication of what should be evidence of consent, and I want to submit to the Court that the only possible evidence on the subject of what the consent was, in its effect on the recipient of this money, must be what the witness said. Now, what the witness said is entirely clear without any possible mistake. He said that the defendant here applied to him for a contribution to his campaign fund. There cannot be any doubt as to what the meaning of a campaign fund is. The witness said that he responded that he would contribute to the campaign to the extent of $2,500, and upon being interrogated as to whether he could not make it more, he said no, and he has testified in the record several times that that was all the conversation on the subject.

I want to submit to the Presiding Judge and to members of the Court that the intent for which the contribution was made must

be determined from that language. It cannot be that the undisclosed intent of the witness who gave the funds, can in the slightest degree control the individual or broaden the right of the recipient to whom such intent was not disclosed. The question as to what the money was given for must be determined by what was said between the giver and the recipient.

I do not understand, if your Honors please, that evidence of an undisclosed intention, or evidence of intention at all, is competent, except in the very, very few cases where a party is attacked, where the act of a party is attacked for fraud, as for example, a fraudulent intent to cheat creditors by a conveyance. In such case it always may be asked as to whether the party giving the instrument did intend to defraud, and there may be one or two other limitations, in addition to that one. But the general rule has been, with unbending force, that an undisclosed intention cannot be given in evidence in court.

It is doubly vicious here, it seems in view of the counsel for the managers, in that the intent of the defendant in receiving is what must be determined here. It violates, first, the rule that conversation must determine the intent, but next it permits the witness to testify as to his intent, when his intent cannot affect the intent with which the candidate accepts the fund.

It is therefore with, of course, the most profound respect for your Honor's ruling, if you did intend to go to the extent indicated, that we still feel impelled to make this motion not only for its effect here, but as a guide for any future witness that may be interrogated on the subject.

Mr. Marshall.— May it please the Court: The testimony that was brought out on direct examination was in substance that Mr. Schiff had given a check. The check was produced. On that check appeared written certain words which Mr. Schiff put upon the check, not in October, 1912, but in June or July, 1913, stating in substance that it represented a campaign contribution.

The testimony therefore that was presented on cross-examination was entirely legitimate as bearing upon that fact, if for nothing else. But it was competent beyond that on the general issue, on the general proposition which we are considering.

The charge contained in the articles is that certain sums of money were received by the respondent from various individuals, including Mr. Jacob H. Schiff; that that money was received in a fiduciary capacity; that it was received for a special purpose; that there was a breach of trust, and that there was larceny of that money as a result of the manner in which the respondent dealt with it after it came into his possession.

The case, therefore, is to be considered precisely the same as though we were here trying an indictment against the respondent on the charge that he had received from Jacob H. Schiff $2,500, and had, with larcenous intent and with intent to commit a breach of trust, diverted that money from the purpose for which it was given and was intended to be given, and had thereby committed either the crime of larceny or a breach of trust, as a bailee or otherwise.

Therefore, in determining that question, we must consider the quo animo of two individuals; that of the respondent, for the purpose of ascertaining whether or not he dealt with that fund animo furandi, with intent wrongfully to take it and appropriate it to his own use — with criminal intent; and secondly, the purpose and state of mind of the person who is claimed to have been the victim of that crime, the person whose title to the fund was taken, who was the person whose property it is asserted had been wrongfully and with larcenous intent taken from him.

Now, if the charge is made that A has stolen my watch or that A has received my watch as a bailee and has then wrongfully appropriated it to his own use, it certainly would be competent to ask me if I were a witness in the proceeding, for the purpose of establishing the charge, whether or not I intended that A might have the watch, or whether or not I intended that he could do with that watch what he pleased, use it for any purpose that he desired; sell it, give it away, or deal with it according to his own wish for it is undoubtedly true that I cannot be wrongfully made the victim of a crime when I consent and am entirely willing that the particular act upon which the charge of criminality is sought to be predicated shall be done, when I have no objection to it. And, therefore, when Mr. Schiff was here as a witness, and the prosecution attempted to show by him that he had given this fund for a special purpose, it aws entirely

legitimate to ascertain whether or not he had so ear-marked this fund as to put it absolutely beyond the control of the defendant, and whether he was or was not satisfied and willing that that fund should be used for election purposes, for campaign purposes, or for any other lawful purpose or object for which the person to whom the money was given wished to use it.

Mr. Brackett.— With the permission of the Court: It is entirely beside the issue to say that it is competent to show what Mr. Schiff's intention was. If that is true, and it may be conceded for the purpose of the argument, although I am not prepared to say that it is entirely true, but if that is true, the precise question which my friend fails to meet and where he painfully sidesteps is how that intention shall be determined. What is the evidence of the intention? Mr. Schiff intended to give this money. There is no question about that. He intended to part with the title to the money to someone. Now, if there was a specific beneficiary to whom he had given this money and intrusted it to Sulzer to deliver, is there any doubt that the beneficiary could maintain an action for conversion if Sulzer failed to deliver? Here the beneficiary happens to be so multitudinous and perhaps so diaphanous in its substance, that is, the democratic party, that we might not be able to determine who could bring the action, but if Mr. Schiff gave this money to the then candidate for a specific purpose, thereafter it was not Mr. Schiff's money. The conversion does the wrong. So it stands that whatever Mr. Schiff's intention was, and conceding all that the learned counsel has said that his intention may be competent for the purposes of the argument, it still stands, too, that the intent must be determined by what was told by Mr. Schiff to this bailee at the time the money was given. That is absolute and specific. He says he gave it to him for a campaign fund, and he says he has testified to all that was said on the subject. Now it goes away beyond any rule that I know of, and it certainly goes beyond the language of your Honor's ruling in saying that it was competent to show consent (which appears at the middle of page 489 where your Honor says, " That if the owner consented to the use of the money or check given, consented to its use in any manner by the party to whom it was delivered, that would not constitute larceny.") it goes way beyond

that language to permit our friend to ask him what was his intent unspoken and undisclosed in any way, in thus giving the money.

I submit, therefore, that it cannot be held competent. Suppose that, at the time this money was given, instead of a conversation on the subject, Mr. Schiff had sat down and had written out a more or less formal conveyance of the $2,500 for the purposes of a campaign fund, precisely as he testified he told the candidate, could he then be heard to impeach the conveyance, or to modify its terms, by giving testimony that he did not intend what he had written in his conveyance establishing or constituting the trust? It makes not the slightest difference for the purposes of this argument what the competency of this evidence is, whether the trust deed, if I may use that expression, was in writing or whether it was verbal. It must depend in the one case on the writing. It must depend in the other case upon what was said, and in neither case can it be held that the terms of the trust can be varied in the slightest degree by testimony given afterwards as to an intention wholly undisclosed at the time that the trust was created. There is no ambiguity or obscurity in the language that was employed.

The President.— I think I shall adhere to the ruling heretofore made. If it was a common law larceny, I should be certain that my ruling was correct, because a common law larceny requires a trespass as well as a conversion of the property. There could hardly be a trespass if the owner assented. The trespass must be against the consent. The question is not so simple, it must be admitted, when you come to the larceny as defined by the Code. That crime is solely the creation of statute. At common law it would not have been a criminal conversion of property.

As to the conversion, it is not so clear; but yet I believe that the same underlying principle should obtain as that in a common law larceny. And therefore, though I may hereafter change my ruling if I look at the authorities, I shall let that testimony stand, though some of that is objectionable. It is not what the feeling of the witness is now. But the question is what was his intent at the time, and to that he should be strictly confined. If there was an offense committed, he cannot condone it by saying now

that he is satisfied, no more that if his watch was stolen by a person. It must be his intention at the time.

Now, proceed, gentlemen.

Mr. Kresel.— Mr. Godwin.

THOMAS M. GODWIN, recalled.

Direct examination by Mr. Stanchfield:

Mr. Stanchfield.— This is the same witness that was on the stand at the time of the adjournment yesterday.

Q. Mr. Godwin, you stated last night that your first instructions not to testify with reference to any signatures other than those that passed through the Farmers Loan and Trust Company, of the respondent, were given to you by Mr. Horan at the time when he showed you a letter which he wrote to me. Now, is that answer correct? A. Yes, sir.

Q. Do you know Mr. Kresel, who examined you yesterday? A. I do.

Q. Did you see him at the office of the Farmers Loan? A. I did.

Q. In whose company did you see him? A. In the company of Mr. Horan.

Q. The same lawyer that you say advised you with reference to your testimony at the time he wrote me? A. Yes, sir.

Q. Now, when you saw Mr. Horan and Mr. Kresel together on the 16th or the 17th, was not Mr. Kresel's errand there to get you to give testimony with reference to other signatures than those that passed through your bank? A. I believe the question arose.

Q. Yes. And at that interview between you three, did not Mr. Horan tell you that you ought not and should not testify to any other signatures than those that had passed through your bank? A. I do not recall that he did.

Q. What did he tell you? A. I simply heard him state the company's wishes in the matter.

Q. Well, what did he say were the company's wishes? A. As I recall, I believe he stated that the Trust Company did not wish me to volunteer an opinion on transactions not had in the Trust Company, unless directed to do so by the Court.

Q. That conversation took place at your first interview with Mr. Kresel? A. Yes, sir.

Q. Now, when Mr. Horan gave you a letter, or a copy of a letter to me, did he show you the letter that I wrote him? A. No, sir.

Q. Have you got the letter that he wrote me? A. I have the letter that he gave me as a copy of the letter.

Q. See if it is not in answer to one from me.

Mr. Herrick.— How is this material, Mr. President?

Mr. Stanchfield.— I will make it material.

The President.— I think it may be material.

Mr. Herrick.— He responded and answered after you had told him he must. We have no exception, only we are wasting time.

The President.— He is not concluded absolutely by that answer, Judge Herrick.

Q. The letter that he wrote me is in answer to one from me, upon the face of it, is it not? A. Yes, sir.

Q. Now, you had still more specific instructions, did you, from Mr. Horan, not to testify to any other signatures than those that had passed through your bank? A. I had no specific instructions not to testify to certain matters.

Q. Have you communicated with Mr. Horan since you were on the stand yesterday? A. I telephoned to him yesterday.

Q. Since you were upon the stand, I asked you? A. Yes, sir.

Q. Did you get any further instructions from him as to your attitude? A. No, sir.

Q. Did you tell him that you had been instructed here to answer the questions with reference to other signatures than those that had passed through your bank? A. Yes, sir.

Q. What did he say? A. I don't recall that he made any comment upon that.

Q. Didn't he tell you whether or not you should obey the instructions of the Court? A. He had already told me that before.

Q. So that you now understand that you are to obey the instructions of this Court in your testimony? A. I have always understood that.

Q. I hand you exhibits for identification 15, 16, 20, 21 and 12? (Counsel passes papers to witness.) A. (Witness examines papers.)

Q. Those are five deposit slips of William Sulzer with the Farmers Loan and Trust Company, are they not? A. Yes, sir.

Q. You haven't any question in your mind but what the name "William Sulzer," upon the face of those deposit slips, is in his handwriting, have you? A. No, sir.

Mr. Marshall.— He has already so testified.

Mr. Stanchfield.— I understand that perfectly well.

Q. And you likewise expressed the same thing with reference to the figures? A. I did.

Q. Now, I hand you — and it will be marked for identification —

(The check offered for identification was received and marked Exhibit M-24 for identification.)

Q. I hand you a check of Strauss & Company. Does there appear upon it the endorsement of William Sulzer? (Counsel passes paper to witness.) A. (After examining.) There appears upon it an endorsement "William Sulzer."

Q. I ask you, Mr. Godwin, whether in your opinion that endorsement is in the handwriting of William Sulzer or not, the respondent in this proceeding; in your opinion is it in his handwriting or is it not? A. I have no judgment in the matter.

Q. I didn't ask your judgment. In your opinion is it his handwriting or isn't it? I don't care which way you answer. I want to know in your opinion is it or is it not? I want an answer to the question. You must have an opinion of some kind. A. I don't feel qualified to give an opinion on this.

Q. I have not asked you that. I want to have your opinion whether it is or is not.

The President.—I think you are going a little too far. You can ask him if he has or has not an opinion on the subject. If he has any opinion he must give it, and be frank with the Court and answer fairly.

Q. Do I understand you to take the attitude —

The President.— Now, wait and see if he will answer that question.

The Witness.—Your Honor, I have no judgment about this signature. I don't dare affirm that it is or is not.

The President.— He did not ask you to do that. What is your best opinion? Have you an opinion on the subject?

Q. That is all I am asking you, simply whether you have an opinion? A. I am inclined to the opinion that that is the signature of William Sulzer.

Q. I hand you while those signatures are lying before you on the desk, Exhibits 13 and 14, for identification, to which your attention was invited yesterday, and I ask you whether you don't have now the same opinion with reference to them?

The Witness.—Yes, sir.

Q. Now, Mr. Godwin, will you take those five deposit slips. You have them in your hand? A. Yes, sir.

Mr. Stanchfield.— I offer those in evidence.

The President.— If there is no objection they will be admitted.

Judge Bartlett.—Will you not please tell us in a general way what they are?

Mr. Stanchfield.— I will in just a minute.

The President.—Will it not be sufficient if you say certain exhibits hitherto marked for identification are now received in evidence?

Mr. Stanchfield.— I am going to read them so there will not be any mistake what they are. The exhibits that go in evidence for identification are 21, 15, 16, 12 and 20. I will read one:

"Deposited by Wm. Sulzer.

In Farmers Loan & Trust Company, New York, December 28, 1912.

Bills	$3,000 00
Specie	.....
Checks	.....

(Said exhibits for identification received in evidence and marked Exhibits M-15, M-16, M-20, M-21 and M-12 respectively.)

Q. Will you take those five exhibits and figure up how much cash was deposited by William Sulzer in your bank between the dates covered by those exhibits in October, November and December, 1912? A. $14,400.

Q. In currency? A. In currency.

Mr. Herrick.—Will you give us the dates?

Mr. Stanchfield.—Yes. The dates are as follows. I will get them in chronological order:

Exhibit 12, October 8, 1912, bills, $1,400.
Exhibit 15, September 12, 1912, bills, $3,500.
Exhibit 16, September 25, 1912, bills, $4,000.
Exhibit 20, October 10, 1912, bills, $2,500.
Exhibit 21, December 28, 1912, bills, $3,000.

Mr. Stanchfield.— That is all, Mr. Godwin.

Mr. Marshall.— No cross-examination.

Mr. Stanchfield.— Mr. Elkus.

ABRAM I. ELKUS, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Elkus, where do you reside? A. New York City.

Q. What is your vocation or profession? A. Lawyer.

Q. You likewise hold public office? A. I am a Regent of the University of the State of New York.

Q. Are you acquainted with the respondent in this proceeding, William Sulzer? A. Yes, sir.

Q. Does your acquaintance extend over a considerable period of time? A. Yes, sir.

Q. About how long? A. About twenty years.

Q. On the 4th day of October, 1912, did you write the respondent a letter of which I hand you a copy? A. Yes, sir.

Mr. Stanchfield.— Will the gentlemen upon the other side kindly produce the original of Mr. Elkus' letter?

Mr. Marshall.— Use the copy.

Q. The letter you have in your hand, I understand you to say, is a correct copy of the letter you mailed him October 4th? A. Yes, sir.

Mr. Stanchfield.— I offer it in evidence.

The Witness.— This letter — this copy, has no signature.

Mr. Stanchfield.— Counsel for the respondent tell me to use it with like effect as if it were the original.

Letter offered in evidence received in evidence and marked as Exhibit M-25, and is as follows:

"*October 4, 1912.*

"*Honorable William Sulzer, 115 Broadway, New York City:*

"My Dear Friend:

"I beg to extend to you my heartiest congratulations upon your well deserved nomination for Governor. I know you will make a most admirable candidate and if elected will render most valuable service in the capacity of Governor to the State, just as you have rendered valuable service in all your public positions heretofore.

"I know that congratulations are very pleasant and very nice, but that a campaign to be successfully conducted, requires something more than words, and so I take great pleasure in enclosing my check for $500 to aid in the expenses of your campaign.

"I shall be very glad to speak for you as often as my engagements with the national committee will permit, and take every opportunity of telling the people of our long standing friendship and of the high regard in which we all who know you hold you.

"I remain,

"Sincerely yours,"

Q. And I suppose it was signed Abram I. Elkus? A. Yes, sir.

Q. I hand you a check upon the Union Trust Company and ask you whether or no, Mr. Elkus, that is the check that you enclosed in the letter that I have just read? A. It is.

Mr. Stanchfield.— I offer that in evidence.

(The check marked Exhibit M-11 for identification, was received in evidence and marked Exhibit M-11 in evidence of this date.)

Mr. Stanchfield (reading).—"*New York, October 5th, 1912*

Plaza Branch, Union Trust Company of New York.
Fifth Avenue and 60th street.

Pay to the order of William Sulzer
Five hundred dollars.

ABRAM I. ELKUS."

Endorsed by William Sulzer.

Mr. Marshall.— Endorsed William Sulzer.

Mr. Stanchfield.— I say endorsed William Sulzer. Is there any question but what it is his signature?

Mr. Marshall.— I am not an expert.

Mr. Stanchfield.— You are quite an expert. I will take your judgment.

Mr. Marshall.— I merely wish to have the counsel state what was on the check without anything further, without giving testimony.

Mr. Stanchfield.— The name William Sulzer is on the back.

Mr. Marshall.— That I concede. That is all you have a right to say.

The President.— Has the endorsement been proved?

Mr. Kresel.— It has.

Mr. Stanchfield.— I might say it was proved by the last witness, Godwin.

Mr. Marshall.— That is the question, whether it was proved.

The President.— I do not remember. I do not carry in mind these various numbers.

Q. I hand you a letter. Is that the letter you received in response to your communication of October 5th, enclosing this check for $500? A. It is.

Mr. Stanchfield.— I offer that letter in evidence.

Mr. Hinman.— If you will let us look at it before it is marked, please?

Mr. Stanchfield.— Surely.

(The letter was received in evidence and marked Exhibit M-26 of this date.)

Mr. Stanchfield.— I will read the letter in reply.

Q. By the way, Mr. Elkus, did you transmit your letter enclosing the check, through the mail? A. That is my recollection. I did not mail it myself.

Q. And the answer was received through the mail? A. That is my recollection.

Mr. Stanchfield.— This letter reads as follows (reading):

"COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES
OF THE UNITED STATES.
WASHINGTON, D. C.

New York, October 5th, 1912

"*Hon. Abram I. Elkus, 170 Broadway, New York City:*

"My Dear Commissioner:

"Many, many thanks for your very kind letter of congratulations. I appreciate every word you say and all you have done.

"With best wishes, believe me, as ever,

"Sincerely your friend,

"William Sulzer."

Q. I suppose, Mr. Elkus, it did not escape your attention that there was no reference in the acknowledgment to the receipt of the check.

Mr. Marshall.— Wait a minute. I object to that.

The President.— Objection sustained.

Mr. Stanchfield.— That is all.

Cross examination by Mr. Marshall:

Q. Mr. Elkus, how close were your relations to Mr. Sulzer before he became Governor? A. I had known him for a number of years.

Q. You had known him quite intimately? A. No, fairly. I had known him, seen him from time to time.

Q. You wrote this letter in an entirely friendly spirit, of course? A. Surely.

Q. And you were concerned with the welfare of Mr. Sulzer? A. With his election and his welfare.

Q. Yes, both. Did you intend that he might not use a part of this money or the whole of this money which you sent him, for his living expenses, for instance?

Mr. Stanchfield.— That question is objected to. The witness had no conversation with Mr. Sulzer. The letter speaks for itself.

Mr. Marshall.— Conversation, I think, it has been ruled, has nothing to do with the question.

The President.— I think that question forms part of it. What intention did you have in sending him that check? It is not what your subsequent feelings are, witness, but what was your intent at the time you sent it.

Mr. Stanchfield.— To that question, if the Presiding Judge please, with all due respect, we object, upon the ground that the intent of this witness never communicated by direction or indirection to the recipient of that check is utterly inadmissible, incompetent and improper.

The President.— The previous ruling disposes of that.

Judge Hiscock.— Personally, and I think some of the other members of the Court agree with me, I have grave doubts about the admissibility of that evidence under such circumstances certainly as accompanied the transmission of this check; and yet I feel no particular objection to the ruling which has been made, and letting in the evidence, since there is no jury here to consider it, reserving, however, and not being in any way debarred, the right to consider and discuss the rest of the question of the competency and of the effect of any such evidence as that when we come to the final consideration of the case.

Personally, I am perfectly willing that that course should be taken, except that I desire to reserve that right to discuss and question the effect of that evidence when we finally come to a decision.

The President.— It seems to me we should allow that testimony to be given.

Senator Brown.— Mr. President, I have found in public trials of this character that a departure from clear and well-settled rules of evidence drags the trial out, and one violation of the rule leads to others. I have no idea that from any point of view this question can be competent, and I am therefore opposed to its being permitted.

The President.— Then, Senator Brown, it is better that you should call for a vote of the Court.

Mr. Marshall.— In order to avoid that question at this particular time, I will withdraw the question I have asked this witness.

Mr. Brackett.— No.

The President.— It is his question. He can withdraw it.

Mr. Marshall.— The question I desired to ask the witness has not been allowed, and I therefore have a right to withdraw that particular question.

The President.— Any further?

Mr. Herrick.— That is all, Mr. Elkus.

Mr. Stanchfield.— Presiding Judge, we beg leave now, because it is of great consequence, that this question should be settled once

and for all time for the purposes of this trial, our motion to strike out the testimony of Mr. Schiff in the phraseology used by my colleague, Mr. Brackett.

That question, gentlemen of this Court, is going to touch upon and reach the testimony of practically every witness that has been called here. Representing the board of managers and conscious of the seriousness of this case, and actuated by the sole and only purpose and motive of doing equal and exact justice to this respondent within the legal rules of evidence, I insist we, representing the board of managers, have a right to know whether evidence is to be admitted, or standing upon the record showing what the veiled, concealed intent of some contributor to this campaign fund was, or might have been, that intent formed not when he made the contribution, but formed weeks afterwards. We submit that testimony either ought to be in or out of this case by a vote of the majority of the members of this Court.

The President.— That motion has been disposed of once and the Court will not entertain its renewal, except upon the application of some member of the Court.

Mr. Brackett.— It was with a view of enabling some member of the Court to take the precise action that was indicated by the request of Judge Hiscock and of Senator Brown on this point, and to take a vote on it, if it was desired.

The President.— If it is in the testimony of every witness, it will arise when the next one comes, and you will have an opportunity.

Call the next witness.

Mr. Kresel.— Mr. Floyd.

WEBB FLOYD, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Are you an officer of the Mutual Alliance Trust Company of New York City? A. I am.

Q. What office do you hold? A. President.

Q. Has one Louis A. Sarecky an account in that Trust Company? A. He has.

Q. Can you state for how long a time he has had that account? A. Since August 5, 1912.

Q. Since August 5, 1912? A. Yes, sir.

Q. And is it still running? A. It is.

Q. Have you produced a transcript of the account? A. Formerly, yes.

Q. Now, look at this paper, please, and state whether that is a correct transcript of the account from September 5, 1912, to December 31, 1912? (Counsel passes paper to witness.) A. (After examining) It is.

Mr. Kresel.— May I have that marked for identification?

Mr. Herrick.— Offer it in evidence now, if you want to.

Mr. Kresel.— Well, then I will offer it in evidence.

The President.— Admitted.

(The transcript of the account was received in evidence and marked Exhibit M-26½.)

Judge Werner.— May we know what it is?

The President.— Yes, he will read the contents. He will read it to you, gentlemen, or state to you what the contents are. You better dispose of that before you go to any other.

Mr. Kresel.— This transcript of the account shows that on the 31st of August, 1912, Sarecky had a balance to his credit of $435; by October 1, 1912, he had to his credit $563.35. Beginning with October 1st the deposits run as follows: October 1st, $160. Can you hear me?

Judge Chase.— Face us.

Mr. Kresel.— October 1st, $208.13; October 5th, $160; October 8th, $890; October 11th, $1,275; October 15th, $3,350; October 19th, $1,010, and on the same day a deposit of $25. October 21st, $535; October 24th, $910; October 26th, $566.77;

October 30th, $147.70; November 4th, $1,453.33; November 7th, $1,475; November 12th, $400; November 14th, $498.75; November 20th, $115.59; November 21st, $30.30; December 27th, $80; and December 31st, $372.93.

Mr. Brackett.— Give the total.

Mr. Kresel.— The total of the deposits between October 1st and December 31st was $14,066.85. On December 31st there was a balance to the credit of the account of $489.19. Now, is there anything else about it that you want to know?

(No response.)

Q. Now, Mr. Floyd —

Mr. Hinman.— Pardon me, Mr. Kresel. Will you state again what the balance was on December 31st?

Mr. Kresel.— $489.19.

Q. Now, Mr. Floyd, I show you the following deposit slips for the account of Louis A. Sarecky in your company: Deposit slip of October 1, 1912, deposit slip of October 5, 1912, deposit slip of October 8, 1912, October 11, 1912, October 15, 1912, October 19, 1912, two deposit slips —

Mr. Herrick.— You can put them all in evidence without taking the time. Give the numbers to the stenographers.

Mr. Kresel.— I just want to have the record show the dates.

Mr. Hinman.— That is better.

Mr. Kresel.— October 21, 1912; October 24, 1912; October 26, 1912; October 30, 1912; November 4, 1912; November 7, 1912; November 12, 1912; November 14, 1912; November 20, 1912; November 21, 1912; December 27, 1912; December 31, 1912; September 10, 1912, and September 30, 1912.

Q. Please look at those and see that they are the deposit slips and then we will put them in. A. Yes.

Mr. Brackett.— The dates having been given, can all of these be marked as one exhibit?

The President.— If it is just as convenient, yes.

The Witness.— There are twenty-one of the slips. They are all correct.

(The twenty-one deposit slips offered in evidence and marked collectively as Exhibit M-27.)

The President.— Have you stated to the Court what they are?

Mr. Kresel.— The deposit slip of September 10, 1912, contains a record of a deposit of one check for $93.60.

The deposit slip of September 30, 1912, contains a record of a deposit of one check for $34.75. The one of October 1, 1912, contains a record of a deposit of one check of $208.34, drawn by the Treasurer of the United States at Washington, D. C.

October 5, 1912, three checks, one of $100, one of $10 and one of $50, total deposits of $160.

The one of October 8, 1912, contains a record of seventeen separate items, all being checks, ranging in amount from $5 up to $100 and totaling $890.

The one of October 11, 1912, contains a record of eight deposits totaling $1,275, the first one is for $100, then there are two for $50 each, then one for $250, one for $25, another for $250, another for $50, and then $500.

The slip of October 15, 1912, contains a record of ten checks totaling $3,350. As to this.

Q. Mr. Floyd, I want to call your attention to the second item from the bottom of that slip, $2,500, and ask you whether that is a record of the deposit of the Schiff check which is now marked managers' Exhibit 9. Please look at it. A. This was the only deposit on October 15th in the transcript of account. There was only the one deposit on that day.

By Mr. Brackett:

Q. Of $2,500? A. Only one check; that is the check.

Mr. Kresel.— Very well. The one of October 19, 1912, contains 15 items of checks and they are as follows: Checks of Peter Doelger, $250; check of Hugo Haupt, $10; check of J. E. Guder & Co., $25; Nelson Smith, $100; check of John Armstrong, $10; check of Morris Tekulsky, $50; check of Andrew F. Schafer, $40; check of James Hurley, $50; check of George W. Neville, $50; check of David Gerber, $150; check of William F. Carroll, $10;

check of William B. Dowd, $15; check of Macgrane Coxe, $200; check of Samuel Bauman, $50; a total of $1,010.

On the same date there is another deposit slip of a check for $25.

On October 21st deposit slips show six items, all checks, totaling $535, as follows: A. Sterber, $100; W. Penney, $50; J. M. Delahanty, $110; Leo Schlesinger, $200; E. Neufeld, $25; R. J. Cuddihy, $50.

On October 24th there are five items, totaling $910, as follows: S. Uhlman, $300; C. G. Friel, $10; W. H. Miller, $250; R. Forte, $250; W. E. Curtis, $100.

On October 26th there are seven items, aggregating $556.77, as follows: Henry Block, $100; Charles Thorsday, $100; Standard Finance Co., $25; J. M. Gardner, $200; John B. Judson, $100; T. Schlesinger, $30.26; Max Rosen, $11.51; making a total of $566.77.

On October 30th the following: Bird S. Coler, $100; M. F. O'Donoghue, $10; Theresa Schlesinger, $12.70; Samuel Peyser, $25; making a total of $147.70.

On November 4th the first item is cash, $100.

Q. Does that mean, Mr. Floyd, that there was deposited $100 in currency? A. It is opposite "Cash"?

Q. Yes. A. Yes, sir.

Mr. Kresel.— Then the following checks: Joseph W. Kay, $50; L. N. Rosenbaum, $100; J. B. Gray, $50; L. F. Doyle, $100; B. Simagin, $20; J. Temple Gwathmey, $100; Thomas E. Rush, $500; W. E. Senkins, $25; C. J. Pinckney, $200; F. J. Cisna, $208.33; total, $1,453.33.

On November 7th, John F. O'Brien, $50; Daniel M. Brady, $100; Isaac Purdy, $250; John Standfast, $25; O. J. Gude, $100.

On November 12th there are three items, all drawn by the Treasurer of the United States, one for $125, another for $125, and one for $150.

On November 14th, one item, check of $500 drawn by Jacob A. Jacobs.

On November 20th, again a deposit in cash $100.

Q. Is that correct, look at that, Mr. Floyd? A. Yes. sir.

Mr. Kresel.— And checks, one of $5, one of $4.01 and one of $6.58.

On November 21st, two checks, one of $7.80 and one of $22.50.

On December 27th, $80 in cash.

On December 31st, $350 in cash and a check for $22.93.

Q. Now, Mr. Floyd, are you familiar with the signature of Louis A. Sarecky? A. I am.

Mr. Kresel.— Unless there is some question of his competency I will not go any further than that. Is there any question about it?

Mr. Marshall.— What is the question?

Mr. Kresel.— As to the question of whether he can identify Louis Sarecky's signature.

Mr. Stanchfield.— We desire, for the purposes of the record, to make an inquiry of counsel upon the other side. The board of managers have been for quite some period of time endeavoring to serve a subpoena upon Louis A. Sarecky and Frederick A. Colwell unsuccessfully. I noted the other day that Judge Herrick, speaking for counsel for the respondent, said that Louis A. Sarecky was available to the managers at any time, but that they were not advised at that moment of the whereabouts of Mr. Colwell, but had known theretofore. Our inquiry of counsel for the respondent is whether Mr. Sarecky will be available for us on call or Mr. Colwell or either of them?

Mr. Herrick.— This is merely to make a record?

Mr. Stanchfield.— I want to know so that we can determine our course whether you will produce either or both of those witnesses, where we can subpoena them.

Mr. Herrick.— My information is entirely different from the gentleman's that the managers or those that have been entrusted with the mission of bringing Mr. Sarecky made no effort, because Mr. Sarecky has been here in the city from time to time during the last month, and last week he advertised his appearance in the city of Buffalo.

Mr. Stanchfield.— Through you?

Mr. Herrick— Oh no, not through me, through newspapers. A publication of his own. We expect to have Mr. Sarecky here. Your inquiry is unexpected. I do not know where he is today. We certainly expect to have him as a witness.

Mr. Stanchfield.— Will you send for him and have him here say tomorrow morning?

Mr. Herrick.— That I will confer with my associates about.

Mr. Stanchfield.— Will you advise me of the determination?

Mr. Herrick.— I will.

Mr. Stanchfield.— One more question. Will you do the same with reference to Mr. Colwell?

Mr. Herrick.— I do not know as to Mr. Colwell's whereabouts at present. I expect to be informed, and we expect to have him as a witness.

Mr. Stanchfield.— Will you make the same inquiry with reference to him?

Mr. Herrick.— I will endeavor to do so.

Mr. Stanchfield.— And let us know sometime today?

Mr. Herrick.—Yes.

By Mr. Kresel:

Q. Now, Mr. Floyd, I show you the Schiff check for $2,500, which is now marked managers' Exhibit 9, also the check of Bird S. Coler, check of J. Temple Gwathney, Thomas E. Rush, John F. O'Brien, Morris Tekulsky, E. C. Benedict, Charles P. Doelger, William J. Elias, Simon Ulman, William F. McCombs and A. H. Sterber, and ask you to examine the indorsement on the back of each of these checks and state whether the indorsements are those of Mr. Louis A. Sarecky. A. I am not speaking as an expert; they are the indorsements of Mr. Sarecky.

Mr. Todd.— Just one moment. I want a mistake corrected about some of the numbers. There are two exhibits which are marked 26, and I want to call it to the attention of the stenographer before we get into a mix-up about it.

(The transcript of the account of the Mutual Alliance Trust Company was marked Exhibit M-26½.)

The President.— Now will you read, Mr. Stenographer, the last question to the witness and the answer. Read it to the members of the Court so they will understand.

(The stenographer read the question and answer as follows: "Q. Mr. Floyd, I ask you to examine the indorsement on the back of each of these checks, and state whether those are the indorsements of Mr. Louis A. Sarecky? A. I am not speaking as an expert; they are the indorsements of Mr. Sarecky.")

Q. Now, Mr. Floyd, will you examine those checks again and state whether all of those checks were deposited to the credit of Sarecky in your trust company? A. They were.

Mr. Kresel.— Now, may I offer those as one exhibit for identification?

The President.— No objection?

Mr. Herrick.— No objection.

The Witness.— One of them has been marked.

Mr. Kresel.— I want to except from that offer the check of Mr. Schiff, which is already in evidence. I do not need to have that marked for identification.

(The eleven checks offered for identification were received and marked as one exhibit, M-28, for identification.)

Q. Mr. Floyd, have you produced a letter which was delivered to you by Mr. Sarecky during the month of October, 1912? A. I have.

Q. May I have it, please. A. (Witness produces letter.)

Mr. Kresel.— I offer that letter in evidence.

Mr. Hinman.— Let me see it.

(Letter passed to Mr. Hinman for examination.)

Mr. Hinman.— No objection.

Mr. Herrick.— No objection.

The President.— Admit it.

(The letter offered in evidence was marked Exhibit M-29.)

Mr. Kresel.— This letter is written on the stationery of the Committee on Foreign Affairs, House of Representatives, United States.

"*En Route, October 22, 1912*

"*Mutual Alliance Trust Company:*

"GENTLEMEN: This is to inform you that I have authorized my private secretary, Mr. Louis A. Sarecky, to endorse my name to any checks donated to my campaign fund, and to deposit same to his credit.

"Very truly yours,

"WILLIAM SULZER."

Mr. Kresel.— That is all.

Cross-examination by Mr. Hinman:

Q. Referring to this letter, Exhibit M-29, which is the letter dated October 22, 1912, have you a present recollection of its having been delivered to you? Have you any present recollection as to whether or not that particular letter was delivered to you in person? A. I have.

Q. By whom was it delivered to you? A. (No answer.)

Q. What is your best recollection? A. An employee of the company.

Q. An employee of your company? A. Yes, sir.

Q. Have you any knowledge, any personal knowledge, as to how the employee of your company received this? A. It was delivered to him by Mr. Sarecky.

Q. How do you know that? A. I know that because it was told me at the time, and later I had some conversation with Mr. Sarecky with reference to it.

Q. Was that —A. (Interrupting.) He asked me if I had received the letter, and if it was in order.

Q. So, personally, you don't know when it was received; that is, you did not receive it when it was received there at the bank? A. I did not.

Q. Do you remember now who the employee was that delivered this letter to you? A. I do not.

Q. Do you remember now what position the person occupied at the time, who delivered this letter to you? A. I do not.

Q. Do you know whether this letter was delivered to the employee of the bank; that is, did you learn from him whether it was delivered in an envelope or not? A. It was in an envelope when I received it, directed to me.

Q. Have you that envelope? A. I have not.

Q. And do you know where that envelope is? A. It was destroyed.

Q. At the time? A. At the time.

Q. Have you any personal knowledge regarding the reason why this letter was delivered at that time? A. I have.

Q. Did you have any talk with anyone regarding its delivery or the transmitting of the letter before it was delivered? A. I did.

Q. With whom did you have that talk? A. Mr. Sarecky.

Q. There at your bank? A. At the bank.

Q. Do you know where William Sulzer was on the dates that this letter bears date? A. I do not.

Q. Did you have any communication, any conversation, with William Sulzer regarding this letter? A. I did not.

Q. Never at any time? A. At any time.

Q. So far as you know, has any employee or officer of your bank had any conversation with William Sulzer regarding this letter at any time? A. No one has.

Q. As to where this letter was written you do not know? A. I do not.

Q. By whom it was dictated, you know nothing, either by hearsay or otherwise?

The President.— He said that. You said the first knowledge you had of it was when it was given to you by this employee in your Trust Company?

The Witness.— Yes, sir.

Q. Referring now to these checks which have been offered in evidence —

Mr. Hinman.— Have they been offered in evidence?

Mr. Kresel.— Not yet. They were marked for identification. They have not yet been offered in evidence.

The President.— Had you not better offer them in evidence?

Mr. Kresel.— If it is more agreeable to do so, I will offer them in evidence now.

The President.—Admitted.

Mr. Kresel.— They will have to be marked separately.

(The checks heretofore received for identification as Exhibit M-28 for identification, are now received in evidence and marked respectively Exhibits M-28, M-30, M-31, M-32, M-33, M-34, M-35, M-36, M-37, M-38, M-39.)

Mr. Hinman.— May I inquire where Exhibit M-29 is?

Mr. Marshall.— M-29 is the letter.

Q. And referring now to these checks which have been numbered from M-28 to M-39, inclusive, excepting Exhibit M-29, which is the letter, and which you have identified as checks which were deposited in your bank by Louis A. Sarecky, do you observe that on the backs —

The President.— One moment. If one of you gentlemen will assist your associate, by acting, it may be as messenger, but we will get along better.

Q. Do you observe that some of the indorsements thereon of the name of William Sulzer have been affixed with a rubber stamp? A. (After examining papers). I do.

Q. I hand you all of those exhibits, those checks, except Exhibit 26, and I ask you if the indorsement thereon of the name of William Sulzer on each of those checks is made with a rubber stamp? A. Wherever it appears, yes.

Mr. Marshall.— Look on them and see, see on all of them.

The Witness.— It is not on all of them.

Q. I show you now Exhibit 36, and ask you if that is the only check of those that have been produced here this morning upon which the indorsement of the name William Sulzer appears to have been written with a pen? A. (Witness examines papers.) I think that is the only one; that is the only one here.

Mr. Hinman.— That is what I am speaking of.

Q. Take that Exhibit 36 if you will and tell us the date of the check and by whom drawn and the amount of it? A. Dated October 19th, $100; A. H. Stoiber.

Q. What date was that deposited in your bank? A. October 21st.

Mr. Marshall.— 1912?

The Witness.— 1912.

Q. And was credited to the account of Louis A. Sarecky? A. Correct.

Q. Just one other question. Were you, during the period covered by the Sarecky account, to which you have testified, engaged during any of the time in receiving deposits personally? A. No.

Q. Who was the employee of your bank who usually received the deposits at that bank during that period? A. Our teller and his assistants.

Q. What was the name of your teller during that time? A. Johnson.

Q. What was his first name? A. F. N.

Q. Is Mr. Johnson still with you? A. He is.

Q. What are the names of the assistant tellers who were employed there at the bank at that time, if you can give them? A. Those departments have been changed since. They are two of the juniors.

Q. And do you know whether there has been any change? A. They are both still in the employ of the bank.

Q. Can you give the names? A. I cannot tell you at the moment.

Q. Have you any personal knowledge or recollection regarding the deposits by Sarecky in the bank; that is, who brought the various deposits when they were made to the bank? A. He brought them at times, and at times sent them by messenger.

Q. Can you give those names, or the names of any of those messengers who brought those deposits? A. I cannot.

Mr. Kresel.— Is that all?

Mr. Hinman.— That is all.

Mr. Hinman.— There is one other question. I want to inquire of counsel if he had marked this morning as exhibits all the checks that he produced which have been deposited in Sarecky's account?

Mr. Kresel.— I have marked all that I have produced, yes.

Mr. Hinman.— May I inquire for the record whether the counsel has had marked all the checks that he has here that have passed through the Sarecky account?

Mr. Kresel.— No.

Mr. Hinman.— Let me inquire for the record whether counsel did not produce here 14 or 15 checks exhibited in the court and then after they had been marked for identification, and mark them in evidence, that some were not marked which had been exhibited?

Mr. Kresel.— No, that is not so, either. All I exhibited were marked.

Mr. Kresel.— Mr. Tekulsky.

MORRIS TEKULSKY, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Will you try to speak loud enough for the gentlemen in the back rows to hear you? Where do you live, Mr. Tekulsky? A. 414 Central Park West, New York City.

Q. And what is your business? A. Liquor business.

Q. And where is your place of business? A. 389 Sixth avenue.

Q. In the city of New York? A. City of New York.

Q. Is that a wholesale or retail liquor business? A. Retail.

Q. And for how long have you been in the liquor business? A. 32 years.

Q. Are you now officially connected with what is known as the Liquor Dealers Association? A. I am not.

Q. You have been officially connected with that organization?

Mr. Marshall.— I object to that as immaterial.

The President.— Well, I suppose that is introductory, is it not?

Mr. Kresel.— It is, certainly.

The President.— He can show that. He wants to show contributions connected with the association.

Mr. Marshall.—As far as that is concerned, there is no allegation in the articles of impeachment with regard to any contribution by the Liquor Dealers Association or by the witness Tekulsky.

The President.— Is this with reference to some contribution made?

Mr. Kresel.— It is.

The President.— The witness may answer the question.

Mr. Kresel.—What is the last question?

(The stenographer read the last question as follows: "You have been officially connected with that organization?")

The Witness.— I have.

Q. And were you the president of it? A. I was.

Q. Do you know William Sulzer who is now the Governor? A. I do.

Q. Did you know him in the month of October, 1912? A. I did.

Q. And for how long prior to that month had you known Mr Sulzer? A. About 23 years.

Q. And you were very friendly with him? A. I was.

Q. Quite intimate with him? A. Yes.

Q. Do you remember seeing Mr. Sulzer on the 16th of October, 1912? A. I do.

Q. Where did you see him on that day? A. At Tammany Hall.

Q. That is in the city of New York? A. It is.

Q. Was there a meeting in progress there at that time? A. There was.

Q. And were you attending the meeting?

Mr. Marshall.— I object to this leading form of question.

Mr. Kresel.— I withdraw it. I did not know there would be objection to that.

Mr. Marshall.— I want to raise the real question presented here because we are wasting a lot of time on unnecessary inquiries if this testimony is not competent.

Mr. Kresel.— I think it ought to wait until we come to it.

Mr. Marshall.—We can cut the Gordian knot I hope without going through a lot of preliminary discussion. As I understand it, this witness is called for the purpose of having it proved that he made a contribution and that contribution was not —

Mr. Stanchfield.— I object to counsel arguing a legal question until the question is before the Court.

The President.— If they object, you will have to proceed in an orderly manner.

Mr. Marshall.— I am trying to save time.

By Mr. Kresel:

Q. What were you doing at Tammany Hall on that day? A. I went to a ratification meeting.

Q. And was that being held there in the evening of that day? A. It was.

Q. And was Mr. Sulzer one of the speakers there? A. He was.

Q. Now then, will you tell the Court what occurred between Mr. Sulzer and yourself on that occasion?

Mr. Marshall.— May I ask the Court if this is not the proper time to interpose my objection?

The President.— Yes, now what is your objection.

Mr. Marshall.— My objection is that under the articles of impeachment, which govern us here just as an indictment would govern us if this were a criminal action, there is absolutely no allegation which presents as ground for complaint the fact that a contribution was made by this witness or by any organization which he may represent, which was not included in the report or statement filed in the Secretary of State's office, or which was not accounted for, or which was appropriated by the defendant or respondent to his own use; and that therefore any evidence with regard to it is immaterial and incompetent.

The first article alleges that the respondent, having been elected, being required by the statute to make a certain statement setting forth his receipts and expenditures in connection with his candidacy, filed a statement and indicated that he had received certain sums of money from 68 contributors and had expended certain sums of money for expenses; and that the said statement thus made and filed by said William Sulzer as aforesaid was false and was intended by him to be false and an evasion and violation of the statutes of the State, and the same was made and filed by him wilfully, knowingly and corruptly, it being false in the following particulars among others, to wit: It did not contain the contributions that had been received by him and which should have been set forth in said statement, to wit, naming these:

Jacob Schiff, Abram I. Elkus, William F. McCoombs, Henry Morgenthau, Theodore W. Meyers, John Lynn, Lyman A. Spaulding, Edward F. O'Dwyer, Frank V. Strauss Company, John W. Cox, John T. Dooling, and not including this witness nor any organization which he represented.

That in making and filing such false statement as aforesaid the said William Sulzer did not act as required by law but did act in express violation of the statutes of the State and wrongfully, wilfully and corruptly and so forth.

The second article charges that he made an affidavit in which he

wilfully, knowingly and corruptly made a false statement, which was claimed to constitute a perjured statement in that it did not contain the names as contributors of the same individuals whom I have mentioned, that the statement was wilfully, knowingly and corruptly false in the following particulars, to wit, that it did not contain an account of the contributions that had been received by him and which should have been set forth in said statement, to wit, those of the individuals I have just named.

The sixth article is the one that relates to the charge of larceny and states that he stole the moneys and checks of Jacob A. Schiff, Abram I. Elkus, William F. McCoombs, Henry Morgenthau, John Lynn, Theodore W. Meyers, Lyman A. Spalding, Edward F. O'Dwyer, John W. Cox, the Frank V. Strauss Company and John T. Dooling and cash aggregating $32,850.

Of course, the purpose of these articles of impeachment, as it is also the purpose of an indictment, is to give notice to the person charged with the commission of an offense, of the nature and character of the charges made against him so that he may have an opportunity to investigate the accusation, to prepare for his defense and to present such explanatory matter as is required or deemed desirable.

It is contemplated by the provisions of the Code of Criminal Procedure relating to the trial of impeachments that there shall be an interval of time not less than twenty days from the time of the filing of the articles and the giving of such notice, as to the character of the charges made so, presumptively, and the trial to enable the person charged with an impeachable offense to prepare himself to meet the allegations of wrongdoing and to defend himself against them.

We are now in the unenviable position of having presented to us for the first time upon this hearing, more than thirty days after the filing of the articles, without any additional articles of impeachment having been presented by the Assembly, a charge which we have not been heretofore notified to defend against. Upon the theory of our opponents they might practically change the entire nature of the case. They might remain entirely silent with regard to the individual transactions which are set forth in the articles of impeachment and come here for the first time upon

this hearing and present to us for consideration the names of individuals who were not suggested or specified in the articles. A trial under such circumstances would be a misnomer. The articles of impeachment would be deceptive and misleading in the same way that an indictment would be misleading if it charged that the defendant had committed larceny in stealing the goods of John Smith, and when the trial came on, attempt were made to show that the goods stolen were the property of Richard Roe, or John Robinson.

The purpose and intention of the framers of the Constitution and also of those who framed the Code of Criminal Procedure was to provide articles of impeachment which would be specific and which would give notice of the charges which the respondent is called upon to meet. Not only is that so, but it is for the purpose of indicating to the respondent what charges were considered by the Assembly as the charges which he was to be called upon to meet; non constat, a majority of the Assembly might have determined that matters relating to Mr. Tekulsky or Mr. Smith or Mr. Robinson were not proper to be considered by the Senate upon the trial and that the only charges which were to be considered were those which related to Mr. Schiff and Mr. Morgenthau and other specified individuals.

In other words, this is merely an attempt to recast the articles of impeachment, to recast an indictment upon the very trial and to enable this tribunal, which is only a Court, to assume the functions of a grand jury or of an accusing body.

It has been held in the cases to which I called the attention of the Court on a previous occasion, that the articles of impeachment and an indictment are for all practical purposes the same; that there can be no more an amendment of the articles of impeachment upon the trial than there can be an amendment of an indictment upon the trial. It is only the Assembly that can change the charges or amend them. The Senate cannot do it. The Court of Impeachment cannot do it, and certainly, by attempting on such an occasion as this, to accomplish the same result by the interrogation of a witness with respect to transactions not pleaded, without even the amendment of the articles of impeachment, is not permissible. It cannot be reasonably expected of the de-

fendant that he be prepared to meet charges which are not included within the articles of impeachment; which have not been acted upon by the Assembly; which have not been made the subject of an amendment; and thus enable the prosecution by indirection to accomplish the very thing which the courts have held cannot be done directly.

Mr. Stanchfield.— If the Presiding Judge please, and members of this tribunal, the objection raised by counsel for the respondent is of quite more than passing consequence, as will appear from a bald bare statement of the contention made.

These charges upon their face allege certain specific amounts of money were received by the respondent for campaign purposes and that they do not appear in the statement filed by him under the statute, subsequent to his election.

The board of managers have secured, and we are now prepared to prove, a large number of contributions vastly in excess of those that appear upon the face of the charges, were received by the respondent for campaign purposes and that those amounts do not appear in the statement filed by him subsequent to his election.

The suggestion was thrown out by one of the counsel for the managers in his opening statement to you that we should make this proof. Therefore, not only counsel upon the other side, but members of this Court, are familiar with that contention.

There is the strongest human reason of which all men familiar with political affairs are cognizant as to the motives actuating a candidate for office for not desiring a particular contribution, such as the one involved in this controversy, to be opened up to the public gaze. Now, in all the motions that have been addressed to your consideration, challenging, first, the competency of certain members of this tribunal to sit, second, the jurisdiction of the Court as a whole, third, the impeachability of all offenses charged in the impeachment, but none of you as yet has heard any question raised as to the sufficiency, adequacy or completeness as matter of form, of these charges. That question comes before us for the first time now. If the gentlemen upon the other side claim that they are taken by surprise, as Mr. Marshall in his

argument would indicate, and that they are not prepared to meet the line of proof that we now tender, his remedy in this tribunal is not to say you gentlemen cannot amend, the Assembly must serve additional charges; his remedy is to follow the decisions in impeachment trials that have gone before us, and ask at the hands of this Court that they compel the board of managers to render unto them a bill of particulars of these charges. There is authority for the proposition, there is precedent in the books, and if they make that motion, we will meet it when we come to it. So much for the question as to whether it has been raised before. There is no question here as a matter of competency, as a matter of law, absolute, strict, rigid law, but what this evidence is admissible.

We charge here a wilful, a corrupt, intent upon the part of the respondent to file a statement of his receipts and expenditures that was violative of law; that he did it knowingly, that he did it intentionally; and as part of that statement we allege there were certain specific items enumerated by Mr. Marshall that did not appear in that filed statement of the respondents. Upon the face of the charge, we say, "It being false in the following particulars, among others, to wit." Therefore, as a matter of technical pleading, these people were advised that the board of managers were not limited to the items that appear upon the face of these charges. But if the Presiding Judge please, going back to the form of the pleadings, ignoring for the moment the question as to whether or no these charges be sufficient upon their face or otherwise, we claim that under the law of the State as adjudicated by the highest tribunal in the State, the competency of this evidence and its admissibility is not an open question. Upon the contrary, it is a closed door. And we have the right to prove that the respondent received and failed to account for other items than those that appear upon the face of these charges, upon the broad ground that the reception of those other moneys not spread upon these charges is part of a common purpose, a common scheme, running through the entire conduct of this respondent with reference to the filing of this statement.

I can make, perhaps, no more lucid or clear enunciation of our

position than to read an excerpt from the People v. Dolan, in the 186th N. Y., in which Mr. Justice Werner wrote for the court as follows:

> "They must" — that is this class of evidence — "must be so connected as parts of a general scheme or they must be so related to each other as to show a common motive or intent running through them.
>
> "It is true that the evidence of this general plan or scheme tended to show the defendant guilty of other crimes, but that, as so very aptly stated by Judge Cooley in a Michigan case, is one of the misfortunes of the defendant's position."

Who will be heard to say that if an accusation of grand larceny be made against a defendant upon the ground that he has obtained property by means of false and fraudulent representations that the district attorney upon the trial of such an action is not permitted to prove contemporaneous acts similar in nature and similar in character? Although, of course, as is suggested by my colleague, not pleaded upon the face of the indictment.

That is the general situation that obtains here. We charge a crime, and an intent upon the part of the respondent to parade for the public gaze certain itemized statements that appear in the papers he filed under oath as containing a list of all the contributors to his political campaign of small amounts from obscure sources that would not attract attention, and that by a scheme, a plan, he omitted from that statement amounts that came from Wall street, as identified in the person of Mr. Schiff, of amounts that came from the liquor interests, as represented in the person years ago of Mr. Tekulsky, of amounts that came from brewers, from all sources, where he thought the receipts of those moneys might reflect in any way upon his political future or be the subject of criticism or cavil or debate, those amounts were sedulously, deliberately, omitted by design, by intent, by this respondent from those statements, and therefore we claim that as bearing upon the fitness of the man, that as bearing upon the truth of these charges, as showing this corrupt, wilful, deliber-

ate intent, that renders this man unfit to occupy the place that he at present fills, we have the right to show that in numberless other instances not appearing upon this record, he has deliberately failed, intentionally failed, to file a statement of his receipts. I might, perhaps, have concluded that with the statement, as is suggested by one of my associates, that one of his defenses was and is that these omissions were in the nature of a mistake, and that they were done without a guilty intention.

Mr. Marshall.— May it please the Court: This is purely and solely a question of pleading and proof under the pleading. When the proper time comes to sum up this case, we will be prepared to do that. I shall try to discuss this question as a question of law and not introduce into it extraneous matter, which is not proper to be considered before a judicial tribunal. Counsel has said that in the terms of this article 1 it is stated that the report was wilfully, knowingly and corruptly made, it being false in the following particulars among others, to wit, etc. The words "among others" do not meet the defect in pleading which we are here considering, because its allegations are specific. It charges that the statement did not mention contributions that had been received by him, and which should have been set forth in said instrument, to wit, naming the persons, naming the amount of the contributions which the statement failed to enumerate. If there were other omissions, they must be set forth in the indictment, in the articles; it cannot be left to the district attorney or to the impeachment managers to say that there may be something besides that which they have specified which might be a ground for charging falsity. Indictments cannot be carried in the hat of a district attorney nor in the minds of impeachment managers. Charges must be set forth fully, completely. Counsel says we might have asked for a bill of particulars. It was not for us to ask for a bill of particulars. They are bound in their articles to furnish us with the statement of facts constituting the wrongful act, the crime, the impeachable offense. You might as well say in any case where there is a defective indictment, that the person charged with the commission of crime could eke out the insufficiency of the indictment by asking for a

bill of particulars or by going back and asking that the case be sent back to the grand jury, or in this case to the Assembly, for the purpose of having a proper indictment framed or proper articles of impeachment framed. They have furnished us their bill of particulars in these articles of impeachment. It was their duty to show us what the facts are on which they base the claim that we have committed a crime or a wrongful act, or an impeachable offense. The charge which we are called upon to meet is the charge of the Assembly, acting by a majority of all the elected members of the Assembly, and not otherwise, and it would be contrary to the spirit of the law and of the Constitution if the board of managers or counsel to the board of managers, might be considered as a substitute or the delegate of the constitutional body which alone can find charges or present articles of impeachment. Counsel has said that it is elementary that you may prove other acts, other crimes, for the purpose of showing intent. It is true that there are certain exceptions to the general rule that you can only be called upon to meet those particular offenses which are charged in the indictment. The law upon that subject has been stated with wonderful clearness and comprehensiveness in the monumental opinion of Judge Werner in People v. Molineux, in the 168 N. Y. Reports, indicating that the rule is, the primary principle is, that a man charged with crime can only be called upon to meet that particular charge which is set forth in the indictment, and that he is not called upon to meet any other charge, and that evidence tending to show the commission of any other crime, even though it be a similar crime, is incompetent. Will my friend claim for a moment that upon an indictment for larceny committed by A for taking the property of B, that you can show that A has committed twenty other larcenies, even though they may be contemporaneous larcenies, or that A has committed twenty other burglaries or twenty other murders? Why, in the Molineux case they tried to show for the purpose of indicating that it was Molineux who committed the crime which was charged against him, that he committed other similar offenses, for the avowed purpose of establishing that the several crimes were committed by one and the same person. Yet the Court of Appeals held that that proof was not competent, because

it violated the fundamental rule of justice and fairness which underlies our whole system of criminal law. There are, however, it is said, some exceptions. Undoubtedly there are. But this is not one of them. Counsel has cited People v. Dolan in 168 N. Y. But that was a case of forgery and the whole principle of that case, and its whole ratio decidendi was summed up in a few words which are contained in the opinion of Judge Werner on page 9 of the opinion, where he says that "a man might think," quoting from Judge Peckham in People v. Sharp (107 N. Y. 467), "the money he passed was good, and he might be mistaken once or even twice, but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit, the latter observation very tersely states a rule that is as applicable to prosecutions for forgery as to cases for passing counterfeit money."

That was all that was decided in the case of People v. Dolan. There are also other cases which are referred to in the opinion of Judge Werner in the Molineux case that where there is an indictment for obtaining goods on false pretences that it is competent to show that contemporaneously goods were obtained on similar pretences from other people for the purpose of indicating the intent, the general purpose in connection with that transaction.

Again citing authorities, I call attention to the case of People v. McLaughlin, 150 N. Y., which was an indictment against a police inspector for extortion. The indictment charged extortion from some particular individual, A, B or C. On the trial, evidence was allowed to show that he had also committed extortion by taking money under like circumstances from C, D or E, through his ward men; and the Court of Appeals finally held, when the question came before it, that that evidence was incompetent and should not have been received and reversed a conviction on the ground that the trial court had committed error in admitting the evidence. Now, how does this case differ from that in any respect? Here is a charge that there had been committed a wrongful act, the failure to make proper report, and that that report was improper in these particulars; and then there is another charge, that of perjury, in that perjury was committed in respect to these particulars, and there is the charge of the

commission of the crime of larceny in that the larceny consisted in stealing the property of the particular individuals named. And yet, the prosecution is trying now to show that instead of there having been committed the larcenies which are set forth in article 6, that there were five, six, seven or eight, I don't know how many other larcenies committed from other individuals who are not mentioned or specified in the articles of impeachment; that there was not only committed perjury in the respect indicated in this charge, setting forth the perjury, but there were other perjuries in respect to other persons or other things, and so far as the false report was concerned, it was false not only in the particulars specified but in other particulars.

We are, therefore, transforming this case from that which we have been invited to try; we are transforming the charge from that which the Assembly has made into one which my friends are now seeking to make and to have tried here under these extraordinary circumstances. I might here say parenthically that so far as the allegation is concerned, that the report filed was false in specified particulars, "among others," that statement is to be found solely in the article relating to the filing of a false report; it is not to be found in the charge with regard to perjury; it is not to be found in the charge with regard to larceny; it is confined merely to that first article.

But independent of that, taking this case in its broad aspect, in the interest of fairness and justice, I assert that it would be a violation of our rights if we were now called upon to go into testimony with regard to any matters except those which we were invited to try by the articles of impeachment which have been here presented.

Senator McClelland.— I would like to ask a question of information.

Mr. Marshall.— Certainly.

The President.— Senator McClelland.

Senator McClelland.— Are you sure that the McLaughlin case was not decided upon the ground that no crime, upon the evidence, had been proved against the defendant-appellant, and that he was

absolutely discharged under the decision of the Court of Appeals and no trial subsequently had?

Mr. Marshall.— Senator, I think not. The only question which I am now considering was discussed in the opinion of the Court. I know the reversal was based upon the ground of the incompetency of testimony. Mr. Fox — one of my associates — was one of the counsel for the prosecution and can, if desired, give his personal recollection of the matter. I could send for the report, but I am very sure that one of the propositions decided was that to which I am now referring, and it was also, as I recollect it, reviewed together with all the authorities bearing upon the subject, in the opinion of Judge Werner in the Molineux case, to which I have referred.

Mr. Stanchfield.— If the Presiding Judge please: In the warmth and zeal of this legal discussion we must not overlook the fact that the same strictness does not obtain upon trials for impeachment that would obtain in a criminal court in the trial of an indictment, and there is no —

Mr. Marshall.— It is not.

Mr. Stanchfield.— Pardon me, but it is true and it has been announced in a great many cases.

Lest there should be the slightest misgiving in the mind of any member of this Court as to what the Court of Appeals of this State has held I will, for the purpose of refreshing the recollection of all the members of this Court, read in detail a brief decision of Mr. Justice Werner in the Molineux case. I read from page 297:

> "There are cases in which the intent may be inferred from the nature of the act. There are others where wilful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore, intent is

of the essence of the crime, and previous offenses of a similar character by the same may be proved to show intent. So in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense and scienter may be proven by other previous similar acts. In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent. On the trial of an indictment for obtaining goods by false representations, similar representations made by the defendant to creditors, from whom goods had been previously purchased by him, were held admissible to prove intent. It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act."

The President.— Now, counselor, I do not think you should open the general reargument.

Mr. Stanchfield.— I am not going to. Just to recapitulate — I am not going over my original argument. The contention here is that these transactions, a hundred or more in number, constituted a common purpose, a common scheme, and not, upon the part of this respondent, to display certain contributions and veil and conceal others. I concede that the failure to report one contribution might be an accident; the failure to report two contributions might be a coincidence; the failure to report a hundred is crime.

The President.— My opinion is that this evidence should be admitted. I agree perfectly with the contention of the counsel for the respondent that there can be no amendment made in an impeachment trial that would bring in a new and different offense because the sole power of impeachment is in the Assembly. We can try in this Court only offenses which the Assembly have pre-

sented as grounds for the removal of the person impeached. But when you look at this article — the first and second only, the gist of those articles is a single offense. It is the falsity of a particular statement or return. Now, it does enumerate respects in which it is false, and it may be possible as to those articles that you should not go beyond the question of whether the report was false in those respects. But the gist of that article is the scienter, the knowledge or intention to make a false report. And it seems to me, within the authorities, proof of similar acts at the time or about the time might be competent evidence.

There is, later than any decision that has been presented here, a decision of the Court of Appeals from which I dissented. It was a forgery by a notary public in failing, in making a false statement to an acknowledgment to a deed that somebody had appeared before him and acknowledged it. The charge was that the grantor was a fictitious person or it was an impersonation by another party than that by which the deed purported to be signed, and it was held by the court that similar acts with different persons extending over a period of some year and a half, were competent on this ground: that a man might have been deceived in one case or in two cases, but he hardly would be deceived in fifty.

I do not see why the logic of that case is not applicable to the case before us. The sixth article alleges a conversion or stealing of certain checks, and then it concludes, and cash amounting to thirty odd thousand dollars. Of course, the respondent was entitled to a fair intimation of what those sums were, and if they had asked for a bill of particulars of that article it might have been granted, but the respondent has not done anything of the kind.

This is not to be construed with the absolute strictness of an indictment in a criminal case. It does not matter particularly who was the owner of the property; and my notion is that articles of impeachment are not to be construed and judged in the same way that you would articles of indictment. They ought of course to conform to the requisites of substantial justice. They should inform the defendant fairly what is to be charged against him, but I do not think that it is, as already said, to be construed with the

specification, the nicety and refinement that is requisite in a criminal case.

I hope, as this will come up often, that someone will demand a vote on this ruling. I rule the testimony is admissible.

Judge Collin.— Mr. Presiding Judge, in conformity with the intimation or the request of yourself, I move that a vote be taken now upon the question before the Court.

The President.— Does any gentleman wish to discuss the question? Does any member of the Court wish to discuss it?

(No response.)

The President.— Call the roll, Mr. Clerk.

Senator Argetsinger.— Mr. President, I do not wish a majority of this Court to deny me every scintilla of evidence that may give me an opportunity of judging this case.

Judge Collin.— Mr. Presiding Judge, may I ask just what the question is that we are voting upon. Is it that your ruling is to be sustained —

The President.— I have ruled that the testimony is admissible. Do you vote it inadmissible, Senator Argetsinger?

Senator Argetsinger.— Admissible.

Judge Bartlett.— I vote that the testimony is admissible for the reasons assigned by the Presiding Judge with which I fully agree.

Senator Blauvelt.—.Aye.

Senator Boylan.— Aye.

Senator Brown.— Aye.

Senator Bussey.— Aye.

Senator Carroll.— Aye.

Senator Carswell.— Aye.

Judge Chase.— Aye.

Judge Collin.— Aye.

Judge Cuddeback.— Aye.

Judge Cullen.— Aye.

Senator Cullen.— Aye.
Senator Duhamel.— Aye.
Senator Emerson.— Aye.
Senator Foley.— Aye.
Senator Frawley.— Aye.
Senator Godfrey.— Aye.
Senator Griffin.— Aye.
Senator Heacock.— Aye.
Senator Healy.— Aye.
Senator Heffernan.—Aye.
Senator Herrick.— Aye.
Senator Hewitt.— Aye.
Judge Hiscock.— Aye.
Judge Hogan.— Aye.
Senator McClelland.— Aye.
Senator McKnight.— Aye.
Senator Malone.— Aye.
Judge Miller.— Aye.
Senator Murtaugh.— Aye.
Senator O'Keefe.— Aye.
Senator Ormrod.— Aye.
Senator Palmer.— Aye.
Senator Patten.— Aye.
Senator Peckham.— Aye.
Senator Pollock.— Aye.
Senator Ramsperger.— Aye.
Senator Sage.— Aye.
Senator Sanner.— Aye.
Senator Simpson.— Aye.
Senator Stivers.— Aye.
Senator Sullivan.— Aye.
Senator Thomas.— Aye.

Senator Thompson.— I agree with the ruling of the Presiding Judge for the reasons specified by him and for the additional reason that in article 6 of the specifications of the articles of impeachment I find the charge that various persons contributed and delivered money and checks representing money to the said William Sulzer, and it simply limits in the third paragraph that, among such money and checks thus stolen were the following, and I do not believe they were limited to any of the transactions mentioned in article 6. I vote aye.

Senator Torborg.— Aye.

Senator Velte.— Aye.

Senator Wagner.— I vote aye on the grounds stated by the President.

Senator Walters.—Aye.

Senator Wende.— Aye.

Judge Werner.— Aye.

Senator Wheeler.— Aye.

Senator White.— Aye.

Senator Whitney.— Aye.

Senator Wilson.— Aye.

The President.— Mr. Clerk, announce the vote.

The Clerk.— Fifty-five in the affirmative; no negative.

The President.— Gentlemen, the hour of adjournment has now arrived. Crier, adjourn Court.

Thereupon, at 12.30 o'clock p. m., a recess was taken until 2 p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2 o'clock p. m.

The roll call showing a quorum to be present, Court was duly opened.

MORRIS TEKULSKY resumed the stand.

Direct examination continued by Mr. Kresel:

Q. Now, Mr. Tekulsky, will you state to the Court what you did at Tammany Hall that evening?

The President.—What you did with reference to the respondent here, Sulzer, in giving him money or any conversation about it? A. When he got through making his speech I walked downstairs with him, and I said to him, "Here is a little contribution to your campaign fund, and I hope it will do you good." I handed him a check, and he said, "Thank you." That was all the conversation we had.

Q. Now, I show you managers' Exhibit 32, and ask you whether that is the check which you handed to him? A. It is.

Mr. Kresel.— That is all.

Judge Werner.— May the check be read, Mr. President?

Mr. Kresel:

"*New York, Oct. 16, 1912*

No. .....

THE GARFIELD NATIONAL BANK,

Fifth avenue and 23rd street.

Pay to the order of William Sulzer, $50.

Fifty ———————————— Dollars.

(Signed) MORRIS TEKULSKY."

Indorsed on back,

WILLIAM SULZER.

L. A. SARECKY.

Pay to the order of The National Bank of Commerce, Oct. 19, 1912. The Mutual Alliance Trust Company of New York, 35 Wall street. Received payment through the New York Clearing House, Oct. 19th, 1912. Receiving Teller. Indorsements guaranteed, National Bank of Commerce in New York.

The President.— That is the check that went through the Alliance Trust Company.

Mr. Kresel.— It did, sir.

The President.—And deposited in Sarecky's account?

Mr. Kresel.—Yes, sir.

Cross-examination by Mr. Hinman:

Q. In November, 1912, were you the president of the Liquor Dealers Association? A. I was not.

Q. And you had not been such president for how long? A. A good many years.

Q. What was this ratification meeting that was held in Tammany Hall on October 16, 1912? A. A general Democratic ratification meeting that is held every year.

Q. How large a meeting was it?

The President.— Is it worth while to go into that?

Mr. Hinman.— I do not care about that particularly.

Q. When you went downstairs with Mr. Sulzer, as you have stated, what room did you go in; did you go in some room? A. No, we went in no room.

Q. Was the talk which you had with him as you went down the stairs? A. It was.

Q. Were you and he alone, or were there others going down at the same time? A. He and I were alone; there might have been others on the stairs, but not with us.

Q. He went down as the meeting broke up, you went down? A. No, it was after he got through speaking.

Q. That is, Governor Sulzer, then Congressman Sulzer, had made a speech there at the meeting? A. He did.

Q. And this was immediately succeeding his speech? A. It was.

Q. Did you make any particular note or pay any particular attention at the time to just what conversation you had with Governor Sulzer with reference to the check? A. I made no note of it, only just what I just stated.

Q. The conversation that you had at that time, has it been called to your attention since the time when you had it that night of the 16th of November, 1912, until recently? A. No.

Q. The matter I assume that is, the conversation, had passed from your mind until recalled lately? A. That is right.

Q. As to what particular language you used or just the words you used, I don't suppose you can be absolutely positive? A. That is just about what I said; what I repeated, very few words.

Q. I understand, but do you undertake to give us word for word, verbatim, just what you said to him? A. About that.

Q. Well, it may have varied somewhat? A. Not very much.

Q. May it have varied any? A. It might, a word or two.

Q. You intended, did you, to give that $50 to William Sulzer individually?

Mr. Brackett.— I object to that, if the Court please.

Mr. Hinman.— I will withdraw that question.

Q. What position, if any, do you occupy in Tammany Hall? A. Only a member of the general committee.

Q. You are at present a member of the general committee? A. I am.

Q. And were you a member of that committee in November, 1912? A. I was.

Q. Did you have any official position on the committee except to be a member thereof? A. I have not.

Q. Did you have at that time? A. I did not.

The witness excused.

Mr. Stanchfield.— I desire to recall Mr. Godwin for the single purpose connected with a paper that we had prepared this morning.

THOMAS M. GODWIN recalled.

Direct examination by Mr. Stanchfield:

Q. I hand you exhibit marked 22 for identification, and ask you what it is (counsel passes Exhibit 22 to witness). A. (After examining.) This is a transcript of the account in the name of William Sulzer of the transactions covering the period between September 3, 1912, and September 20, 1913.

Q. Does the statement embrace all items passed to his credit as well as all checks drawn against it over that period of time? A. It does.

Mr. Stanchfield.— I offer it in evidence.

Mr. Herrick.— Is that not in evidence already, Mr. Stanchfield?

Mr. Stanchfield.— No, it was marked for identification.

(The transcript of the account heretofore marked Exhibit M-22 for identification was received in evidence and marked Exhibit M-22.)

Mr. Marshall.— May I have it?

Mr. Stanchfield.— No, I am not through with it. I will read the credit side of this statement.

Q. The dates and the amounts deposited to his credit, his credit balance, Mr. Godwin, on the 3d of September, 1912, was $1,112.58, was it not? A. (After examining) $1,112.58.

Mr. Stanchfield.— September 3d a deposit of $625. September 12th a deposit of $3,500. September 19th a deposit of $200. September 23d, a deposit of $1,253.75. September 25th, a deposit credit of $4,000. October 8th, a deposit credit of $4,400. October 10th, a deposit credit of $3,500. December 1st an interest credit of $61.13. December 16th a deposit credit of $2,625. December 18th, a deposit credit of $1,230.43. December 28th, a deposit credit of $3,000. I will not read any further.

Q. Will you state the credit balance as appears by this exhibit on the 1st day of October, 1912? A. The first day of October?

Q. (Counsel passes paper to witness.) A. (After examining) I think it is the first day of November.

Q. Have you figured the deposit credit or the credit balance on the 1st day of November, 1912? A. I have.

Q. How much was it at that time? A. $15,704.15.

Q. And have you figured the credit balance on the 1st day of December, 1912? A. I have.

Q. How much is that? A. The same amount, $15,704.15.

Mr. Stanchfield.— That is all.

Mr. Hinman.— Let me take that a moment.

(Exhibit 22 is passed to Mr. Hinman.)

Mr. Hinman.— No questions.

Mr. Stanchfield.— Will you want Mr. Godwin any more?

Mr. Hinman.— I think not.

Mr. Kresel.— The city clerk.

PATRICK MCCORMACK, residing at 258 West 135th street, borough of Manhattan, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. McCormack, are you employed at the office of the city clerk of the city of New York? A. Yes.

Q. And what position do you occupy in that office? A. Commissioner of deeds clerk in the city of New York.

Q. Commissioner of deeds clerk of the city of New York? A. Yes, sir.

Q. In a general way, what duties do you have to perform in that office with reference to commissioners of deeds of the city of New York? A. See that they are signing their register.

By the President:

Q. You are the clerk that sees that the commissioners of deeds that may be appointed, come there and sign the records? A. Yes, sir.

Q. Do you administer any oaths of office to them, too? A. Yes, sir, I do.

Q. You administer to them the oath of office and have them sign the register? A. I do.

Q. Have you produced the original register or a leaf therefrom containing any entries with regard to the appointment of commissioner of deeds of one Alfred J. Wolff? A. Yes.

(Witness produces paper.)

The President.— Are you going to take issue that Mr. Wolff — do you concede that he was a commissioner of deeds at the time that he took the oath?

Mr. Herrick.— We do not know anything about it and raise no issue about it.

The President.— Do you concede it? He will have to prove it if you do not.

Mr. Marshall.—Let us look at it.

The President.—It is hardly worth while to spend time on that if you do not dispute it.

Mr. Kresel.— He did not want to concede that yesterday and I had to send for this witness.

Mr. Herrick.— No use wasting time on that. We concede his appointment.

The President.— Then you can take on the record, Mr. Stenographer, that counsel for the respondent concedes — what was the name of that witness?

Mr. Kresel.— Alfred J. Wolff.

The President.— Who was on the stand as a witness yesterday, was at the time he testified he administered the oath a commissioner of deeds in the city of New York, qualified to take oaths and acknowledgments in said city.

Is that sufficient for you?

Mr. Kresel.— That certainly is. That is all, Mr. McCormack.

(Witness excused.)

Mr. Kresel.— I will call Mr. Stadler.

CHARLES A. STADLER, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. What is your occupation now, Senator? A. Maltster. President of the American Malting Company.

Q. And the business of that corporation is the manufacture and sale of malt? A. Yes, sir.

Q. To brewers? A. Yes, sir.

Q. And you are the president of that corporation? A. Yes, sir.

Q. Have you in your employ a gentleman named Dersch? A. Yes, sir.

Q. Charles Dersch? A. Yes, sir.

Q. And is he a salesman for your corporation? A. Yes, sir.

Q. You were at one time a member of this Senate? A. I was.

Q. Of the State of New York? A. Yes, sir.

Q. During what year? A. 1888-92.

Q. Do you know Governor Sulzer? A. I do.

Q. And you knew him in October and November, 1912? A. Yes, sir.

Q. You had known him for a number of years before that? A. Yes, sir. Governor Sulzer was a member of the Assembly during my senatorial term.

Q. Now, Senator, do you remember calling upon William Sulzer at his office in the city of New York early in September, 1912? A. I don't know whether it was in September or October, but thereabouts.

Q. Can you recall whether it was before his nomination for Governor? A. It was.

Q. Now, did you have a conversation with him there? A. At his office, yes, sir.

Q. How did you happen to go there? A. I was informed through Mr. Dersch, who had evidently called upon him before, that Mr. Sulzer would like to see me, and asked him to invite me to his office, and after one or two invitations I went there.

Q. Did anybody accompany you to Mr. Sulzer's office? A. I know Mr. Dersch did, and if my memory is correct, I think Mr. White did.

Q. Mr. Frank White? A. Mr. Frank White.

Q. Who is an attorney in the city of New York? A. Yes, sir.

Q. When you got into Mr. Sulzer's office did the conversation which you had with him occur in the presence of Mr. Dersch and Mr. White? A. Yes, sir.

Q. Or did any part of the conversation take place in Mr. Sulzer's office? A. No; the conversation was a public conversation in the office.

Q. In the office? A. Yes, sir.

Q. Now then, as near as you can recall, will you please state what that conversation was? A. Mr. Sulzer informed me that he was a candidate for Governor, and required the help of his friends; he said that he had known me for some time, and thought

that I might help him, and asked me to be of assistance to him. He said, "You can help me in more than one way, and I need the help of my friends."

Q. Did he say at that time that he was a candidate for Governor, or a candidate for the nomination for Governor? A. I think he said he was a candidate for Governor.

Q. But this was before the nomination? A. Yes, sir.

Q. Now, after Mr. Sulzer's nomination, did you have any communication with him? A. Yes, sir.

Q. And what was the first communication after his nomination that you had with him; was it by letter or telegram? A. It was an invitation again to visit him.

Q. I see. And did you visit him again? A. I did.

Q. And where? A. At his office.

Q. His office was where? A. I think it is 115 Broadway.

Q. New York City? A. Yes, sir.

Q. Do you recall whether on this second occasion you went there alone or in company with anybody? A. Mr. Dersch was with me.

Q. State what transpired between you and Governor Sulzer at that time? A. The conversation was of the general topic of the political situation pending, and the same request to intercede wherever I could among my friends, and to help him all that I could, saying that he needed and required the help of his friends.

Q. And what did you say? A. I promised him I would.

Q. Would do what? A. I told him I would do all that I could to help him.

Q. Did you say to him what you were going to do in a general way? A. In a general way, I told him that I would intercede with my friends for him. The exact conversation is impossible for me to remember, for this reason: at the time it was casual and the subject was political, and on the question of assisting him and having my friends to assist him. The fact is I think I am going too fast. I think the conversation was before the nomination, the second time.

Q. You mean the second conversation was likewise before the nomination? A. Yes, sir.

Q. In that conversation was there anything said? A. Yes, sir.

Q. In that conversation was there anything said by Mr. Sulzer as to how you and your friends could help him? A. He said, "You can help me more than one way, and you know what you can do." I told him I thought I understood the situation and would do what I could.

Q. Now, subsequent to the nomination, did you see friends of yours? A. I did.

Q. Among others, whom did you approach? A. Mr. Sulzer requested me to go to 14th street and intercede for him there. I promised him I would, and I did. I went to 14th street and saw the parties in power, talked the matter over there, and recommended Mr. Sulzer's nomination, and promised if they gave him their support, I would do all I could for him and all that my friends could do; and then subsequently reported back to Mr. Sulzer what I had done, and he thanked me.

Q. Before you went to 14th street, as you described, did Mr. Sulzer expressly request you to go to 14th street? A. He did.

Mr. Herrick.— We do not want to raise technical objections, but how is all this material, that took place before the nomination?

The President.— I do not see, counselor, that it is worth while. Are you coming to a pecuniary contribution?

Mr. Kresel.— I am.

The President.— Don't you think you can get to that transaction?

Mr. Kresel.— I am coming right to it.

The President.— Come right to it, please.

Q. After the nomination, Senator, did you see some of your friends? A. I did.

Q. And whom did you go to see?

Mr. Herrick.— How is that material?

The President.— I do not see that it is.

Mr. Kresel.— Those are the people from whom he got the contributions.

The President.— Get down to what took place between him and the respondent. Is it not a question of what took place between him and the respondent?

Mr. Kresel.— Yes, but what I propose to prove is he went around among his friends and collected moneys and then turned them over to Mr. Sulzer.

The President.— Get right down to it.

Mr. Kresel.— I will put it this way —

By the President:

Q. You went around to your friends and collected money to help? A. I did.

Q. And then did you go to the respondent here? A. Yes, sir.

Mr. Kresel.— If your Honor will permit me to go on from that point.

The President.— Yes.

By Mr. Kresel:

Q. Did you get a check from Mr. Peter Doelger? A. I did.

Q. I show you Exhibit 34, and ask you whether that is a check you got? A. Yes, sir.

Q. Now, who is Peter Doelger? A. Mr. Peter Doelger is a brewer in the city of New York, an old friend of mine.

Q. And that is the man that you spoke of as having gotten this check from? A. Yes, sir.

Q. Did you get a check from William J. Elias? A. No.

Q. William J. Elias? A. Yes, sir, I did.

Mr. Kresel.— What is the number of that?

Mr. Todd.— Exhibit M-30.

The Witness.— $100, yes, sir.

Q. You got that check from Mr. Elias? A. Wait a moment. I think that check was sent direct. I requested Mr. Elias for a contribution, and if my memory is correct, I think he sent that direct.

Q. You think that went direct to Mr. Sulzer? A. Yes, sir.
Q. At any rate —

Mr. Hinman.— Just a moment, if your Honor please. I object to the form of the question, if it went direct to Mr. Sulzer, the form of it.

The President.— He cannot testify it is true if he does not know of his own knowledge, but the check has been indorsed or the proof is it was indorsed.

Mr. Hinman.— We do not object to the answer the witness gave. We object to the form of the question.

Q. Who is William J. Elias? A. He is president of the Henry Elias Brewing Company.
Q. Did you also get a check from George C. Hawley? A. I did.
Q. I show you this check and ask you whether that is the check you got from Mr. Hawley? A. Yes, sir.
Q. Now, who is Mr. Hawley? A. Mr. Hawley is the owner of the Dobler Brewing Company of Albany, New York.

Mr. Kresel.— I offer that check in evidence.

The President.— Is that indorsed?

Mr. Kresel.— No, that is not indorsed. It will appear that was cashed.

The President.— Is it to the order of cash?

Mr. Kresel.— No, it is made to William Sulzer.

Mr. Hinman.— No objection.

Mr. Kresel.— There is no objection to it. It is drawn to William Sulzer. May I first have it marked?

The President.— Yes.

(Check offered in evidence was received in evidence and marked Exhibit M-40 of this date.)

Mr. Kresel.— This check is now marked Exhibit M-40 and reads as follows: The name of George C. Hawley is printed on it. (Reading.)

"Albany, New York, October 18, 1912

"NATIONAL COMMERCIAL BANK

"Pay to the order of William Sulzer Two hundred and fifty dollars.

"Signed George C. Hawley.

"Endorsed William Sulzer. John Holt."

Then the stamps of the various banks through which it went.

Q. Now, Mr. Stadler, who was John Holt whose indorsement appears on this check? A. I don't remember.

Q. Didn't you have an employee in your company named John Holt? A. We did.

Q. That is right? A. We did, John Holt. Yes, he is dead.

Q. Yes, he died recently? A. The poor fellow, he is dead.

Q. Do you recall what you did with this check of Hawley when you got it? Just look at it. A. Yes, I sent it to the bank to be cashed.

Q. You had it cashed? A. Yes, sir.

Q. And you obtained cash on it? A. Yes, sir.

Mr. Kresel.— All right. Now, let me have that.

Mr. Herrick.— Just let me see that one moment.

Mr. Kresel.— All right. (Handing check to Mr. Herrick.)

Q. Now, did you also get a check from August Luchow? A. I did.

Q. Who is August Luchow? A. He keeps a hotel and restaurant on 14th street, New York City.

Q. And he is also a representative in the city of New York of some foreign brewers, is he not? A. Yes, sir.

Q. Now I show you this check and ask you whether that is the one you obtained from Mr. Luchow? A. Yes, sir.

Mr. Kresel.— I offer that check in evidence.

Mr. Hinman.— Just let me look at it before it is marked. Until it is shown, as I assume it will be, that the check went

through Governor Sulzer's hands or bank account, I wish to object to it. I assume it can be shown.

The President.— First show the subsequent fate of the check and then you may renew your offer.

Q. After you got this check from Mr. Luchow, state what you did with it? A. I had it cashed.

Q. You had it cashed? A. Yes.

Mr. Kresel.— Now, may I offer it again?

The President.— Are you going to connect that, showing that money went through the respondent?

Mr. Kresel.— I will show it went through the hands of William Sulzer.

The President.— Then I will allow it and it will be stricken out if you do not connect it.

(The check offered in evidence was received in evidence and marked Exhibit M-41 of this date.)

Mr. Kresel.— The Luchow check reads as follows (reading):

"TRUST COMPANY OF AMERICA,

" 37–43 Wall Street, New York.

" October 28, 1912

" Pay to the order of Charles A. Stadler Two hundred dollars.

(Signed) August Luchow
(Endorsed) Charles A. Stadler"

Underneath that the endorsement of Charles Dersch, and then the stamp of the Security Bank of New York and the Fourth National Bank of New York.

Q. Now, did you also get a check from William and Peter Hoffman? A. Philip Hoffman. William Hoffman?

Q. This check is signed William and Peter Hoffman? A. I think it is Philip.

Q. It may be Philip. I may not be reading it right. Now, look at the check and see if that is the one? A. Yes, it is Philip. Yes, sir.

Q. Who are William and Philip Hoffman? A. William Hoffman is the president of the Jacob Hoffman Brewery of New York.

Q. And he was at that time? A. Yes, sir.

Mr. Kresel.— I offer that check in evidence.

Mr. Hinman.— Let me look at it. We call the attention of the Court to the fact that it has not been shown that the endorsements show that it ever passed through the hands of William Sulzer, and the endorsements show the contrary.

Q. What became of the check, Mr. Stadler, after you received it? Show it to Mr. Stadler, please. A. Why, I requested Mr.— I endorsed it and requested Mr. Dersch to have it cashed.

Q. It was cash? A. Yes.

Mr. Kresel.— Now, I make the same statement, that I shall show that the cash went to Mr. Sulzer.

The President.— It will be admitted.

(The check offered in evidence was received and marked Exhibit M-42.)

Mr. Kresel.— This check reads as follows:

"No. 223. *New York, Oct. 12, 1912*

"HUDSON TRUST COMPANY,

"Pay to the order of Charles A. Stadler,
"Two hundred and fifty dollars.

"(Signed) WILLIAM AND PHILIP HOFFMAN."

Endorsed "Charles A. Stadler, Charles Dersch;" then the stamp of the Security Bank of New York.

Q. Now, Mr. Stadler, will you state how it happened that the Hoffman and Hawley and Luchow checks were cashed?

Mr. Hinman.— That is objected to as immaterial.

The President.— How is it material unless it was by some direction —

Mr. Kresel.— (Interrupting.) That is exactly what I am going to show.

The President.— Suppose you ask him if he had any conversation about it.

Q. Did you, before delivering any of the money derived from the Luchow, Hawley and Hoffman checks to Mr. Sulzer, did you have any conversation with him about cashing it?

Mr. Hinman.— That is objected to upon the ground that it assumes facts not proved. There is no evidence here, as I understand it, that Mr. Stadler told this to Mr. Sulzer.

By the President:

Q. Did you have any conversation with the respondent about cashing these checks or for any checks? A. Not at that time.

By Mr. Kresel:

Q. When did you have a conversation with him about cashing checks? A. When the cash money was handed over.

Q. Well, tell now whether you handed it in cash to Mr. Sulzer? A. I handed the cash to Mr. Dersch, and Mr. Dersch invited me, and I went with him, to Mr. Sulzer's house, and it was handed over to Mr. Sulzer.

Q. You and Dersch went to Mr. Sulzer's house where? A. On Second avenue and Fifteenth street.

Q. And you say that there Mr. Dersch handed to Mr. Sulzer how much money? A. If my memory is correct, Mr. Dersch went there twice; the fact is, just as soon as I received any money, I handed it to Mr. Dersch to take it down to Mr. Sulzer, and then subsequently when I got these checks they were cashed, and I think it was on a Sunday morning we went down and saw Mr. Sulzer, and there handed him the money.

Q. How much? A. The second time I don't know; in the neighborhood of $800, $900.

Q. $800 or $900? A. I don't remember exactly.

Q. Well, now, the check of Hoffman is for $250? A. Yes.

Q. The Hawley check is for $250, and the Luchow check is for $200, and you have testified that all three of these checks were cashed? A. Yes, sir.

Q. Now, was the amount — the total amount of those three

checks handed to Mr. Sulzer on that Sunday morning visit? A. Yes, sir.

Q. Personally to Mr. Sulzer? A. Yes, sir.

Q. Now, state what conversation there was between Mr. Sulzer on the one hand and yourself and Mr. Dersch on the other? A. Mr. Sulzer appreciated the efforts I had made in his behalf, and thanked me for it. I also informed him at the time that I had made a trip through the State for him, and he thanked me for that, and said that everything else that I might do or could do for him I should not leave undone.

Q. Did you at that time — was there any conversation between you at that time as to where the money came from that you were handing him at that time? A. I informed Mr. Sulzer of every one that I received any money from, and requested him kindly to acknowledge it.

Q. Acknowledge it to whom? A. To the parties that had given it to me.

Q. In other words, you told Mr. Sulzer at that time the name of the person that had made a contribution and the amount of it?

Mr. Marshall.— I object to that as repetition and leading. There is no necessity of leading the witness where it is contrary to the rules of the Supreme Court.

Mr. Kresel.— It was not made plain when he gave the names.

The President.— You may ask it.

Q. Is that correct? A. That is correct.

Q. And in addition to that, you asked him to make acknowledgment direct to the contributors? A. I did.

Q. Well, now, was there anything said upon that occasion by Mr. Sulzer to you with regard to cash or checks? A. I think not.

Q. When was it, on what occasion?

The President.— Was there any occasion, witness, on which he spoke to you about the subject of cash instead of checks, or anything of a similar kind or nature?

The Witness.— I would have to say something in addition to that. The fact of cashing those checks came about at the request

made to me by Mr. Dersch. Mr. Dersch, who is here, informed me —

Mr. Hinman (Interrupting).— That is objected to.

Mr. Kresel.— Don't tell us that.

The President.— Objection sustained.

Q. I understood from a previous answer you had made that at some time or other there was some talk between yourself and Mr. Sulzer with regard to cashing some of these checks. Now, I am trying to get from you that talk. A. Mr. Dersch remarked —

Mr. Marshall (interrupting).— I object to Mr. Dersch's remark.

The President.— I think the witness means to tell you what occurred.

By the President:

Q. Mr. Witness, did you have any personal talk with the respondent Sulzer on the subject of getting cash instead of checks? A. Yes, sir.

Q. Well, then, will you not tell what he said to you personally, that you heard? A. He answered the question — he answered Mr. Dersch, who remarked to him at the time that these checks were cashed, and Mr. Dersch said, in the presence of Mr. Sulzer, that Mr. Sulzer had requested it, and I said it didn't make any difference to me.

By Mr. Kresel:

Q. Mr. Sulzer had requested what? A. That he preferred to have cash to checks.

Q. Now, in addition to these five checks that you obtained, did you personally give any money of your own to Mr. Sulzer? A. Counselor, I am in doubt about it.

Q. You are in doubt about that? A. Yes, sir; I contributed money that I know never went through Mr. Sulzer's hands.

Q. No, I mean directly to Mr. Sulzer? A. I will not swear that I did.

Q. Very well. Now, then, will you tell the Court what you did with the Doelger check when you got that money? A. Why, that was given to Mr. Dersch, and Mr. Dersch handed it over to Mr. Sulzer.

By Mr. Herrick:

Q. In your presence? A. Yes, sir.

By Mr. Kresel:

Q. And the Elias check, your impression is that that is direct — A. (Interrupting). That is my impression.

Q. (Continuing). To Mr. Sulzer? A. Yes.

Q. Now, let me ask you, Mr. Stadler, to try — take your mind back to the visits that you made to Mr. Sulzer's office and Mr. Sulzer's house — and tell us what the total amount of cash was that you handed over to him, or that Mr. Dersch handed over to him in your presence? A. I think the total amounts to about $1,400, yet I may be in error; it might be perhaps only $1,300; I don't think it is over $1,400.

Q. And did you tell Mr. Sulzer at the time when you handed over these moneys where you got them from? A. I did.

Q. And did you tell him what they were given for? A. I told him they were contributions that I had requested from my friends towards his campaign, and I got it, and here it is. I am sorry I was ever brought here.

Q. Now, Senator, during the course of the campaign did you write any letters to Mr. Sulzer? A. I think I wrote him one letter.

Q. One letter? A. Yes, sir.

Q. Do you remember the date? A. I do not.

Q. Will you look at this paper which I show you and see whether that refreshes your recollection as to the date of the letter that you wrote? A. I really cannot.

Q. Was it about the date of that letter? A. I could not tell.

Q. You notice that the letter that I handed you purports to be a response to a letter of yours? A. Yes, sir.

Q. Is that the letter that you are speaking of as having written to Mr. Sulzer? A. No, I think I must have written another one a little later on.

Mr. Kresel.— Very well. Now, will the gentlemen on the other side please produce the original letters from Mr. Stadler to Mr. Sulzer?

Mr. Herrick.— We have not got it.

Mr. Marshall.— We know of no such letter.

Mr. Kresel.— I will give a notice to produce, if your Honors please.

Q. Did you keep copies of letters that you wrote to Mr. Sulzer? A. No, sir.

Q. Will you state to the Court the substance of what you wrote to Mr. Sulzer in the first letter? A. Regarding the letter that is just shown me, dated, I think, November 4th, I cannot remember what my letter was. I do not remember. The only letter I do remember writing to Mr. Sulzer was subsequently regarding the editor of a newspaper who had been very active and who wanted me to intercede for him for the purpose of getting some of the advertising of the State and I endorsed the application and I sent that to the Governor-elect.

Q. I was not trying to get that letter. I was directing my inquiries to letters that you wrote to Mr. Sulzer about these various contributions? A. I wrote a letter — let me see — yes, I wrote a letter to Mr. Sulzer I think, about the acknowledgment.

Q. What about the acknowledgment? A. Acknowledging the amount of money that he received from the various parties from whom I had received the money.

By the President:

Q. As I understand your statement, you mean that you wrote to him that he should acknowledge to these various parties their contributions? A. Yes, your Honor.

By Mr. Kresel:

Q. Now, I show you four letters and ask you whether you received those four letters from Mr. Sulzer? A. Yes.

Mr. Kresel.— I offer those in evidence.

Mr. Herrick.— Let us see them.

Mr. Hinman.— If your Honor please, I did not get the question that was last asked the witness and his answer; did he say he received them?

The President.— He said he received those four letters from the respondent.

Mr. Hinman.— I object to the form of the question if I may, or rather to the letters in so far as the question assumes further than that he received these letters. I do not know about the signatures to them and I do not assume the witness undertakes to say they are signed by William Sulzer.

Mr. Kresel.— Let me inquire of the witness.

Q. Senator, did you receive these letters through the mail? A. I did.

Mr. Kresel.— Now, I offer them.

Mr. Herrick.— No objection.

(Four letters offered in evidence received and marked Exhibits M-43, M-44, M-45 and M-46, respectively.)

Mr. Kresel.— Taking the letters up in the order of their dates, the first one, Exhibit M-43, is on the stationery of the Committee on Foreign Affairs, House of Representatives, and reads as follows:

"*115 Broadway, New York, October 11, 1912*

"*Charles A. Stadler, Esq., care American Malting Company, Buffalo, New York:*

"My Dear Mr. Stadler.— Many thanks for your good wishes and congratulation. You are a good friend of mine and I certainly appreciate all you say. You can help very much in the campaign.

"With best wishes for your health and success, believe me,

"Very sincerely your friend,

"William Sulzer."

The next letter is Exhibit 44 and is dated November 4, 1912, likewise on the stationery of the Committee on Foreign Affairs and reads as follows:

"*Hon. Charles A. Stadler, foot of East 63rd Street, New York City:*

"My Dear Senator.— Your letter was duly received. Many thanks for all you have done in my behalf. I certainly appreciate it. With best wishes, believe me,

"Very sincerely your friend,

"William Sulzer."

Exhibit 46 is likewise on the stationery of the Committee of Foreign Affairs and reads as follows:

"*115 Broadway, New York, November 7, 1912.*

"*Hon. Charles A. Stadler, foot of East 63rd Street, New York City:*

"My Dear Senator.— Many thanks for your kind telegram of congratulations and good wishes. I certainly appreciate all you say and all that you did. Believe me, as ever,

"Very sincerely your friend,

"William Sulzer."

The last one, Exhibit M-45, is on the stationery of the House of Representatives, United States, Washington, D. C.:

"*115 Broadway, New York, November 15, 1912*

"*Hon. Charles A. Stadler, foot of 63rd Street and East River, New York City:*

"My Dear Mr. Stadler.— Many thanks for your congratulations and good wishes. I certainly appreciate all you say. With best wishes, believe me, as ever,

"Sincerely yours,

"William Sulzer."

That is all.

Mr. Hinman.— No questions.

Mr. Marshall.— That is all. No questions.

Mr. Herrick.— Have you got any more important letters of that kind?

The Witness.— I did not know I had them.

(Witness excused.)

Mr. Kresel.— Mr. Dersch.

CHARLES DERSCH, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Where do you reside? A. 222 East 29th street, New York City.

Q. Your occupation is what? A. Salesman for the American Malting Company.

Q. That is the corporation of which the last witness is the president? A. Yes, sir.

Q. Do you know the respondent, Governor Sulzer? A. I do.

Q. Did you see him in the fall of 1912 subsequent to his nomination? A. I did.

Q. Where? A. At his office, 115 Broadway.

Q. Did you go there to congratulate him? A. No, sir, he was not then nominated as yet.

Q. I asked you if you saw him after his nomination? A. I thought you asked prior.

Q. No, I used the word subsequent. A. I did.

Q. I will not go before his nomination. I care nothing about that. After his nomination did you see him? A. I did.

Q. At his office? A. I saw him at his house on 2d avenue and 11th street.

Q. Was that in October? A. Why no, that was after he was elected. You asked after his election.

The President.— No, after he was nominated.

The Witness.—After he was nominated? Yes, I saw him then and afterward.

Q. About the 15th of October? A. Around about that time.

The President.— Before the election, during the period called the election campaign?

The Witness.— Exactly, your Honor. During that time.

Q. On the 15th or about that, of October? A. Yes, sir.

Q. You saw him at his house? A. Saw him at his house.

Q. Did you have anything with you at the time in the way of checks? A. I had some money with me at the time.

Q. This is the first occasion you saw him after his nomination? A. At that time.

Q. Did you not have with you two checks at that time? A. I believe I delivered the two checks at his office 115 Broadway and delivered the money at his house.

Q. We will get over to his office. What two checks did you have with you when you saw him at his office? A. I cannot remember.

Q. You have signed a statement here, haven't you? A. I have.

Q. And you — A. I didn't at the time I signed the statement, I think I mentioned I didn't know which two checks were. I thought one, to the best of my knowledge, was the Doelger check. Which the other one was, I don't know. I wish you would call my attention to it.

Q. That is the statement you signed, isn't it? (Handing statement to witness.) A. Yes.

Q. You took the pains to initial the bottom of each page? A. By request I did that.

Q. Never mind. You initialed it, didn't you? A. I did.

Q. You knew the contents of that when you signed it? A. I read it, yes, sir.

Q. Start at October 15th and read the next five lines.

Mr. Marshall.— Do you mean aloud?

Mr. Stanchfield.— To himself.

The President.— What?

Mr. Marshall.— I simply wanted to know if the witness is called upon to read that aloud.

Mr. Stanchfield.— No. I simply want him to read the next five lines to himself after October 15th.

The President.— Of course he can read it to refresh his recollection. You cannot read it to impeach him.

Mr. Stanchfield.— No, I didn't offer it for any such purpose.

The President.— That is what I understood. You simply offered it to refresh his recollection.

The Witness.— I knew one was the Doelger check and the other —

Q. I will ask you. You have read what I requested you to read? A. Just those two lines, yes, sir.

Q. On the 15th of October when you saw Governor Sulzer did you have with you two checks? A. Yes, sir.

Q. The Doelger check for $250 and the Elias check for $100? A. That is what I thought I had at the time when I made that statement. I presume it was the Elias check. There were two checks.

Q. One for $250 and one for $100? A. Yes, sir.

Q. Are those the two checks in Exhibits 30 and 34 that you had? A. They were in an envelope and I handed them to the Governor, not seeing the checks.

Q. You did not see the checks? A. No, sir. They were handed to me in an envelope. I was merely acting in the capacity of messenger.

Q. Did you see them before you went to see the Governor? A. I didn't.

Q. Did you tell Mr. Sulzer at that time what you had been instructed to say to him with reference to those checks? A. I just merely told him the senator gave me those two checks to bring down to him. He thought they were very nice.

Q. Is that all you said to him? A. That is all that time at his house.

Q. Just take your paper again and read three or four lines more.

Mr. Herrick.— May I ask a few preliminary questions at this stage?

Mr. Stanchfield.— I object to that. Let us go on.

The Witness.— That is all I say there; there were two checks, to the best of my recollection; that is all I spoke of.

Mr. Herrick.— I want to know about this before he is examined to refresh his recollection.

The President.— I suppose the witness can refresh his recollection by anything?

Mr. Stanchfield.— Yes.

Mr. Herrick.— I understand that to be true, but it depends upon what it is from.

Mr. Stanchfield.— I think a judge of the Court of Appeals once remarked a witness might refresh his recollection by looking at a barn door.

The President.— Only certain papers are competent to be put in evidence, but he may refresh his recollection from any. It is only for that purpose.

Mr. Herrick.— It may be of some consequence to us to know what he is refreshing his recollection from.

The President.— He can find that out after cross-examination.

Q. Did you read through the statement I showed you? A. Yes. I just say I offered the Governor two checks at his office which were given to me by Senator Stadler to deliver to him.

Q. For what purpose? A. Well —

Mr. Herrick.— One moment. I object to that.

The Witness.— I don't know.

Q. What did you tell —

The President.— What did you tell Mr. Sulzer?

The Witness.— I told Mr. Sulzer there were two checks sent down by Mr. Stadler for me to give to him, which he thanked the senator for through me.

Q. For what purpose did you tell Mr. Sulzer you brought those checks?

Mr. Herrick.— We object to that. It assumes he told him it was for some purpose.

Mr. Stanchfield.— Look at the statement again.

Mr. Herrick.— We object to this method of cross-examination.

The President.— I think it is proper.

Mr. Herrick.— He can't refresh his recollection —

The President.— He may do so.

The Witness.— Even if I did use the word "campaign" no doubt it was used for that purpose.

Mr. Herrick.— We ask that that be stricken out; no doubt it was used for that purpose.

Q. There is no doubt of the purpose. I ask you what you said to Mr. Sulzer about those two checks? A. I merely said, as I said before, that I handed these two checks to Mr. Sulzer and told him Senator Stadler asked me to bring them to him. They were enclosed in an envelope. If I did use the word "campaign"—

Mr. Herrick.— We object to that. It does not appear you used it.

Q. I didn't ask you that. I ask you to read what you signed and initialed and then tell me what you said to Governor Sulzer those checks were for. That is what I want you to tell me. A. I merely stated this. I gave you my answer.

The President.— Now, what did you say they were for?

The Witness.— I said for campaign purposes, that they were for campaign purposes.

Mr. Stanchfield.— Very well. That is what I want.

Q. Now, you handed those checks to Governor Sulzer, did you not? A. I did, sir.

Q. What did he say after you handed them to him? A. He told me to thank the senator for it.

Q. Well, go on, what else? A. That was all. I left his office.

Q. Read the bottom of that page and the top of the next one. (Witness does as directed.) A. Well—

Q. Now, tell me what Governor Sulzer said when you handed him those checks? A. He thanked me and told me to thank the senator for it.

Q. What else? A. I don't know of anything else. I left the office after that.

Mr. Herrick.— Now, Mr. President, may I be permitted to ask a few questions about this time? It eeems to me this is a most extraordinary way of examining the witness.

Mr. Stanchfield.— If your Honor please —

The President.— I think it comes within the rule.

Mr. Stanchfield.— If your Honor please, if Judge Herrick persists in wanting an explanation of why I am pursuing this method I am perfectly willing to give it to him. I am endeavoring not to.

Mr. Herrick.—Very carefully.

Mr. Stanchfield.— I will tell it if you keep at it.

Q. I want you to read those four lines. A. Oh, yes, but this was after —

Q. Never mind whether it was after or before. A. I know, but you —

Q. What else did Governor Sulzer say to you? A. To whom?

Q. To you, with reference to future collections; what did he say to you? A. Oh, well — you asked me about the checks and I told you about them. When you get down to that, I will tell you about that.

Q. What did he say about future collections? A. He asked

me if I got any more checks to be kind enough to have them cashed.

Q. Precisely. A. But you didn't ask me that question, sir.

Q. Did you subsequently see Senator Stadler after you left Mr. Sulzer's office? A. I did, sir.

Q. Did you deliver Governor Sulzer's message to him, with reference to getting cash in the future? A. I did, sir.

Q. Now, later, about the 29th of October, did you get another envelope from Senator Stadler? A. I did, sir; the date I cannot remember, but thereabouts.

Q. The latter part of October? A. The latter part of October.

Q. What did that envelope contain? A. Some money.

Q. How much? A. To the best of my knowledge about $700.

Q. Was it in cash? A. In bills; yes, sir.

Q. What did you do with that envelope, with the $700 in bills in it? A. Brought it to the Governor's house.

Q. Where? A. On Second avenue and Eleventh street.

Q. Did you see the Governor there? A. I cannot remember whether the Governor was there, but his wife was there and she took it and put it in the desk.

Q. Do you recollect with any certainty whether the Governor was there? A. I cannot recall, and I think my statement says that too.

Q. What day of the week was that? A. That is something I cannot remember. We were there on Sunday morning, but on that occasion I don't remember that I brought any money.

Q. Just look at that statement where I am pointing, "I delivered." Do you now want to cling to your statement that you delivered the cash to Mrs. Sulzer? A. I said Mrs. Sulzer. I don't remember whether Mr. Sulzer was there and I so said at the time.

Q. I ask you to read that statement to refresh your recollection and then tell this Court to whom you delivered that cash. A. I said at the office at the time —

Q. No, no —

The President— No, that is not the question.

Q. After reading that, to whom will you now say you delivered that cash?

The President.—That is it. That is the question.

The Witness.— I believe both were there. Now, whether I handed it to Mr. Sulzer or to Mrs. Sulzer I don't remember, but I know they took the cash I brought up to the house; admitting then it was Mr. Sulzer —

Q. Very well. I don't want you to admit anything.

Mr. Herrick.— I ask to have that stricken out.

The President.— One moment; ask your questions, counsel.

Mr. Stanchfield.— If there was anything improper I withdraw it, but I say I did not ask him to admit anything.

Mr. Herrick.— He consented to having it stricken out.

Mr. Stanchfield.— Surely, we consent to striking it out.

The Witness.— To the best of my knowledge it was Mrs. Sulzer.

Mr. Herrick.— It was not a play between us. It was a consent that something be stricken out.

The President.— I beg your pardon. It was my defective hearing that caused me to misunderstand.

Q. I call your attention once more to that page which you initialed. Are you reading the few lines that you signed there with reference to the delivery of this cash? A. Yes.

Q. Now, with that in your mind fresh as to just what you wrote there, whom will you now swear under your oath you gave that cash to? A. At the time this was made —

The President.— That is not the question. You have read it.

The Witness.— I cannot remember to whom I handed the money at the time, whether to Mr. Sulzer or Mrs. Sulzer. I believe they were both there at the house and Mrs. Sulzer took the money and laid it in the desk.

Q. In that statement do you make any reference to Mrs. Sulzer?

Mr. Herrick.— One moment.

The President.— Objection sustained.

Q. Your statement now is, with that before you, that you gave it to either Mrs. Sulzer or Mr. Sulzer.

Mr. Herrick.— He has just said that Mrs. Sulzer took it in her hand and put it in the desk.

Q. Did you say Mr. Sulzer was there? A. I said at the time when I made this statement that I believe that he was there at the time.

Q. What do you say now? A. I cannot recall it really, whether he was there or not, but I believe he was there at the time, but I know I handed the money, and I know the words she said to him, if you will permit me to use the words she said to him.

Q. What I am interested in is what you did with the money? A. I handed it to either of them at Mr. Sulzer's house on Sunday morning. I could not remember the date, for it is not there; I cannot recall now. You have my statement there, and this might refresh it if you show it to me. If I made that statement—

Q. You have read it, haven't you? A. When?

Q. Now. A. Just now. I read that line there, yes.

Q. Was Senator Stadler with you at that time? A. To the best of my knowledge, I believe not, no.

Q. Did you go there on another Sunday with Senator Stadler? A. We were there together, one Sunday morning.

Q. How much money did you give Mr. Sulzer upon the Sunday morning that you were there with the senator? A. There were only two occasions. On one occasion I brought the checks and that was at his office, and the other occasion was when I brought the $700; those were three checks which I had cashed, and I brought him the money. I do not know whether the senator was there with me or not. There was no other occasion I brought him any money.

Q. On the Sunday when you were there with the senator, did the senator hand him any money? A. No, sir, not to my knowledge.

Q. Were you sitting here while he was on the stand? A. Over here, yes, sir.

Q. Did you hear him testify? A. Yes.

Q. Did you hear him say that he did give him money on that Sunday morning? A. He said that I handed him the money on one occasion, the two checks I brought, and the three checks were cashed, that is the best of my knowledge. Those are the only two instances I know of.

Q. On the occasion when Senator Stadler says that on Sunday morning that you handed Mr. Sulzer this money, is he mistaken about it?

Mr. Hinman.— Objected to.

The President.— Objection sustained.

Q. You take the position now, if I understand you, that you say the one occasion that you gave Mr. Sulzer this $700, if that was the correct amount, in cash?

Mr. Hinman.— Objected to upon the ground that the witness has already stated that he could not be there and cannot testify that he gave it to Mr. Sulzer, and his recollection is he gave it to Mrs. Sulzer.

The President.— The witness' statement, as I understand it, was that there were only two occasions, one when he gave him two checks, which was at his office, and the other at the house where he gave the money, he says, or at least the physical possession of it was given to Mrs. Sulzer.

The Witness.— Yes, sir.

The President.— He cannot swear positively whether Mr. Sulzer was there or not, but his recollection is he was there.

By the President:

Q. Is that what you said? A. Yes, sir.

By Mr. Stanchfield:

Q. You were never there with Senator Stadler, according to your recollection, on but one Sunday morning? A. Yes, sir.

Q. On but one Sunday morning? A. That is all, to the best of my knowledge, yes, sir.

Q. Are you perfectly sure that you were at Mr. Sulzer's house with Senator Stadler on one Sunday morning? A. Yes, sir.

Q. You are sure of that? A. Yes, sir, I am sure of that.

Mr. Stanchfield.— That is all.

Cross-examination by Mr. Hinman:

Q. Mr. Dersch, counsel in examining you, has called your attention to a statement for the purpose of refreshing your recollection. Where was that statement prepared? A. At the office of Mr. Kresel, at the board of managers.

Q. Mr. Kresel, one of the counsel here in this case? A. Counsel of the board of managers.

Q. In what office were you when that statement was prepared? A. In the private office of Mr. Kresel.

Q. Who was present there in the private office of Mr. Kresel when the statement was prepared? A. Mr. Kresel and the stenographer.

Q. Do you know the name of the stenographer? A. I do not, sir.

Q. Do you recall now whether it was a man or a woman? A. A lady.

Q. And by the office of Mr. Kresel you mean his law office in New York? A. No, at the board of managers' office, in a side room, a separate room.

Q. In referring to the board of managers, do you mean the board of managers of the Assembly of the State of New York? A. Of the Assembly, of which Mr. Kresel is counsel.

Q. When was that statement prepared? A. Oh, about two weeks ago, to the best of my knowledge; I can't recall the date.

Q. Was anyone present during any part of the preparation of the statement besides Mr. Kresel, the stenographer and yourself? A. No, sir. Only one interruption of Mr. Levy running in and coming out, that was all, nothing said.

Q. What Levy is that?

The President.— Was that Mr. Aaron Levy?

The Witness.— Mr. Aaron Levy.

Q. A member of the Assembly? A. Yes, sir. He asked where he could get something good to eat.

Q. Asked you? A. Asked Mr. Kresel.

Q. How long a time was consumed in the preparation of the statement? A. Oh, I should say half hour, half hour or thereabouts; I didn't time it.

Q. Was what you said there at that time, when the statement was being prepared, and what Mr. Kresel said, all taken down in shorthand, or don't you know? A. In shorthand, yes, sir.

Q. Do you know whether or not everything that was said from the time you went in that office till you left the office was incorporated in this statement? A. To the best of my knowledge the stenographer took it down; of course I can't say.

Q. Do you know whether or not everything that Mr. Kresel said to you on that occasion was incorporated in this statement? A. I noticed the stenographer taking down everything he had said and I had answered.

Q. What appears in the stenographer's notes, of course you do not know? A. I do not after — what I merely signed.

The President.— Is that all?

Mr. Hinman.— I think so.

Mr. Stanchfield.— On that cross-examination, if the Presiding Judge please, I offer this statement in evidence.

The President.— Excluded unless — well, I beg your pardon.

Mr. Herrick.— We object to it.

The President.—You object to it?

Mr. Herrick.—Yes.

The President.—Excluded.

By Senator Thompson:

Q. Mr. Witness, what did you go to Mr. Sulzer's house on the Sunday morning for? I understood you to say you went there

on Sunday morning? A. To bring him the money which I had the care of — the checks cashed at my bank for him, when he asked me to kindly do so, and asked the senator.

Q. Senator Stadler? A. To the best of my knowledge and belief, yes. And if you want me to, I probably may add what he asked me at the time, that he needed it for traveling expenses, and the words of Mrs. Sulzer I will also state.

Redirect examination by Mr. Stanchfield:

Q. Mr. Dersch, you were subpoenaed before the Frawley commttee, were you not? A. Yes, sir.

Q. Now, when you went down to the office of the board of managers — A. (Interrupting)—You asked me about the Frawley committee first.

Q. I will withdraw that for the time being. A. There was nobody there except Mr. Richards and myself.

Q. You went down to the office of the board of managers? A. Yes, sir.

Q. And you there saw Mr. Kresel? A. I did, sir.

Q. Did you ask that you be given a private hearing? A. I didn't, but Mr. Kresel asked me.

Q. Asked you? A. Yes sir.

Q. Well, put it either way. And you then made a statement, did you not? A. I did, sir.

Q. And the paper that I have asked you to look at over and over again is signed by you? A. True.

Q. It is the statement that you made? A. Yes.

Q. Each individual page of it is initialed by you, isn't it? A. Well, the lower end.

(Counsel passes paper to witness).

Q. Each individual page of it is initialed by you? A. It is, only it was the words that were put to me; probably they may have changed it a little; the substance of it is there.

Q. You do not in any way challenge the correctness of that statement, do you?

Mr. Herrick.— Wait a minute. That is objected to. It is incompetent and immaterial.

Mr. Stanchfield.— I submit it is entirely competent and material.

The President.— I think the question should be, so far as he knew at the time, whether that was correctly taken down.

Mr. Herrick.— He can't state as to whether it was correctly taken down; he didn't know what the stenographer took down.

The President.— Probably I used inaccurate language. I mean does that paper given to the witness show—

Mr. Hinman.— If the paper will be handed up to the Court, the Court will observe that it is not all questions and answers, and the witness testified that he was asked questions and made answers.

The President.— I suppose that was written in narrative form.

Mr. Stanchfield.— Yes.

Q. Mr. Dersch, there isn't anything in that statement to which I have called your attention that you did not sign?

Mr. Herrick.— Wait a minute, that is objected to.

By the President:

Q. Witness, was that read to you after the stenographer had taken it from his notes, and put it in narrative form? A. It was shown to me after the stenographer had it typewritten and I read it over in a hurry at the office of Mr. Kresel, and signed it.

Q. Was it correct, as far as you know? A. To the best of my knowledge, yes.

By Mr. Stanchfield:

Q. You dropped a remark that you forgot to say either here or in that statement, that Mr. Sulzer said he needed that money for traveling expenses? A. Yes, I forgot to mention that in there.

Q. Traveling expenses in the campaign? A. Why, he said about cashing the checks that he could use the cash, he could use the cash as he goes along in traveling expenses.

Q. During his campaign? A. During his campaign, yes, sir.

Mr. Stanchfield.—Yes. That is all.

The Witness.— If you want to know what she said, I will tell you.

Mr. Stanchfield.—When I want to know I will ask you.

By Senator Wagner:

Q. Was that on the Sunday morning that you were at his office? A. To the best of my knowledge, yes.

Q. Then you did talk to him on that Sunday morning? A. Oh, sure. Well, as I said, I don't remember whether I handed him — it was asked whether I handed him the money or her.

Q. You talked to him about it on that Sunday morning, about the money? A. About the money, that is right.

Mr. Stanchfield.— That is all, Mr. Dersch, by common consent.

Mr. Stanchfield.— I call Mr. Coler.

BIRD S. COLER, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Coler, where do you reside? A. Brooklyn, New York.

Q. You will have to speak pretty distinctly so that this entire Court may hear you. You say you live in Brooklyn, New York? A. Yes, sir.

Q. And your occupation now is, and for the past ten or fifteen years has been what? A. Banker.

Q. With an office in the city of New York? A. Yes, sir.

Q. Are you acquainted with William Sulzer, the respondent in this proceeding? A. I am.

Q. Have you known quite some years? A. Yes, a long while.

Q. Now, where were you, Mr. Coler, at the time of his nomination for Governor in the fall of 1912? A. What time was he nominated?

Q. The 2d day of October, and the election was on the 6th of the succeeding November.

Mr. Hinman.— The 5th.

Mr. Stanchfield.— The 5th.

A. I was either in New York or on my way to New Mexico.

Q. Did you learn of his nomination? A. I did.

Q. Did you write him a letter in regard to it? A. Around the 24th of October I wrote him a letter enclosing a check for $100 contribution.

Q. From where did you write that letter, Mr. Coler? A. The city of Santa Fe, New Mexico.

Mr. Stanchfield.— Will you produce that letter?

Mr. Herrick.— We have not got it.

Q. Did you keep any copy of the letter? A. No, sir.

Q. Will you tell us from memory, as well as you are able, its contents? A. As near as I can recollect it, it stated that he was sure of being elected, and that he did not need, that there was not use for much money during the campaign.

Q. Is that the substance of it? A. Yes, sir.

Q. Did you receive any acknowledgment from it or of it? A. I did.

Q. Did you preserve the answer? A. No, I did not.

Q. I hand you a check — A. I did not receive any acknowledgment of the check; I received a letter thanking me for my kind words of encouragement.

Q. A great many others got that. Is that the check you enclosed to him (showing check)? A. It is.

Q. Signed by you? A. Yes, sir.

Mr. Stanchfield.— I offer it in evidence.

Mr. Kresel.— It is in evidence already.

Mr. Stanchfield.—Very well. The check is marked in evidence, Exhibit 37, in the form of a check:

"New York, October 24th, 1912.

W. N. COLER & COMPANY, BANKERS

No. 43 Cedar Street.

Pay to the order of William Sulzer.....$100.00

One hundred .....dollars

BIRD S. COLER."

Endorsed: William Sulzer and Louis A. Sarecky.

Mr. Marshall.— Is it a rubber stamp endorsement?

Mr. Stanchfield.— I don't know whether it is or not. You can see it. That is all.

The President.—Any cross-examination?

Mr. Hinman.— I want to ask a question or two.

Cross-examination by Mr. Hinman:

Q. Mr. Coler, had your attention been called to the contents of the letter which you wrote to Mr. Sulzer, on or about October 24, 1912, since the time you wrote it, until recently? A. No.

Q. I ask you whether or not you are giving or undertaking to give, the language that was used in that letter, which you wrote him on the 24th of October, or simply giving your recollection of the substance of it? A. Practically the language; it was very short.

Q. Did you dictate it in Santa Fe? A. I was giving some other contributions at the time, and I wrote it in the rooms of the Democratic state committee of the state of New Mexico.

Q. Have you caused search to be made for the letter which you say you received thanking you for your congratulations? A. I have.

Q. And have you been able to find it? A. No, I haven't. I did not lay any particular stress on it at the time.

Q. I will ask you, Mr. Coler, to look at this check and tell me if you can whether the endorsement "William Sulzer" appears to be affixed there with a rubber stamp?

The President.— That appears for itself, doesn't it?

Mr. Hinman.— I think so. It was read off and stated as though it was an endorsement of William Sulzer.

Judge Bartlett.— We all have facsimiles of it that indicate the character of the endorsement on it.

Mr. Kresel.— We call Mr. Fixman.

EZEKIEL FIXMAN, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Fixman, are you an attorney and counselor at law? A. I am.

Q. And you are practicing your profession in the city of New York? A. I am.

Q. Do you know Mr. A. H. Stoiber? A. I do.

Q. Where is Mr. Stoiber? A. In Paris, France.

Q. Has he been living abroad for some time? A. Since 1897.

Q. Prior to going abroad were you in business with him? A. I was.

Q. And have you charge of his business in America while he is abroad? A. I have.

Q. And you have a power of attorney to draw checks on his account in the city of New York? A. I have.

Q. Do you know Governor Sulzer? A. I do.

Q. You have known him for how many years? A. Over 30 years.

Q. During the month of October, 1912, did you send Mr. Sulzer a check? A. I did.

Q. Did you send him a letter with that check? A. I did.

Q. Have you a copy of the letter? A. I have.

Q. May I have that copy, please? A. You may.

Mr. Kresel.— Mr. Marshall, have you the original letter.

Mr. Marshall.— I have no letters.

Mr. Kresel.— We have given notice to produce. I offer in evidence the copy of this letter.

(Letter offered in evidence, admitted and marked Exhibit M-47.)

Mr. Kresel.— I will read the letter in a minute.

Q. Enclosing in the letter, did you send a check? A. I did.

Q. I show you managers' Exhibit 36. Is that the check? A. It is.

Mr. Kresel.— May it please the Court, the check reads as follows:

" New York, Oct. 19, 1912

THE CHEMICAL NATIONAL BANK OF NEW YORK

Pay to the order of Hon. William Sulzer, $100.00 One hundred dollars.

A. H. STOIBER,
per EZEKIEL FIXMAN, Atty."

Q. Is that correct? A. That is correct.

Mr. Kresel: Endorsed: William Sulzer, and then L. A. Sarecky, and deposited in the Mutual Alliance Trust Company. The letter reads as follows:

"October 19, 1912

Hon. William Sulzer, 115 Broadway, New York City:

DEAR MR. SULZER.— I am in receipt of a letter dated at Paris October 10th, 1912, from Mr. A. H. Stoiber, in which he requests me to send you his check for $100 to your order, together with the enclosed letter. I take pleasure in enclosing the check and letter addressed to you, and beg to express to you my best wishes for your election as Governor.

Very sincerely yours,
EZEKIEL FIXMAN."

Mr. Kresel.— Now, gentlemen, may I have the letter which was enclosed with this check and letter?

Mr. Marshall.— We have no letter.

Mr. Kresel.— Have you a copy of the letter which you enclosed, as coming from Mr. Stoiber? A. I did not keep the letter. I did not see the letter, except the letter was enclosed in a sealed envelope which I enclosed with my letter and check.

Q. Have you the letter, Mr. Fixman, which you received from Mr. Stoiber, directing you to send this $100 check? A. I have not.

The President. — How is that material? He did it. Mr. Sulzer got the money. That is the main point.

Q. Did you receive any letter from Mr. Sulzer acknowledging the receipt of this money? A. Not from Mr. Sulzer. I did receive a letter from Mr. Sarecky.

Q. Mr. Sarecky? A. Yes.

Q. Have you that letter? A. I have.

Q. Let me have it? A. (Producing letter.)

Mr. Kresel.— I offer that letter in evidence.

(Letter offered in evidence, received and marked Exhibit M-48.)

Mr. Kresel.— This letter is written on the stationery of the Committee on Foreign Affairs, and reads as follows:

"115 Broadway, New York, October 21, 1912

Ezekiel Fixman, Esq., 55 Liberty street, New York City:

My Dear Mr. Fixman.— Your letter to Congressman Sulzer enclosing check for $100 as a contribution from Mr. Stoiber, was duly received by me during the Congressman's absence on a campaign trip up the State. I know Mr. Sulzer appreciates this very much indeed. I want to thank you also for your good wishes. Hope you will write Mr. Stoiber to this effect. With best wishes believe me,

Very sincerely yours,

Louis A. Sarecky,

Secretary."

Mr. Kresel.— You may examine.

Mr. Hinman.—No cross-examination.

Ralph Trier, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Where do you reside? A. New York City.

Q. What is your occupation? A. I am vice president of the Frank V. Strauss Company.

Q. In the fall of 1912, did you receive any communication from Mr. Strauss with reference to a contribution to the candidacy of Mr. Sulzer's gubernatorial campaign?

Mr. Herrick.— We object to the form of that question.

Mr. Stanchfield.— I have not endeavored in that question — it is preliminary — it does characterize the communication. I will withdraw it.

Q. Did you receive a cable from Mr. Strauss? A. I did.

Q. Will you produce it, please? A. Yes.

Q. Is the cablegram which you hand me the cable you received from him at that time from Paris? A. It is.

Mr. Stanchfield.— I offer that in evidence.

(Cablegram offered in evidence, received and marked Exhibit M-49.)

Mr. Stanchfield.— "Paris, Program"—

Q. "Program" is the cablegraphic address of Frank V. Strauss & Company? A. It is.

Q. F. V. Strauss & Company is a concern engaged in the publication of theatrical programs? A. Yes.

Mr. Stanchfield.— "Paris, Program, N. Y., Give Herman Sulzer, candidate Governor one thousand dollars with my compliments. Have cabled him can have more."

Q. Pursuant to that authorization by cable, did you write Mr. Sulzer enclosing a check? A. I did.

Mr. Stanchfield.— Will you produce the letter?

Mr. Herrick.— We have no letter.

Q. Have you a copy of the letter? A. I have.

Q. Produce it, please. A. (Witness refers to copy of letter in letterpress copy book.)

Mr. Stanchfield.— We offer in evidence this letter.

(Letter offered in evidence received and marked Exhibit M-50.)

Mr. Stanchfield.— I will read it.

"*October 5th, 1912*

Mr. William Sulzer, 175 Second avenue, City:

DEAR SIR.— We are in receipt of a cable from Mr. Strauss instructing us to send you the enclosed check for $1,000 with his heartiest congratulations and best wishes for your success. Will you please acknowledge receipt to us, and oblige,

Yours very truly,
FRANK V. STRAUSS & COMPANY."

Q. Have you the check that was enclosed in that letter? A. No. I have not. That check was lost.

Q. That check you say was lost? A. Yes.

Q. Did you subsequently receive from someone representing Mr. Sulzer a notice to the effect that no check had been enclosed in that letter? A. I did.

Q. Thereupon did you stop payment of it at the bank? A. We did.

Q. Thereupon, did you make out a duplicate check? A. Yes, sir.

Q. And mail it to Governor Sulzer? A. Yes, sir.

Q. I hand you that check and ask you whether or no the check I now show you is the duplicate check? A. Yes, sir.

Mr. Stanchfield.— I offer that in evidence.

(Check offered in evidence, received and marked Exhibit M-51.)

Duplicate.

Mr. Stanchfield.— "FRANK V. STRAUSS & COMPANY,
THEATRE PROGRAM ADVERTISING

New York, October 5th, 1912

Duplicate.

(There is some advertising matter on one end of the check which I will not read.)

Pay to the order of William Sulzer ———— One thousand dollars.

FRANK V. STRAUSS & Co."

Certified at the Metropolitan Bank. Endorsed "William Sulzer," and "Pay to the order of the Manhattan Company, New York, Boyer, Griswold & Co."

Q. That check was paid in due course? A. It surely was.

Q. And received back by you from your bank among your vouchers? A. It was.

Q. Did you receive any acknowledgment from that check? A. We did not, although we found out it was received on account of it being the second check sent.

Q. But you got no formal acknowledgment of it? A. No, sir.

By the President:

Q. You know it was paid? A. We telephoned to find out this time whether it was received.

Q. And you got an answer over the telephone? A. Yes, sir.

Q. From whom, the bank of Mr. Sulzer? A. It was a woman's voice; she represented herself to be Mrs. Sulzer.

Mr. Stanchfield.— That is all.

Cross-examination by Mr. Hinman:

Q. Do you recall, Mr. Trier, that is, are you able to tell us whether this first check of $1,000 was sent through the mail by you or by messenger? A. It was sent through the mail.

Q. Can you tell to what address it was sent? A. To 175 Second avenue.

Q. And was that the residence of William Sulzer and his wife at that time? A. The telephone book gave it so.

Q. How did you learn, if you can tell me, that the first check was not inclosed with the letter? A. We were telephoned to that effect.

Q. By whom? A. By a woman who said she was Mrs. Sulzer.

Q. The second check, the one that is now produced here, the duplicate check, was that also sent to the same address? A. It was.

Q. By mail? A. By mail; yes, sir.

Q. Do you know whether or not Mrs. Sulzer is related to Frank V. Strauss by marriage? A. There is some relationship, yes, through marriage.

Mr. Hinman.— That is all.

Senator Thompson.— By request, I want to ask this witness one question.

By Senator Thompson:

Q. Did you make an entry in the books of the Strauss Company of this payment of $1,000 at the time? A. There certainly was.

Q. Have you got the entry here? A. I have the check book.

Q. Will you state what it was charged to, or what it was charged for? A. You can see for yourself, if you look. It is right here (referring to check book). It says here, "William Sulzer, $1,000, account of F. V. Strauss."

Q. Was there any other entry made on the books of the concern; that is your check book stub, isn't it? A. Yes, sir.

Q. I mean on the regular books of the concern was there any entry went through them? A. An entry of a similar kind.

Q. Have you got that book with you? A. No, I was not asked to bring that.

Q. You do not recollect then what the entry is or what it is for? A. I can show you where the money has been returned to us, if you like. I can show you where the $1,000 has been returned to us through this check book.

Q. Who returned it? A. Mr. Strauss.

By Mr. Stanchfield:

Q. In other words, to clear this up, what you mean is— A. It is a personal check.

Q. That check sent to Mr. Sulzer was the check of Strauss & Co? A. Yes.

Q. And that check, in due course of time, on your books, was charged up to the personal account of Mr. Strauss? A. Yes.

Q. And it was paid by Mr. Strauss back to the corporation? A. That is it, exactly.

By Senator Thompson:

Q. Was there anything stated in the charge made to Mr. Strauss as to what the disbursement was for? A. No, sir.

Mr. Stanchfield.— It states on the original cablegram "For William Sulzer."

Mr. Marshall.— No, it does not, it says for "Herman Sulzer."

Mr. Stanchfield.— I will read it, "Give Herman Sulzer, candidate for governor, one thousand dollars." Do you mean to take the point that it was not meant for William Sulzer?

Mr. Herrick.— No.

Mr. Hinman.— Just one question.

By Mr. Hinman:

Q. When was this $1,000 repaid by Frank V. Strauss to Frank V. Strauss & Company, if you can tell me, about the date? A. I have the exact date; I have the entry.

By the President:

Q. Was it repaid, or was it charged to his account? A. It was repaid.

Q. Then find the entry. A. It was repaid to us on October 16, 1912.

By Mr. Hinman:

Q. Where is Frank V. Strauss now? A. I had a cable from him that he is in Paris.

Q. How long ago did you receive that cable? A. I think it was last Monday.

Q. How long since Frank V. Strauss has been in the United States, as far as you know? A. Since about the middle of last May.

Q. He has been away since that time? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Mr. Brackett.— Mr. Jacob H. Schiff, recalled.

JACOB H. SCHIFF, recalled.

Direct examination by Mr. Brackett:

Q. You stated in your testimony yesterday that you had given all of the conversation between you and William Sulzer with

respect to the $2,500 check, and the purposes for which it was given; am I correct? A. I think I have.

Q. How long had you known William Sulzer? A. Quite a number of years.

Q. Had he frequently been in your office? A. Not very.

Q. Occasionally? A. Occasionally.

Q. I think you said that he gave you the name of Louis A. Sarecky? A. He did.

Q. How did he come to do that? How did the name of Sarecky come to be mentioned? A. When Mr. Sulzer said draw a check to the order of Louis A. Sarecky.

Q. Did he tell you who Sarecky was? A. He did not.

Q. Did he give it to you on a piece of paper so you had the spelling of the name? A. I am not sure of that.

Q. Did he tell you whether Sarecky had any relations, business or otherwise, with him? A. He did not.

Q. Did he give you — A. May I answer the question just before a little more fully so as to be entirely correct? The name of Louis A. Sarecky was put down on a piece of paper. Who wrote that down I do not know, whether one of my stenographers or Mr. Sulzer, I cannot say. I have lately looked at that piece of paper, having by accident discovered it, and I find the name was not plainly spelled, and I wrote across it exactly how it was spelled. Probably Mr. Sulzer told me how it was spelled.

Q. Well, have you the piece of paper here? A. I have torn it up.

Q. When? A. About two weeks ago I should say.

Q. Since you knew that this subject was under investigation? A. I paid no attention to that piece of paper. I accidentally discovered it and tore it up.

The President.— You cannot prove anything against your witness.

Mr. Brackett.— I have no wish to.

Q. Either Mr. Sulzer wrote the name or he told how the name was spelled and you wrote it or he signed? A. That is correct.

Q. That is one of the ways? A. Yes.

Q. Did he state to you any reason why he wanted the check made to Sarecky? A. He did not.

Q. Or why he did not want it to himself? A. He did not.

Q. Did you ask him why? A. No.

Q. Had you ever given Mr. Sulzer checks before? A. Not that I can recollect.

Q. Do I understand you to say — no. This was after he was nominated for Governor? A. It was about the 16th of October.

Q. Was it given to him for the reason that he was a candidate for Governor? A. I suppose if he had not been a candidate for Governor that such discussion would not have come up at all.

Q. And per consequentia the check would not have been given? A. I don't know about that. I think that if Governor Sulzer had come to me at any time for a check for $2,500 I would have given it to him.

Mr. Brackett.— I ask that that be stricken out as not responsive.

Mr. Fox.— The question did not call for anything else except a conclusion. He asked him per consequentium.

The President.— The latter part of that answer does not seem to be called for.

Mr. Marshall.— Will your Honor please have the question read? It will indicate that he was calling for a conclusion. He says per consequentium.

The President.— Read the question and answer, stenographer.

(The stenographer thereupon read the question and answer referred to as follows: Q. And per consequentia, the check would not have been given? A. I don't know about that. I think that if Governor Sulzer should have come to me at any time for a check for $2,500 I would have given it to him.)

The President.— I do not think the last part answers the question. He answers he does not know.

Q. Had you heard of any change of circumstance of William Sulzer at any time previous to this $2,500 check except his nomination? A. I don't understand your question.

Mr. Brackett.— I will ask the stenographer to read it to you.

(The stenographer thereupon read the last question propounded to the witness as follows: Q. "Had you heard of any change of circumstance of William Sulzer at any time previous to this $2,500 check except his nomination?") A. What do you mean by change of circumstance?

Q. Whether he had suffered reverses or troubles of any kind except his nomination? A. I had not.

Q. You had not for at least a year prior to this time given him any checks, and you do not recall that you ever did? A. I do not recall that I ever gave him any money of any kind.

Q. You knew that he was at the time a member of Congress? A. I did, I do.

Q. And you did then? A. I did then.

Q. And you knew that as a member of Congress he received a salary? A. I know that members of Congress receive salaries.

Mr. Marshall.— May it please the Court, I object to this in this investigation. It is entirely immaterial. It is apparent that it is foreign to the general inquiry.

The President.— He has told you he knew. There is no use of asking the witness whether a member did not receive it; he did not receive the salary if he did not draw it. It is a matter of common knowledge that members of Congress receive salaries.

Mr. Brackett.— You mean it is common knowledge that they receive a salary?

The President.—Yes.

Mr. Brackett.— I don't know exactly what it is, but it is a matter of common knowledge, I am sure.

The President.— You can find it out very readily.

Q. Is the notation on the front of the check, on the corner, and which you say was not put on until the year — some time in the year 1913 — just prior to the time that the check went to Mr. Richards, the counsel for the Frawley committee, in your own handwriting? A. It is.

Q. Did you intend to put on there truthfully and correctly the purpose for which the check had been drawn?

Mr. Marshall.— May it please the Court, this is cross-examination of the witness and it is a repetition of what was gone into on the examination yesterday. Mr. Kresel asked the same question, and the whole thing has been gone over. This is a reopening of the case.

The President.— Part of the question is a repetition. But you are allowed to ask the question. You cannot impeach any witness of course; you cannot ask discrediting questons; you cannot show that he has made other declarations elsewhere. But you can really cross-examine him.

Mr. Marshall.— It is merely repetition, that is all.

Mr. Brackett.— The stenographer will now read the question.

Judge Bartlett.— Mr. President, may I just call attention to the fact that all these questions and matters were really gone over yesterday in almost exactly the same question. Mr. Brackett, you will find —

The President.— He may answer the question, as it has been put, and then they need not go any further.

Mr. Brackett.— What page?

Judge Bartlett.— On pages 489 and 490. The witness made almost the same answer.

Mr. Marshall.— May I repeat that question?

The President.— The question as asked him may as well be answered. That is the quickest way to dispose of it. It can do no harm. Repeat the question to the witness, Mr. Stenographer.

(The stenographer read the question as follows: "Did you intend to put on there truthfully and correctly exactly the purpose for which the check had been drawn?")

The Witness.— I refer you to my answer of yesterday and let it stand as the answer for today.

The President.— Just say now, did you or didn't you?

The Witness.— This was written.

Q. Yes or no, Mr. Schiff.

The President.— No, he cannot answer yes or no. He can't say whether it was written —

The Witness.— I would like to have the answer of yesterday read. Can I have the privilege to have the answer of yesterday read?

The President.— No, I think you can answer without referring to that. Just answer the question yes or no.

The Witness.— Repeat the question again please.

The President.— You are not limited to yes or no. Repeat the question, Mr. Stenographer.

(The question was read by the stenographer as follows: "Did you intend to put on there truthfully and correctly exactly the purpose for which the check had been drawn?")

The Witness.— I don't believe I can answer the question correctly without answering fuller than by yes or no.

The President.— I say you are not limited to answering yes or no. You are not limited to that answer yes or no.

The Witness.— I must answer yes or no?

The President.— No, it is not necessary you should answer yes or no. You can answer it fully.

The Witness.— I can answer it in full?

The President.— Yes, that is what I say.

The Witness.— All right. Mr. Richards was standing at my desk, and asked for the check. I promised to give him the check. As I explained yesterday that was not my own check. It was the check of my firm, Kuhn, Loeb & Company, and since there might be no misunderstanding and no misinterpretation why that

was the check of Kuhn, Loeb & Company I put on such notation in a quick way and gave it to Mr. Richards.

Q. Was this check in any way charged on the books of Kuhn, Loeb & Company? A. It was charged to my account.

The President.— That is your personal account?

The Witness.— To my personal account.

Q. Was it then charged or was the $2,500 then charged in your personal books in any way? A. It was charged by Kuhn, Loeb & Company to my personal account and by reason of this it passed into my books as expenses.

Q. Well, was it charged in your personal books? A. As my expense account.

Q. Your own expense account? A. My own expense account.

Q. Was there any notation of the purpose for which it had gone on your own personal books? A. Except that it had gone to William Sulzer, no doubt, or to Louis A. Sarecky. There certainly was no explanation.

Q. No explanation of the purpose for which it went? A. There was not.

Q. Do you speak from recollection or from reasoning? A. I speak from the way I know my books are kept.

Q. Then, knowing the system, you reason that there was no entry made of the reason it was given to Mr. Sulzer? A. That is correct.

Q. Although it is without any examination of the entry itself? A. It is.

Q. You have stated that Mr. Sulzer could have had $2,500 at any time?

The President.— That was stricken out at your request, Senator.

Mr. Brackett.— I will not recite them. I will ask the question directly.

Q. Mr. Sulzer couldn't get $3,000 on request, could he? A. He asked me as I have stated yesterday, I think, "will you not give any more," and I said no, and he was satisfied.

Q. Then $2,500 was the limit, was it? A. That I felt at that time.

Q. Had you had any feeling on the subject before that time? A. I had not.

Q. As to the amount? A. I had not.

The President.—Well, I think you can pass that.

Mr. Brackett.—A single word.

Q. Was there anything said by you in that conversation as a reason why you did not give him more than $2,500, other than you have stated? A. Yes.

Q. State it. A. I suppose Mr. Kresel, to whom I very freely told all that happened, abused my confidence and said from such question, but I will tell it notwithstanding.

Mr. Brackett.— I move to strike out.

Mr. Marshall.—That is a proper answer.

Mr. Brackett.— I should be permitted to state for the record, that Mr. Kresel has told me nothing with respect to it but it is a chance shot.

The President.— You can argue it.

Mr. Brackett.— I want to see whether there is anything further said. That is all.

The President.— Then call his attention. What was the answer? Read the answer, Mr. Stenographer.

(The answer was read by the stenographer as follows: "I suppose Mr. Kresel, to whom I very freely told all that happened, abused my confidence"—)

The President.— Strike that out.

Witness, what the counsel asks you is whether there is any other reason why you refused to make it any more than $2,500, other than that which you have already said? A. Yes.

The President.— Did you give him any reason when he said he wanted more, or would like more?

The Witness.— I stated to Mr. Sulzer the reason.

The President.— That is what we want, what you said to Mr. Sulzer.

The Witness.— I must answer that a little more fully if the Court will permit me.

The President.—Yes.

The Witness.— Mr. Kresel —

The President.—Witness, keep right to the point of what transpired between you and Mr. Sulzer. You cannot go beyond that or outside of it.

The Witness.— I shall have to tell the entire circumstances. I cannot without injustice to myself answer without giving the full circumstances.

The President.— You must confine yourself. You cannot give it any fuller than the Court allows you. Tell what transpired between you and Mr. Sulzer on that subject.

Mr. Marshall.— May it please the Court, I do not think the question put by the Court was the question asked by Mr. Brackett.

Mr. Brackett.— Precisely.

Mr. Marshall.— I think Mr. Brackett's question called for a reason.

Mr. Brackett.— Or for anything further said.

The President.— The last question was, Was anything further said? or I must have misunderstood it.

Mr. Brackett.— That is right.

Mr. Marshall.— I would like to have Mr. Brackett's question read.

(The stenographer read the question as follows:

"Was anything said by you in that conversaton as a reason why you did not give him more than $2,500, other than you have stated?")

The President.— That is the point, what he said in the conversation.

The Witness.— I cannot answer it.

The President.—You have already said that he wanted more or asked for more.

The President.— You told him no, or you would not give him any more. Was there anything more than that said? Did you tell him why you wouldn't give him more?

The Witness.— Yes.

The President.— What did you tell him?

The Witness.— I told him some time before he was nominated Mr. Kresel and Mr. Einstein, an attorney of New York, had called on me and asked me to interest myself in Mr. Straus' campaign, and since I said I would, provided Mr. Sulzer was not nominated, since if Mr. Sulzer was nominated, I would have to vote for Mr. Sulzer, because I thought he was entitled to my support and that I had given $1,000 to Mr. Kresel and Mr. Einstein for the Straus campaign, and as I probably would not get that back I couldn't give him any more.

Q. Was that all that was said on the subject? A. That was all that was said on the subject.

Q. Was the $1,000 given to the Straus campaign after Mr. Straus had been nominated? A. After Mr. Straus had been nominated.

Mr. Marshall.— No questions.

Mr. Kresel.— That is all, Mr. Witness.

Senator Murtaugh.— I would like to know why the witness wrote the words "campaign expenses" on the check.

The President.— I think he has been asked that, but you may ask him again. Why did you write campaign expenses? The senator wants to know.

The Witness.— It was just a note of expression; a hurriedly-made note of expression.

Senator Duhamel.— I would like to ask if he wrote the memorandum voluntarily or if anyone suggested it?

The Witness.— I wrote it upon my own inspiration, you might say.

Senator Walters.— May I ask whether the $1,000 given to the Straus fund was for campaign expenses?

The Witness.— It was.

Senator Sage.— May I ask that that answer regarding the $1,000 given to the Straus campaign fund and what followed it be read by the stenographer. A good many did not hear it.

The President.— Read it, Mr. Stenographer.

(The stenographer read as follows: "I told him some time before he was nominated Mr. Kresel and Mr. Einstein, an attorney of New York, had called on me and asked me to interest myself in Mr. Straus' campaign, and I said I would, provided Mr. Sulzer was not nominated, since if Mr. Sulzer was nominated, I would have to vote for Mr. Sulzer, because I thought he was entitled to my support and that I had given $1,000 to Mr. Kresel and Mr. Einstein for the Straus campaign, and as I probably would not get that back I couldn't give him any more.")

The President.— Is that all you wish, Senator Sage?

Senator Sage.— Yes.

Senator Walters.— I would like to know how the witness differentiates between the contribution to Straus and the contribution to the Sulzer campaign or to Governor Sulzer?

The Witness.— I don't differentiate. Mr. Straus might have used that $1,000 for whatever he pleased, if he wanted to.

By Senator Foley:

Q. Mr. Schiff, I would like to know if you had any communication from Governor Sulzer since this matter was first disclosed in

the last two months? A. I had not, except that he invited me to come to Albany, which I declined.

Q. How long ago was that? A. Last time I should say was about four or five weeks ago. To be correct, his secretary invited me to come to Albany to see Mrs. Sulzer who was ill, which I declined. I have seen Governor Sulzer only once since he has been in office.

Q. Was that after the disclosure of the contribution by you to him? A. It was. I received that letter, you mean?

Q. Yes. A. That was only a few weeks ago.

Q. Have you a copy of that letter with you? A. I have not, but I can tell you what was in it exactly, almost exactly.

Q. I understand. Did you communicate or did anybody communicate with you on behalf of Mr. Sulzer in New York City and discuss this mater of the contribution by you? A. Yes.

Q. And who was that? A. In the first place two of the counsel came in, Mr. Richards and Mr. Kresel, and discussed it, and then this gentleman (indicating), Mr. Frankenstein, came in to see me and said that if I would accept it Governor Sulzer —

The President.— That is hardly necessary, unless the senator wants what transpired.

Mr. Marshall.— We do not object.

The Witness.—If I would accept it Governor Sulzer would be very glad to refund to me this $2,500, to which I replied that I could not now, since the matter was under investigation, permit the status to be changed.

By Senator Foley:

Q. You refused to accept a refund of the $2,500? A. I didn't.

Q. I say, you refused to accept a refund of the $2,500? A. It was never tendered to me. The question was only asked whether I would accept it, to which I said no.

Q. I understand the offer was made you to refund it. A. I cannot say such a definite offer was made. I was asked whether I would accept it. In exact words, so far as I remember they were "Governor Sulzer would like to repay you this $2,500," and to that I answered I could not accept it now since this matter is under investigation.

Q. Did you talk to anybody else connected with the defence of Governor Sulzer? A. No.

Q. Nobody else at all? A. Nobody else at all.

By Senator Thompson:

Q. I want to ask who is Mr. Frankenstein of whom he spoke, who talked to him; what relation did he have with Governor Sulzer? A. I have never seen Mr. Frankenstein before, and when he came to my office I asked him the very same question, what relation he had to Governor Sulzer and he said to me he was his former law partner.

Q. Yesterday you said at the time you contributed $2,500 you had no doubt that Governor Sulzer was to be elected. Now, did you have any ideas on the subject when you contributed to Mr. Straus in reference to his election? A. As I said before, I believed, when Mr. Straus' friends came to me and asked me to interest myself in this campaign, Mr. Straus being a personal friend of mine, Governor Sulzer had not been nominated, Governor Sulzer was not nominated for several weeks to come, I only had heard that Mr. Sulzer was a candidate for the nomination and I felt if he was nominated I would have to support him.

Q. Just one more question. Were those contributions for the purpose of establishing a more intimate relationship between yourself and the persons to whom they were contributed? A. When Mr. Straus was nominated, it was my hope that he would be elected. But when, after several weeks, Governor Sulzer was nominated, my hopes changed; I felt that Governor Sulzer was, as far as I was concerned, better entitled to election, and my hopes were that he would be elected, and feeling strongly of his merits, I had very little doubt that he would be elected.

The President.— Call your next witness.

SIMON UHLMANN, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Uhlmann, what is your business? A. I am retired. I

was formerly in the hop business, but I have retired from the business.

Judge Collin.— Cannot that answer be read, Mr. President?

The President.— Mr. Witness, try and tell it yourself, your business?

The Witness.— Yes. I was formerly in the hop business, from 1861 until 1907. Then I retired from the business.

Q. Well, are you now connected with any brewing business? A. Yes.

Q. And what brewery are you connected with? A. With the Hinckel Brewing Company.

Q. Where is that located? A. At Albany.

Q. Albany. You know Governor Sulzer? A. I do.

Q. On the 18th of October, 1912, did you go to see Governor Sulzer at his office? A. I did.

Q. In New York City? A. Yes.

Q. Now, will you state what conversation you had with him then? A. I went to his office. My conversation was a brief one. I congratulated him on his nomination and hoped that he would be elected.

Q. What else did you say to him? A. I said I would make a contribution, and that was all I did say.

Q. A contribution to what?

Mr. Fox.— What did you say?

Mr. Kresel.— That is right. What did you say about the contribution?

Q. What did you say about the contribution? A. I said I would contribute to his campaign fund.

Q. Well, what did he say in answer to that? A. He told me to see his secretary.

Q. Well, did you subsequently see his secretary? A. After I had remained in the office, I don't think I was there more than five minutes, I stepped in the outer office and there I saw a young man, and I asked him to tell me who his secretary was, for I never seen him before, and he mentioned the name to me.

Q. And then did you go back to your office? A. I did.

Q. And did you write a letter? A. I instructed my secretary to write a letter to him.

Q. And did you draw a check? A. I did.

Q. Now, have you the letter with you? Have you a copy of the letter? A. I have got the copy book here.

Q. Yes. Now, please turn to the copy of the letter. A. (Witness produces book and examines same.) I have it.

Q. To whom is that letter addressed? A. To Louis A. Sarecky.

Q. And is that the name that was given to you as Governor Sulzer's secretary? A. Yes, sir.

Mr. Kresel.— Now, I offer this letter in evidence. Shall I read it?

Mr. Herrick.— Read it in.

Mr. Kresel.—(Reading)

October 18, 1912

"*Mr. Louis A. Sarecky, No. 115 Broadway, New York:*

My Dear Sir.— Enclosed please find my check to your order for $300, which is my voluntary contribution to your campaign fund.

Very truly yours,

Simon Uhlmann."

Now, have that marked.

(The letter offered in evidence was received and marked Exhibit M-52.)

The Witness.— It is signed by my initial by my secretary, I think.

Mr. Kresel.— I did not see the initial.

Mr. Marshall.— May I look at that?

(Exhibit M-52 is passed to counsel.)

Q. What did you say, Mr. Uhlmann, about initials here? A. It is — I instructed my secretary to write that letter, which is not signed by me, but it is signed "Simon Uhlmann, per M. M."

The President.— Signed in your name, by your secretary, by your authority?

The Witness.— Yes, sir.

Q. Now, I show you Exhibit 33, and ask you whether that is the check that went with the letter (counsel passes paper to witness). A. (After examining) That is the check.

Mr. Kresel.—This check reads:

"*New York, October 18, 1912*

THE STANDARD TRUST COMPANY OF NEW YORK

Pay to the order of Louis A. Sarecky

Three hundred dollars.

SIMON UHLMANN."

Indorsed: "Louis A. Sarecky." Deposited in the Mutual Alliance Trust Company.

By the President:

That came back to you through the bank? A. Yes, sir.

By Mr. Kresel:

Q. Did you receive any acknowledgment of this check, a letter? A. I did not.

Mr. Kresel.— That is all.

Mr. Herrick.— No questions.

The President.— That is all, Mr. Uhlmann.

Mr. Kresel.— I call Judge Conlon.

LEWIS J. CONLON, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Judge Conlon, where do you reside? A. New York City.

Q. And your profession is what? A. I am a lawyer.

Q. You were for quite a period of years a judge in the city of New York? A. Yes, sir.

Q. On what bench were you a judge? A. The city court.

Q. Are you acquainted with the respondent, William Sulzer? A. Yes, sir.

Q. You have known him how long? A. Thirty years — about thirty years.

Q. And over all that period of time have your relations with him been friendly and intimate? A. Yes, sir.

Q. And do you live in the — and vote in the same election district in which he resides? A. Why, I did. Not latterly. I did at one time.

Q. And have you often, when he has been a candidate for office, presented his name at conventions in nomination? A. I have.

Q. So that your acquaintance with him is intimate, and your relations are more than ordinarily friendly? A. I was friendly, and have been during all that period.

Q. Now, did you see Governor Sulzer after his nomination for Governor? A. Yes.

Q. Had you previous to your interview with him, had a talk with any of your friends in regard to raising funds to aid him in his campaign?

Mr. Herrick.— One moment, we object to that, raising contributions. Leave out the purpose.

The President.— What is the objection?

Mr. Marshall.— That is objected to as leading, and as giving the conversation with other parties in the absence of Governor Sulzer.

The President.— If he testifies to conversations with him, it is competent.

Mr. Stanchfield.— Previous to his conversation with Governor Sulzer I asked that question.

The President.— I do not see that his conversation with other persons is competent.

Q. Did you see Governor Sulzer after his nomination? A. Yes, sir.

Q. Where first?

The President.— Don't misunderstand. You can go back of the nomination of the respondent, as to conversations had with him.

Mr. Stanchfield.— I follow your Honor's ruling.

The Witness.— Repeat the question.

Mr. Stanchfield.— The stenographer will read it to you.

(The stenographer thereupon read the question referred to as follows: Q. Where first?)

A. I think at the Manhattan Club when he came down from the convention.

Q. You are a member of the Manhattan Club, Judge? A. Yes, sir.

Q. And is Mr. Abram I. Elkus a member of the Manhattan Club? A. He is.

Q. Mr. William F. McCombs? A. Yes, sir.

Q. John Lynn? A. Yes.

Q. Lyman A. Spalding? A. Yes.

Q. Edward F. O'Dwyer? A. Yes, sir.

Q. John W. Coxe? A. Yes, sir.

Q. Is Mr. Morgenthau a member? A. Yes, I think he is a member now.

Q. And is Theodore W. Myers? A. I beg your pardon?

Q. Is Theodore W. Myers? A. Yes.

Q. The Manhattan Club is generally recognized as a Democratic club, is it not? A. Yes, it is.

Q. My adversary, Judge Herrick, is a distinguished member of it? A. He is.

Q. Now, did you have any talk with Governor Sulzer at the Manhattan Club, upon the occasion to which I am calling your attention, on the subject of making some collection for him to aid him in his campaign? A. Not at the Manhattan Club.

Q. Where first did you have a talk with him on the subject of collecting money for him for his campaign? A. At his house.

Mr. Herrick.— That assumes that he had a conversation to raise money for the campaign.

The President.— The last question was almost an answer to that effect. You can ask it.

The Witness.— At his house.

Q. About when was that, Judge? A. Why, it was probably seven or eight or ten days after the convention, immediately following the convention.

Q. At that time, will you state what conversation you had with him on that subject, that is the subject of collecting checks for his campaign? A. I went down to his house, Second avenue and 11th street, in the morning, about ten o'clock, and they were getting breakfast, his wife was getting his breakfast, and I went to his room, and we shook hands and talked over things generally and about the campaign, the possibilities of success and the line of campaign that he intended to undertake, and he told me he was going up state, going to make a state wide campaign, and going to make it as active as he could during the time he had; and we talked in that way for a time. I then told him that I had brought him some money to assist him in his work, and I then gave him a check for $200, signed by Mark Potter, payable to my order, and endorsed by me, I think; that is my recollection of it.

Q. Will you look at the check, Judge, of which you are now speaking, and see if you are not mistaken about giving him that check. (Counsel passes paper to witness.) I want to call your attention to it to keep you from error. Didn't you in fact get that cashed and give him the cash? A. (After examining)— No.

Q. Well, look at the endorsement on it? A. Well, that is my endorsement.

Q. Whom is it payable to, whose order? A. Nobody else, it was my order.

Q. Whom was it payable to? A. It was payable to me, and I endorsed it.

Q. Did you give it to the Governor in that form? A. Yes, sir, I gave it to him in that form. I never cashed it.

Q. What is your bank? A. The Nassau bank. It never went through my bank.

Q. I care nothing about the fact. I thought you had it cashed, from the endorsement. A. No, I gave the check —

Q. (Interrupting) Very well. A. May I continue?

Q. Yes. A. And at the same time, I had another check, and I am a little in doubt now whether it was Lyman Spalding's check for $100, or John Delehanty's check for $110. My impression as to it is that it was John Delehanty's check for $110. I may, however, be mistaken about that.

Mr. Stanchfield.— I offer in evidence this check.

The President.— Admitted.

Mr. Hinman.— Before it is admitted, I would like to see it.

(Paper is passed to counsel.)

(The check offered in evidence was received and marked Exhibit M-53.)

Q. Now, will you produce, Judge, the check of Mr. Delehanty. Haven't you — A. (Interrupting) I had it in my pocket yesterday. Mr. Delehanty came here today and I returned it to him.

Q. Is he here at this time? A. He is at this time, and it is with him.

Q. Will you state at this time — we will get it for you. A. Yes. I brought it up here with me, and I returned it to Mr. Delehanty.

Mr. Stanchfield.— Your Honor will pardon me until I can get that check.

Q. I hand you a check, Judge Conlon, and ask you whether or no that is the check that Mr. John Delehanty — that you gave to Mr. Sulzer, on the occasion with reference to which you are now speaking? (Counsel passes paper to witness.) A. (After examining) It is.

Mr. Stanchfield.— I offer that in evidence.

(The check offered in evidence was received and marked Exhibit M-54.)

Mr. Stanchfield.— I will read it in evidence:

"*New York, October 14, 1912*

BANK OF THE METROPOLIS

Pay to Lewis J. Conlon or order $110.

JOHN DELAHANTY."

Q. You handed that to Mr. Sulzer at the same time? A. I think I did. I handed it to him, and I think that was the occasion.

By the President:

Q. It is either that, you think, or Lyman Spalding's? A. Yes, either one, but I handed that I know.

By Mr. Stanchfield:

Q. Did you at any time upon that occasion give him any other contribution in cash or checks other than perhaps the Spalding check? A. I gave him a $100 bill as my own contribution.

Q. In cash? A. In cash.

Q. Anything more did you give him at that time? A. Not on that occasion.

Q. You state that you told him at the time as I recollect it, that you gave it to aid him? A. Yes, sir.

Q. What did you say to him on that subject? A. Well, it was a general conversation. I do not recall exactly what I said. I spoke in that general way, that I brought something to aid him or help him out, terms like that.

Q. Did you qualify that expression in any way that you remember now? A. I think I mentioned that I believed he was short of funds, or I thought he was, and that I intended to do what I could to collect some money for him, and that I hoped to get more, and he thanked me for what I had done and for what I expected to do.

Q. Let me call your attention, if that is all you recall, to a statement here, and ask you if you will read it to refresh your recollection (handing paper to witness)? A. That is substantially as I testified.

Q. What else did you say to him as to the purpose for which you were collecting and giving him this money? A. It was to help him along with the necessary work of the campaign that he was entering upon. I did not limit the use of it in any way, nor did I attempt to direct him what he should do with it.

Q. Judge, I call your attention to another check, the so-called Spalding check? A. Yes, sir, that is the check that I gave Mr. Sulzer.

Mr. Stanchfield.— I offer that in evidence.

(Check offered in evidence received and marked Exhibit M-55.)

Q. While they are examining that check, Judge, you stated unqualifiedly that this conversation was with Mr. and not Mrs. Sulzer? A. It was with Mr. and Mrs. Sulzer, they were both in the room, they were more or less in and out; she was preparing breakfast, but he sat at the breakfast table and I left it on the table.

Q. And the conversation you have related was with him? A. With him.

Mr. Stanchfield.— I will read Exhibit 55:

"*New York, October 10, 1912*

FULTON TRUST COMPANY OF NEW YORK

Pay to the order of William Sulzer $100.

LYMAN A. SPALDING,"

with the indorsement "William Sulzer" upon the back of it.

Q. Now, have you related all the conversation that you can recall with Mr. Sulzer at the time of the delivery of the three checks that I have offered in evidence and the $100 in cash? A. I think I have.

Q. Did you at that time have in your possession — I am asking you now to refresh your recollection and because Mr. Lynn thinks it is the fact — did you have with you at the time John Lynn's check for $500? A. No, I do not think I ever handled that check at all.

Q. You know Mr. Lynn; Mr. Lynn is a man you know very well? A. I know him very well.

Q. And a member of the Manhattan Club? A. Yes, and here now as a witness.

Q. I hand you a check for $500, and ask you whether or no that is John Lynn's signature to that check? A. It is; it is all in his handwriting, I think.

Q. It is all in his handwriting? A. Yes, sir.

Q. And it is indorsed by Mr. Sulzer? A. It is indorsed by Mr. Sulzer — purports to be.

Q. Are you quite certain in your recollection that you did not have that check with you at the time? A. I am quite certain; I know I did not have it when I visited his home.

Q. Did you have it later? A. No.

Q. As a matter of recollection? A. No, I never had that check.

Mr. Stanchfield.— I will offer that check while I have it here.

(Check offered in evidence received and marked Exhibit M-56.)

Mr. Stanchfield.— I will read this check:

"October 10, 1912

GUARANTY TRUST COMPANY OF NEW YORK

Pay to the order of William Sulzer $500.

JOHN LYNN."

Endorsed, " William Sulzer."

The President.— Adjourn court.

The Clerk.— All witnesses summoned to appear by either side shall be here tomorrow morning at 10 o'clock.

Thereupon at 5 p. m. the Court adjourned to meet again on Friday, September 26, 1913, at 10 a. m.

EXHIBIT MARKED IN EVIDENCE DURING TODAY'S PROCEEDINGS.

EXHIBIT M-12.

Deposited by

WILLIAM SULZER

IN

THE FARMERS LOAN AND TRUST CO.

New York, Oct. 8, 1912

	Dollars	Cents
Bills	$1,400	00
Specie	.....	.....
Checks, 103	1,000	00
Checks, 107	1,000	00
Checks, N. C	500	00
Checks, Eq	250	00
Checks, 113	250	00
	$4,400	00
D. I. R.		

EXHIBIT M-15.

Deposited by

WILLIAM SULZER

IN

THE FARMERS LOAN AND TRUST CO.

New York, Sept. 12, 1912

	Dollars	Cents
Bills	$3,500	00
Specie	.....	.....
Checks	.....	.....
D. I. R.		

EXHIBIT M-16.

Deposited by

WILLIAM SULZER

IN

THE FARMERS LOAN AND TRUST CO.

New York, Sept. 25, 1912

	Dollars	Cents
Bills	$4,000	.....
Specie	.....	.....
Checks	.....	.....
	$4,000	.....
D. I. R.		

EXHIBIT M-20.

Deposited by

WILLIAM SULZER

IN

THE FARMERS LOAN AND TRUST CO.

New York, Oct. 10, 1912

	Dollars	Cents
Bills	$2,500	00
Specie	....	..
Checks (2)	1,000	00
D. I. R.	$3,500	00

EXHIBIT M-21

Deposited by

WILLIAM SULZER

IN

THE FARMERS LOAN AND TRUST CO.

New York, Dec. 28, 1912

	Dollars	Cents
Bills	$3,000	00
Specie	....	..
Checks	....	..

EXHIBIT M-22.

Dr. William Sulzer in account with the Farmers Loan and Trust Company, Cr.

1912.					
Sept. 5.	To cash	.....	.....	.....	$5 00
6.	...	.....	.....	.....	50 00
7.	...	.....	.....	.....	75 00
7.	...	.....	.....	.....	50 00
9.	...	.....	.....	.....	4 00
9.	...	.....	.....	$8 00	.....
9.	...	.....	.....	50 00	58 00
10.	...	.....	$25 00	.....	.....
10.	...	.....	25 00	14 89	64 89
13.	...	.....	.....	.....	100 00
14.	...	.....	.....	.....	25 00
14.	...	.....	.....	.....	25 00
16.	...	.....	.....	.....	20 00
18.	...	.....	50 00	7 50	.....
18.	...	.....	25 00	50 00	132 50
19.	...	.....	.....	.....	100 00
20.	...	.....	.....	.....	50 00

1912.						
Sept.	21.	...	.....	.....	.....	$20 00
	21.	...	.....	.....	.....	25 00
	23.	...	.....	.....	.....	15 00
	23.	...	.....	.....	.....	9 00
	24.	...	.....	.....	.....	100 00
	25.	...	.....	.....	.....	50 00
	26.	...	.....	.....	.....	191 31
	26.	...	.....	.....	$10 00	.....
		...	.....	.....	66 93	76 93
		...	.....	.....	10 00	.....
	27.	...	$154 75	$25 00	.....	.....
		...	.....	100 00	150 80	440 55
		...	.....	.....	44 25	.....
	28.	...	.....	.....	165 00	209 25
	30.	...	.....	.....	.....	50 00
Oct.	1.	...	.....	.....	14 00	30 75
		...	.....	.....	16 75	.....
	3.	...	.....	.....	.....	20 00
	16.	...	.....	.....	.....	900 00
Dec.	19.	...	.....	.....	.....	75 00
	24.	...	.....	.....	.....	18 24
1913.						
March	7.	...	.....	.....	.....	254 16
Aug.	5.	...	.....	.....	.....	2,500 00
Sept.	20.	To balance.	.....	.....	.....	22,278 92
						$28,013 50

1912.						
Sept.	3.	By balance.	.....	.....	$5,112 58	.....
	3.	...	.....	.....	625 00	.....
	12.	...	.....	.....	3,500 00	.....
	19.	...	.....	.....	200 00	.....
	23.	...	.....	.....	1,253 75	.....
	25.	...	.....	.....	4,000 00	.....
Oct.	8.	...	.....	.....	4,400 00	.....
	10.	...	.....	.....	3,500 00	.....

1912.					
Dec.	1.	Interest		$61 13	
	16.			2,625 00	
	19.			1,230 43	
	28.			3,000 00	
1913.					
March	19.			616 66	
April	7.			150 00	
	15.			575 00	
	18.			416 66	
May	20.			416 66	
June	1.	Interest		330 63	
					$28,013 50
1913.					
Sept.	20.	By balance.		$22,278 92	

EXHIBIT M-26½.

Please examine and report as soon as convenient.

Mr. Louis A. Sarecky,

in account with

THE MUTUAL ALLIANCE TRUST COMPANY,

35 Wall Street.

No. 1 JJ.

Dr.			Cr.		
1912.			1912.		
Sept.	5	$2.	Aug.	31, Balance.	$435.
	5	34.	Sept.	10	93.60
	7	5.		30	34.75
	8	50.	Oct.	1	203.13
	10	67.10		5	160.
	10	25.		8	890.
	11	50.		11	1275.
	17	41.45		15	3350.
	17	20.		19	1010.

Dr.			Cr.		
1912.			1912.		
Sept.	20	$10.	Oct.	19	$25.
	21	5.		21	535.
	23	7.15		24	910.
	24	6.60		26	566.77
	26	40.		30	147.70
Oct.	1	74.80	Nov.	4	1453.33
	2	1.50		7	1475.
	3	2.30		12	400.
	3	50.		14	498.75
	3	10.		20	115.59
	5	10.		21	30.30
	7	29.75	Dec.	27	60.
	8	5.85		31	372.93
	8	10.			
	8	40.			
	10	500.			
	Forward,	$1107.70	Forward		$14,066.85

No. 2 JJ.

Dr.			Cr.		
1912.			1912.		
	Forward,	$1107.70	Forward		$14,066.85
Oct.	11	75.			
	14	1.70			
	14	20.			
	15	5.61			
	16	225.45			
	18	6.			
	18	25.10			
	18	15.			
	18	10.			
	21	16.17			
	22	369.			
	22	29.10			

Dr.		Cr.	
1912.		1912.	
Oct. 22	$14.06		
22	6.10		
22	25.		
23	31.69		
23	1.75		
23	2.50		
24	550.		
25	1250.		
25	1.80		
25	330.40		
25	330.40		
25	1252.50		
26	90.79		
26	5.57		
Forward,	$6,398.39	Forward	$14,066.85

No. 3 JJ.

Dr.		Cr.	
1912.		1912.	
Forward,	$6,398.39	Forward	$14,066.85
26	1.05		
28	6.25		
28	550.		
28	18.		
28	4.		
28	1.30		
29	14.		
29	2.70		
30	50.		
30	150.		
30	5.		
30	12.		
31	1.60		

Dr.			Cr.	
1912.			1912.	
Oct.	31	$8.75		
	31	25.		
Nov.	1	351.		
	2	500.		
	2	5.		
	4	50.		
	4	2.50		
	6	300.		
	6	10.		
	6	6.15		
	7	200.		
	7	50.		
	7	8.04		
	Forward,	$9,596.98	Forward	$14,066.85

No. 4 JJ.

Dr.			Cr.	
1912.			1912.	
	Forward,	$9,596.98	Forward	$14,066.85
Nov.	7	2.50		
	7	600.		
	7	75.		
	7	315.		
	8	75.		
	9	150.		
	9	547.79		
	9	150.		
	9	3.55		
	9	2.04		
	11	10.		
	11	20.		
	12	10.		
	13	861.50		
	13	5.		

Dr.		Cr.	
1912.		1912.	
Nov. 13	$44.		
15	60.50		
15	25.		
15	25.		
16	20.		
18	30.		
19	15.		
20	30.		
21	3.		
21	25.		
22	10.		
Forward,	$12,721.86	Forward	$14,066.85

No. 5 JJ.

Dr.		Cr.	
1912.		1912.	
Forward,	$12,721.86	Forward	$14,066.85
Nov. 23	8.		
23	4.		
25	10.		
26	10.		
26	1.50		
26	12.50		
27	5.40		
29	24.		
29	5.		
30	20.		
30	10.		
Dec. 2	30.		
3	10.		
3	18.		
4	31.42		
4	25.		
5	40.		

Dr.			Cr.	
1912.			1912.	
Dec.	6	$25.		
	9	30.		
	11	44.60		
	14	15.		
	16	5.		
	18	10.		
	19	77.50		
	21	25.		
	Forward,	$13,308.78	Forward	$14,066.85

No. 6 JJ.

Dr.			Cr.	
1912.			1912.	
	Forward,	$13,308.78	Forward	$14,066.85
Dec.	21	133.		
	27	15.		
	27	20.		
	28	28.		
	28	12.35		
	28	23.25		
	30	12.28		
	31	25.		
	Balance,	489.19		
		$14,066.85	Dec. 31, 1912...	$14,066.85
August 15, 1913.			Balance..	$489.19

I hereby certify that the foregoing statement comprising six sheets numbered 1 to 6 inclusive, each bearing my initial is a true copy of the original records.

CHARLES J. JUSTER,

Notary Public, Queens County. Certificate filed in New York County, No. 9. New York County Register's No. 5044. Commission expires March 30, 1915.

EXHIBIT M-27.

Twenty-one deposit slips in Mutual Alliance Trust Co.

DEPOSITED IN

THE

MUTUAL ALLIANCE TRUST COMPANY

of New York,

35 Wall Street.

By Louis A. Sarecky, Sept. 10, 1912.
Check $93.60.
(Stamped on face of slip — " Mutual Alliance Trust Company of New York. Credited Sep. 10, 1912. 35 Wall Street.")

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Sept. 30, 1912.
Check $34.75. (Stamped credited Sept. 30, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 1, 1912:

Check 1/10	$208 34
	21
	$208 13

(Pencil notation on slip " Treas. of U. S. Washington, D. C.")
Stamped credited Oct. 1, 1912.

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 5, 1912:

Check 1/10	$100
D	10
76	50
	$160

Ex. cash 10 cents. (Stamped credited Oct. 5, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 8, 1912:

Checks D	$50
Home Ti Co. Bklyn	60
82	10
17	25
Citizens Tr. & Saving Bank, Columbus, O., 1/10	100
111	100
40	25
3	100
45	50
81	50
D	100
45	25
45	25
45	25
Kings County Tr. Co. Bklyn	50
48	100
54	5
	$890

10/c. Ex. Cash. (Stamped credited Oct. 8, 1912.)

Deposited in Mutual Alliance Trust Company by L. A. Sarecky, Oct. 11, 1912:

Checks, 117	$100
American Trust Co., St. Louis	50
D	50
D	250
	25
	250
	50
	500
	$1,275

(Stamped credited Oct. 11, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 15, 1912:

Checks D	$250
D	100
	25
	200
	100
	50
	50
	50
Hempstead Bank	2,600
Hempstead, L. I	25
	$3,350

(Stamped credited Oct. 15.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 19, 1912:

Check, 91	$25 00

(Stamped credited Oct. 19, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 19, 1912:

(Top figures heading deposit slip $25.00 canceled with lead pencil.)

Checks:

Peter Doelger	$250 00
Hugo Hauf	10 00
J. E. Gander & Co	25 00
Nelson Smith	100 00
John Armstrong	10 00
Morris Tekulsky	50 00
Andrew M. Shaefer	40 00
James Hurley	50 00
Geo. H. Neville	50 00
David Gerber	150 00
W. F. Carrell	10 00
W. R. Dowd	15 00
McGrau Coxe	200 00
Samuel Bauman	50 00

(Total in ink canceled and lead pencil total of $1,010 supplied.)
Ex. cash 20/c.
(Stamped credited Oct. 19, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 21, 1912:

Checks:

A. Storhi 12	$100 00
W. Penney 40	50 00
Jn. Calamity B	110 00

L. Schesinger D	$200 00
E. Neufeld 77	25 00
R. J. Cassidy 45	50 00
	$535 00

(Stamped credited Oct. 21, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 24, 1912:

Checks:

S. Uhlman 167	$300 00
C. G. Fuil 45	10 00
W. H. Miller 44	250 00
R. Foster 23	250 00
W. E. Curtis 2	100 00
	$910 00

(Stamped credited Oct. 24, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 26, 1912:

Checks:

Henry Block	$100 00
Chas. Thostay	100 00
Standard Finance Co	25 00
J. H. Gardner	200 00
John B. Judson, Gloversville, N. Y	100 00
T. Schlesinger	30 26
Max Rosen	11 51
	$566 77

Ex. cash 10/c
(Stamped credited Oct. 26, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Oct. 30, 1912:

Checks:

Bird S. Coler D	$100 00
M. F. O'Doughue, Washington, D. C. Loan Tr. Co.	10 00
Therese Schlesinger	12 70
Samuel Peyser	25 00
	$147 70

Ex. cash 10/c

(Stamped credited Oct. 30, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Nov. 4, 1912:

Bank notes cash	$100 00

Checks:

Jos. W. Kay 113	50 00
L. N. Rosenbaum ¼ Nat. City Bank Seattle Wash.	100 00
J. B. Gray 1/10 Yonkers Nat. Bank	50 00
L. I. Doyle 54	100 00
B. Guawm (?) d	20 00
J. T. Gwathmey	100 00
Thos E. Rush 4	5 00
W. E. Genglus 77	25 00
C. G. Pinkney 11	200 00
F. S. Cisna Treas. W. S. 1/10	208 33
	$1,453 33

55/c Ex.

(Stamped credited Nov. 4. 1912).

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, November 7, 1912:

Bank notes	$950 00
John F. O'Brien	50 00
Daniel M. Brady	100 00
Isaac Purdy ?, Mt. Kisco, N. Y.	250 00
Joe Standfast	25 00
O. J. Gude	100 00
	$1,475 00

Ex. cash 25/c
(Stamped credited Nov. 7, 1912).

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Nov. 12, 1912:

Checks:

Treas. W. S. 1/10	$125 00
Treas. W. S. 1/10	125 00
Washington 8	150 00
	$400 00

Ex. cash 25/c
(Stamped credited Nov. 12, 1912).

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, November 14, 1912:

Checks:

Jacob A. Jacobs, Montreal	$500 00
	1 25
	$498 75

(Stamped credited Nov. 14, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Nov. 20, 1912:

Bank notes		$100 00
Checks 1/10		5 00
	D	4 01
	D	6 58
		$115 59

Ex. cash 10/c
(Stamped credited Nov. 20, 1912.)

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, November 21, 1912:

Checks 54	$7 80
45	22 50
	$30 30

(Stamped credited Nov. 21, 1912).

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Dec. 27, 1912:

Bank notes	$80 00

(Stamped credited Dec. 27, 1912).

Deposited in Mutual Alliance Trust Company by Louis A. Sarecky, Dec. 31, 1912:

Bank notes	$350 00
Checks	22 93
	$372 93

(Stamped credited Dec. 31, 1912).

EXHIBIT M-28.

No. 1670 *New York, October 31, 1912*

THE MECHANICS & METALS NATIONAL BANK

OF THE CITY OF NEW YORK.

Pay to the order of Louis Sarecky, Secretary &c,..... $500.00
Five hundred and no/100..... .....Dollars.

(Signed) THOMAS E. RUSH.

(Printed on check on left end.)
THOMAS E. RUSH.

Endorsed on back, L. A. Sarecky, Secretary. Endorsed, Pay to the order of the National Bank of Commerce Nov. 4, 1912, The Mutual Alliance Trust Company of New York at Wall Street. Also endorsed, Received through the New York Clearing House Nov. 4, 1912 Receiving Teller, Endorsements guaranteed by Natl. Bank of Commerce, of New York.

EXHIBIT M-30.

No. *New York, Oct. 10th, 1912*

METROPOLITAN TRUST COMPANY

OF THE CITY OF NEW YORK.

Pay to the order of William Sulzer.....
One hundred .....Dollars.
$100.00 (Signed) WILLIAM V. ELIAS.

(On left hand side of check) 49 Wall Street.
Endorsed on back Wm. Sulzer, L. A. Sarecky.

Endorsements on back, Received payment through the New York Clearing House Oct. 11, 1912, receiving teller, Endorsements guaranteed Nat. Bank of Commerce in New York.

Pay to the order of the National Bank of Commerce Oct. 11, 1912, The Mutual Alliance Trust Co. of New York, 35 Wall Street.

EXHIBIT M-31.

New York, Oct. 10, 1912

E. C. BENEDICT & CO.,
80 BROADWAY,

Pay to the order of Wm. Sulzer,
Two hundred and fifty.....Dollars.
$250. (Signed) E. C. BENEDICT.

Endorsed on back, Wm. Sulzer, L. A. Sarecky.

Received payment through the New York Clearing House, Oct. 14, 1912, 3rd Teller, Endorsements guaranteed Nat. Bank of Commerce in New York. Pay to the order of the National Bank of Commerce Oct. 11, 1912, the Mutual Alliance Trust Co. of New York, 35 Wall Street. Received Payment Oct. 14, 1912, E. T. Endorsements guaranteed, Nat. Bank of Commerce in New York.

EXHIBIT M-32.

No. *New York, Oct. 16, 1912*

THE GARFIELD NATIONAL BANK.
5TH AVE. & 23RD STREET.

Pay to the order of William Sulzer,.....$50.00
Fifty .....Dollars.
(Signed) MORRIS TEKULSKY.

Endorsed on back Wm. Sulzer, L. A. Sarecky. Pay to the order of the National Bank of Commerce Oct. 19, 1912, The Mutual Alliance Trust Co. of New York, 35 Wall Street. Received payment through the New York Clearing House, Oct. 19, 1912, Receiving Teller, Endorsements guaranteed, Nat. Bank of Commerce, in New York.

EXHIBIT M-33.

No. 1063. *New York, Oct. 18th, 1912*

THE STANDARD TRUST COMPANY
OF NEW YORK,
Through New York Clearing House Association.

Pay to the order of Louis A. Sarecky.....
Three hundred and 00/100.....Dollars.
$300.00 (Signed) SIMON UHLMANN.
(On left hand end) 25 Broad Street.

Endorsed on back Louis A. Sarecky. Pay to the order of the National Bank of Commerce Oct. 24, 1912, The Mutual Alliance Trust Company of New York, 35 Wall Street.

Received Payment through the New York Clearing House, Oct. 24, 1912, Mail Teller, Endorsements guaranteed Nat'l Bank of Commerce of New York.

EXHIBIT M-34.

PETER DOELGER,
LAGER BEER BREWERY.
Bottling Department.

No. 7375. *New York, Oct. 14, 1912*

Pay to the order of William Sulzer.....$250.00
Two hundred and fifty and 00/100.....Dollars.
To the Yorkville Bank. Peter Doelger,
New York. (Signed) CHARLES P. DOELGER,
Attorney.

Stamped Not over Two hundred and sixty dollars.

Endorsed on back Wm. Sulzer, L. A. Sarecky. Pay to the order of the National Bank of Commerce Oct. 19, 1912. The Mutual Alliance Trust Co. of New York, 35 Wall Street. Received payment through the New York Clearing House S. Oct. 19, 1912, Receiving Teller, Endorsements guaranteed, Nat. Bank of Commerce in New York.

EXHIBIT M-35.

No. *New York, October 9, 1912*

GUARANTY TRUST COMPANY OF NEW YORK

Pay to the order of Wm. Sulzer, ...
Five hundred ..... 00/00 ..... Dollars

$500.00. (Signed) Wm. McCombs.

Endorsed on back Wm. Sulzer. L. A. Sarecky. Pay to the order of the National Bank of Commerce, Oct. 11, 1912. The Mutual Alliance Trust Company of New York, 35 Wall Street. Received payment through the New York Clearing House, Oct. 11, 1912, Receiving Teller. Endorsements guaranteed Nat. Bank of Commerce in New York.

EXHIBIT M-36.

New York, October 19, 1912 No. 4931

THE CHEMICAL NATIONAL BANK

Pay to the order of Hon. William Sulzer.....$100.00.
One hundred 00/00.....Dollars.

(Signed) A. N. Stoiber,

New York Managing Atty.

Endorsed on back, William Sulzer, L. A. Sarecky. Pay to the order of the National Bank of Commerce, Oct. 21, 1912. The Mutual Alliance Trust Company of New York, 35 Wall Street. Received payment through New York Clearing House, Oct. 21, 1912, Receiving Teller. Endorsements guaranteed, Nat. Bank of Commerce in New York.

EXHIBIT M-37.

No. 2, Santa Fe, *New York, Oct. 24, 1912*

W. K. COLER & CO., BANKERS.

No. 43 Cedar Street.

Pay to the order of William Sulzer,

One hundred and no/100 .....Dollars.
$100.00

(Signed) BIRD S. COLER.

Stamped on face, PAID, W. H. Coler & Co., New York.

Endorsed on back, Wm. Sulzer. Louis A. Sarecky. Pay to the order of the National Bank of Commerce Oct. 30, 1912, The Mutual Alliance Trust Co. of New York, 35 Wall street.

Received Payment Oct. 31, 1912, Endorsements guaranteed, Nat. Bank of Commerce in New York.

EXHIBIT M-38.

No. 3847 *New York, Nov. 1, 1912*

MUTUAL ALLIANCE TRUST CO.

Pay to the order of William J. Sulzer,

One hundred and 00/000 ..... Dollars.
$100.00

(Signed) J. TEMPLE GWATHMEY.

Printed on left hand end, J. Temple Gwathmey, 3 South William Street.

Stamped on face, Mutual Alliance Trust Co., New York, (35 Wall St.) Endorsed on back, Wm. Sulzer, Louis A. Sarecky.

EXHIBIT M-39.

No. 2136. *New York City, Nov. 2, 1912*

FRANKLIN TRUST COMPANY.

166 Montague Street, Brooklyn.

Pay to the order of William Sulzer,
Fifty and no/100 .....Dollars.
$50.00.

(Signed) JOHN F. O'BRIEN.

Printed on left end, John F. O'Brien.

Endorsed Wm. Sulzer. L. A. Sarecky. Pay to the order of The National Bank of Commerce Nov. 7, 1912, The Mutual Alliance Trust Co. of New York, 35 Wall Street.

Received Payment through the New York Clearing House, Nov. 17, 1912, Receiving Teller, Endorsements guaranteed Nat. Bank of Commerce, in New York.

FRIDAY, SEPTEMBER 26, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 a. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Kresel.— May it please the Court: We omitted yesterday to offer in evidence the letter received by Mr. Hawley in regard to his contribution. I want to offer it now.

(Letter offered in evidence received and marked Exhibit M-57.)

Mr. Kresel.— This letter is written on the stationery of the Committee on Foreign Affairs and reads as follows:

"115 Broadway, New York, October 28, 1912

"George C. Hawley, Esq., Dobler Brewery, Albany, N. Y.

"MY DEAR MR. HAWLEY.— Just a line to thank you for all you are doing in my behalf, and to tell you how deeply I appreciate it. With best wishes and hoping to see you before long,

"Believe me, sincerely yours,

"WILLIAM SULZER."

Mr. Kresel.—At the same time, may I offer two letters, one received by William Hoffman and one by William J. Elias. Two letters offered in evidence received and marked Exhibits M-58 and M-59.

Mr. Marshall.—Will you allow me to look at them?

Mr. Kresel.— Certainly. The letter to Mr. Hoffman reads as follows:

"115 Broadway, New York, October 28, 1912

"Mr. William Hoffman, 55th street & 3rd avenue, New York City:

"MY DEAR MR. HOFFMAN.— Just a line to thank you for

all you are doing in my behalf, and to tell you how deeply I appreciate it. With best wishes and hoping to see you before long, believe me,

"Sincerely yours,

"WILLIAM SULZER."

The letter to William J. Elias is as follows:

"115 Broadway, New York, October 19, 1912

"William J. Elias, Esq., 403 East 54th street, New York City:

"MY DEAR MR. ELIAS.— Many, many thanks for your very kind letter and enclosure. I appreciate all you say and all you have done. You are indeed a good friend of mine. With best wishes, believe me,

"Very sincerely your friend,

"WILLIAM SULZER."

Mr. Stanchfield.— Is Judge Conlon in the room?

Mr. Conlon.— Here.

Mr. Stanchfield.— Resume the stand.

LEWIS J. CONLON, recalled.

Direct examination continued by Mr. Stanchfield:

Mr. Stanchfield.— The record, if the Presiding Judge please, fails to disclose the reading in the record of the check of Mr. Potter, offered in evidence yesterday, of October 10, 1912.

The President.— If you will read it today in evidence and let it appear in today's record, will that answer your purpose as well, Mr. Stanchfield?

Mr. Stanchfield.— Yes. I purpose now to read it.

"New York, October 10, 1912

"NATIONAL BANK OF COMMERCE IN NEW YORK.

"Pay to the order of L. J. Conlon two hundred dollars.

"(Signed) MARK W. POTTER."

Endorsed: L. J. Conlon.

Q. Judge Conlon, at the time of the adjournment last evening, we had, I think, concluded the first conversation you had with Governor Sulzer, in which you delivered to him certain checks. Now, did you see him again before the election? A. Yes, sir.

Q. Do you recall where? A. I saw him at the Manhattan Club.

Q. What transpired between you on that occasion with reference to contributions, by check or cash? A. Shortly after this interview at his house, I should think a few days, maybe a week, I met him in the club and gave him a check, either the check of John Delehanty or the check of Lyman Spalding, now in evidence.

Q. Have you completed your answer? A. Yes.

Q. Did you give him any other check at that time? A. Later on I did.

Q. That was upon still another occasion? A. Yes, on another occasion.

Q. Being, numerically speaking, the third occasion? A. Yes.

Q. Now, where did your interview upon the third occasion take place? A. In the club, the Manhattan Club.

Q. And can you give us about what time it was, in the month? A. It was about election, or within a day or two of the election, or approximately, well, two days, perhaps, I should think, in my recollection.

Q. What transpired between you and candidate Sulzer on that occasion? A. I handed him a check for $100, drawn by Mr. Daniel Brady, payable to Mr. Sulzer, and told him it was a contribution from Mr. Brady, and handed it to him.

Q. Contribution for what?

Mr. Marshall.— One moment.

The Witness.— I don't know that I added anything to it, only it was a contribution from Mr. Brady and I handed it to him.

Q. Will you read that last sentence of your statement, please, where my thumb is? A. I read it.

Q. Does that refresh your recollection? A. Yes.

Q. As to what you said? A. That is true, the phrasing.

Q. Just tell us what is true? A. True that I said it was a contribution to help him along in his campaign.

Q. Did you deliver him any other moneys or checks or evidences of finance during the campaign? A. No.

Q. Did you later receive any acknowledgment from candidate Sulzer or Governor-elect Sulzer for any of these contributions? A. I think I received a letter from Sarecky, his secretary, after the first interview at his house acknowledging the receipt of my money.

Q. Have you that acknowledgment with you? A. No, I didn't keep it.

Q. Have you heard these various acknowledgments read here, some of them this morning? A. Yes.

Q. Was this in that usual rubber stamped form? A. No, it was in substance that Sulzer had directed him to acknowledge the receipt of the money and to thank me for it.

Q. You got a direct acknowledgment then of the receipt of money? A. Yes.

Q. I notice in the statement filed by the Governor-elect, marked managers' Exhibit 3, that you are put down among the names of contributors as no. 14 for the amount of $110. That should have been — A. That is a mistake.

Q. That is a mistake? A. Yes.

Q. That should have been a contribution, should it not, from Mr. John Delehanty? A. That was the check of John Delehanty payable to my order and endorsed by me, and perhaps that is what led them to think it was my contribution.

Q. The same check you testified yesterday you delivered to Mr. Sulzer? A. Yes, sir.

Q. Judge, you know Theodore W. Meyers very well? A. Yes, sir.

Q. Do you not? A. Yes, sir.

Q. Known him a great many years? A. A great many years.

Q. He has been a one time comptroller of New York? A. Yes, sir.

Q. And one time president of the National Democratic Club? A. Yes, sir.

Q. And is now abroad, is he not? A. I think he is; reported to be abroad anyway.

Q. And are you familiar with the fact that he is a man of large means? A. Yes, sir; reputed to be a man of very large means.

Q. Well, I mean as a matter of common repute? A. Yes.

Q. I hand you a check —

Mr. Stanchfield.— I will state to counsel upon the other side that I am doing this to save time.

Q. That is the signature, is it not, to that check of Theodore W. Meyers, in your judgment? A. Yes, I should say it was.

Mr. Stanchfield.— I offer that in evidence.

Mr. Marshall.— No objection.

(The check offered in evidence was received in evidence and marked Exhibit M-60.)

Mr. Stanchfield.— I read in evidence, if the Presiding Judge please, Exhibit M-60:

No. 10850 *New York, October 10, 1912*

THE FARMERS LOAN & TRUST COMPANY

Pay to the order of bearer one thousand dollars.

THEODORE W. MEYERS.

It bears upon the back of it the rubber stamp: "Pay to the order of the Manhattan Company" signed by "Boyer, Griswold & Company."

I will state for the general information of the members of the Court that these rubber stamp endorsements of Boyer, Griswold & Company are so faint that I am not at all certain whether they appear upon your photographs or not, but if any of you have the curiosity you may see the original.

The President.— Is there any dispute of the rubber stamp on them?

Mr. Stanchfield.— No, it is conceded on the other side.

Mr. Marshall.— We consented to its going in evidence.

Mr. Stanchfield.— The witness is yours, gentlemen.

Cross-examination by Mr. Herrick:

Q. Judge, before you received this check of Mr. Potter that you have produced here, you had some conversation with him, did you not? A. With Mr. Potter?

Q. Yes. A. Yes, sir.

Q. In relation to Mr. Sulzer's financial condition? A. Yes, sir.

Q. And you made a statement to him in regard to that condition, did you not? A. I expressed an opinion about his finances.

Q. What was that opinion?

Mr. Stanchfield.— That is objected to.

The President.— How is it material?

Q. What was the conversation between you and Mr. Potter?

Mr. Stanchfield.— Objected to upon the ground that it was never imparted to the candidate Sulzer, and not in his presence.

Mr. Herrick.— Possibly true, but we can see the purpose for which the money was given sheds some light upon that.

Mr. Stanchfield.— The purpose for which it was given is reflected in the language of the witness to candidate Sulzer at the moment that he tendered him the check.

Mr. Herrick.— Not entirely.

Mr. Stanchfield.— It cannot be controlled by any private conversation between the witness and Mr. Potter.

Mr. Herrick.— It was a transaction that they introduced. We are entitled to have everything that took place at that time.

The President.— This brings up the question that was discussed to some extent yesterday. It seems to me it would be just as well to dispose of it finally now. I think it is competent, for this reason: The charge, I think it is the sixth, is larceny; that is the term used. It says, "Was guilty of larceny."

We have reserved every question as to the sufficiency of the articles, its character, whether they are ground for impeachment or not, and it is entirely possible that there may be different views by the different members of the Court on that question. Therefore, the parties on each side have the right to introduce evidence to meet any view which the Court, or any of the members of it, may entertain on the final submission. Here is charged a larceny. It may not affect the moral culpability of the party,

but to meet this the respondent, it seems to me, has the right to show that whatever the delinquency may be, still he was not guilty of the crime of larceny, and could not be convicted therefor if he was indicted by a petit jury. I understand the rule in larceny to be that money delivered by a party to another, if he assents, not subsequently, but if his intent at the time was to give him title to the property, cannot be the subject of larceny. In other words, even the undisclosed intent of the party, the owner, to the alleged offender, to give him the property, that negatives the idea of technical larceny, and prevents his conviction for the crime of larceny, however great may be the moral culpability of the party. That I understand to be the law as stated in the text-books. The last case familiar to me is one in the Court of Appeals, 178 N. Y., I think, People v. Mills. There the conviction was affirmed. That was an attempt to steal certain indictments so that the party indicted might not be prosecuted. It was upheld, the conviction, dissenting, Judge Bartlett. That was upheld. The prevailing opinion, written by Judge Vann, shows the distinction between private property and public property, that the act of no one of the officers or the State could amount to an assent to the taking of the property of the State, but he speaks of the difference between that and private ownership.

In that view, I think this testimony is admissible. Of course, gentlemen, when it comes to the determination of the question of fact that he did really intend, you are not bound by the statement of any witness. It is for you to say whether it was so or not. That is my reason for the decision. I hope some member of the Court will ask for a vote on that.

Judge Werner.— In accordance with the suggestion of the President, I ask for a call of the roll.

Judge Hiscock.— Now, just what will be the question we are to vote on, Mr. Presiding Officer, whether the objection will be sustained?

The President.— Whether the objection will be sustained; but practically, for the information of the Presiding Officer, practically you will construe that as raising the question which the

counsel discussed and as to which I have given you my views now. Call the roll, Mr. Clerk.

Senator Argetsinger.— No.

Judge Bartlett.— I vote that the testimony, as to the intention of the persons parting with the property, is admissible.

Senator Argetsinger.— It was my intention, Mr. President, to agree with your Honor's decision, in my vote.

Judge Bartlett.— I hope I have made it plain it is mine also.

Senator Brown.— I understand that very few in the back of the chamber understand the question, and I think it should be stated again before they vote upon it.

The President.— Now, so that you may understand, gentlemen, without putting it formally, all those that vote aye or yes on this question will exclude the testimony and prevent the witness from telling what instructions — what is the man's name that gave you the check?

The Witness.— Mr. Potter.

The President.— Of Potter's instructions, or that Potter gave him. All those who vote "no" will vote to sustain the ruling of the Chair and admit the evidence. Now, do you understand the question, Senator Brown?

Senator Brown.— Yes.

Mr. Stanchfield.— Will your Honor pardon me for a moment. It would seem to me as if it would be much clearer if the vote would be taken upon the question as to whether or no the objection should be sustained?

The President.— That is it. Those who vote yes, sustain the objection and exclude the evidence. Those that vote no, allow the evidence to come in.

Mr. Stanchfield.— Now, will the Presiding Judge permit me to state, in the hearing of the Court, the objection of the board of managers?

The President.—You have stated it.

Mr. Stanchfield.— No, I haven't stated it; I haven't stated its grounds so that they could hear it.

The President.— You may state the objection, but not to discuss it. That has been done.

Mr. Brackett.— I want, before my associate makes his statement, to suggest this as the question to be decided: Shall the decision of the Presiding Judge stand as the decision of the Court? Isn't that the best way to put the question?

Mr. Marshall.— That is right.

The President.— Well, any way that the gentlemen will understand best; that is the practical point to be arrived at. It is of no particular moment how it is put so long as it is understood. In the way it is best understood is the best way to put it.

Mr. Stanchfield.— If the Court please, the position of the board of managers is this: The witness Conlon testified that upon a certain occasion in October, 1912, while Governor Sulzer was a candidate for Governor, he delivered to Governor Sulzer the check of Mark M. Potter for $200, stating to candidate Sulzer at the time of the delivery of the check that it was to aid him in his campaign. Judge Herrick now asks the witness to relate a conversation between the witness and Mr. Potter, the maker of the check, not in the presence of Mr. Sulzer. And the manager's objection is that candidate Sulzer was bound by the statement when he took the check, that it was given to him to use in his campaign, and that the respondent may not prove the conversation between the witness and Mr. Potter, the giver of the check, not in the presence of Governor Sulzer. That is the position of the managers.

Mr. Herrick.— May I state our position?

The President.— Yes.

Mr. Herrick.— Our position is simply this: The witness on the stand has made two statements, one, that he handed this

money, this check, to Mr. Sulzer, stating that it was a contribution. Then his attention was called apparently to some statement that he had made before, and he added, to the campaign contribution. The purpose of my question is this: It has been said by the Presiding Judge heretofore that upon a charge of larceny the question of intent of the owner of the property, his willingness to have it taken, was material and competent upon the question of larceny. We propose to show that a revelation of Mr. Sulzer's financial condition was made to Mr. Potter at this time, and he was informed that contributions would be taken up by Judge Conlon — practically, I don't say in words — for the purpose of relieving that situation. That is the purpose of our question. We propose to follow it up — I believe that we can do it — by some additional evidence from Judge Conlon as to what he stated to Mr. Sulzer at the time these moneys were given to him.

The President.— I hold that the testimony is admissible. The question is shall the decision of the Presiding Judge be upheld and the testimony admitted or overruled. Those that vote "aye" vote for upholding the position of the Presiding Judge. Those who vote "no," vote the other way.

Senator Argetsinger.— Aye.

Judge Bartlett.— Aye.

Senator Blauvelt.— No.

Senator Boylan.— Aye.

Senator Brown.— No.

Senator Bussey.— Aye.

Senator Carroll.— Aye.

Senator Carswell.— As I understand the question before the Court, I don't conceive that the situation here with respect to this witness is identical with the situation with respect to the witnesses Schiff and Morgenthau. I am of the opinion that the testimony that is sought to be adduced from this witness is admissible, in that it relates to the manifestation of intent at the time of the transaction, but in the case of the Schiff witness there was apparently no manifestation of that intent. In other words,

it was an undisclosed intent both with respect to the respondent Sulzer, or anyone else, and I concur with the Chair in the ruling with respect to this particular evidence, but do not in respect to the past evidence. Aye.

Judge Chase.— The question calls for a conversation between the solicitor of contributions and one of the persons contributing. I am entirely clear that this testimony should be received. If the question called for the intent, wholly apart from spoken words, I would want to give it further consideration.

I vote to sustain the Chair.

Senator Coats.— No.

Judge Collin.— Aye.

Judge Cuddeback.— Aye.

Judge Cullen.— Aye.

Senator Duhamel.— Aye.

Senator Emerson.— Aye.

Senator Foley.— Mr. President, on this question I shall vote aye, with the same reservation expressed by Senator Carswell that I should have voted no on the question of the secret intent.

The President.— If there is no manifestation of it.

Senator Foley.— And in contradiction to the express conversation had between the parties at that time. I think further the testimony is admissible, because we have already admitted in evidence the cablegram of Strauss containing a direction as to the $1,000 contribution to Governor Sulzer. I vote aye.

Senator Frawley.—Aye.

Senator Godfrey.— Aye.

Senator Heacock.— Aye.

Senator Heffernan.— Aye.

Senator Herrick.— Aye.

Senator Hewitt.— Aye.

Judge Hiscock.— Mr. Presiding Officer, I vote aye, and I differentiate between this proposed evidence and some of the other evidence which was offered yesterday in the same way which was so admirably expressed by the senator on my right. I think there is a vast difference between this evidence which is now proposed, especially under the offer of the counsel, and that evidence which was asked for yesterday; for instance, on the examination of the witness Elkus, where, having sent with his check a letter explicitly and expressly stating the purpose for which it was designed, he was then asked to disclose a silent, unexpressed possible mental operation, bearing on that question.

I vote aye.

Judge Hogan.— Aye.

Senator McClelland.— Aye.

Senator McKnight.— Aye.

Senator Malone.— Aye.

Judge Miller.— Aye.

Senator Murtaugh.— Aye.

Senator O'Keefe.— Aye.

Senator Ormrod.— Aye.

Senator Palmer.— Aye.

Senator Patten.— Aye.

Senator Peckham.— Aye.

Senator Pollock.— Mr. President, I vote aye on the question, but I reserve to myself the same reservation as Senator Carswell, and concur in his opinion as to the differentiation between the two questions.

Senator Ramsperger.— Aye.

Senator Sage.— As I was unfortunately detained this morning, and as I have not heard any discussion on this question, I think it is improper that I should vote; and I ask to be excused.

The President.— Yes.

Senator Sanner.— Aye.

Senator Simpson.— I vote aye, Mr. President, with the same reservation as Mr. Carswell.

Senator Stivers.— Aye.

Senator Sullivan.— Aye.

Senator Thomas.— Aye.

Senator Thompson.— Mr. President, I vote in the affirmative, but with the same reason as stated by Judge Hiscock. I do not agree with the ruling in reference to the Schiff matter yesterday.

Senator Torborg.— Aye.

Senator Velte.— Aye.

Senator Wagner.— Mr. President, I vote aye upon the grounds expressed by Judge Hiscock. I shall oppose the admission of any evidence calling for the mental intention of anybody's mind, but as to actual conversations at the time of giving the contribution, I think they are admissible.

Senator Walters.— Aye.

Senator Wende.— Aye.

Judge Werner.— Mr. President, I have my serious doubts about the correctness of the ruling which has been made by the President upon which there is apparently to be a sustaining vote, but because I am in doubt I shall vote to sustain the ruling.

Senator Wheeler.— Aye.

Senator White.— Aye.

Senator Whitney.— Aye.

Senator Wilson.— Aye.

Senator Blauvelt.— Mr. President, may I have my name called, please?

The Clerk.— Senator Blauvelt.

Senator Blauvelt.— I want to change my vote at this time from the negative to the affirmative. I am much in the same position that Judge Werner is. I have my doubts, but in view of the sustaining vote I desire to change on this proposition from the negative to the affirmative.

The Clerk.— Ayes 50, noes 2.

The President.— The stenographer will repeat the question.

(The question repeated by the stenographer as follows: "What was the conversation between you and Mr. Potter?) A. I had a conversation with Mr. Potter in the Manhattan Club. We were speaking generally about politics. They were quite warm at that time, and I told him that I did not believe Sulzer had a cent, words to that effect, and that I intended to give him a contribution, and that I thought it would be graceful on the part of his friends to contribute something to help him out; and Mr. Potter said he entirely agreed with me and that he would give his check; he went and drew his check —

By Judge Herrick:

Q. That is all I want of the conversation. A. That is all.

Q. Was there anything additional said about the necessity of his having money quickly and in cash to spend on his trips, and not ordinary campaign contributions?

Mr. Stanchfield.— Isn't that a pretty leading question?

Mr. Herrick.— Yes; it is cross-examination. A. I said to him that Mr. Sulzer was about to make a State campaign and that it would be necessarily expensive, and that I did not believe he had anything, and that it would be a graceful thing if his friends would help him out. That is the substance of it.

Q. Many other of these contributions that you obtained were obtained at the Manhattan Club, were they not? A. They were all.

Q. All obtained at the Manhattan Club? A. Yes, sir.

Q. And at times several of them were together from whom you got these contributions? A. Yes.

Q. And did you talk to them? A. Yes.

Q. About his impecunious condition? A. I talked with several in the club. It was a matter of common conversation.

Q. I mean as to his financial condition? A. As to his financial condition.

Q. And the necessity of doing something to help him out? A. Yes; I was anxious to get money; I believe he needed it.

Q. Now, when you took these contributions up to him can you recall all that you said? A. No, I cannot recollect all.

Q. Let me refresh your recollection. Did you not state to him when you took these several contributions up, I think it was the second visit, that here is something for you, do what you want with it? A. No, I do not recall that.

Q. Well, in substance? A. No, I do not recall that I said that. I only mentioned the use of the money on the first occasion. Then I said I had brought him something to help him out during the campaign, that was about the entire conversation.

Q. Didn't you suggest to him some clothing? A. If I did, I did it jokingly.

Q. You did, didn't you, you suggested that he buy him some clothing ? A. Yes, that it would do him no harm before he went up the State.

Q. Get a new hat? A. In substance that.

Q. In other words, he was to use this money that you brought to him for his personal purposes, clothing, hat, anything that he might want to spend it for? A. I said yesterday that I put no restriction upon it.

Q. Didn't you go a little further?

The President.— I think he should be confined to the conversation.

Mr. Herrick.— That is what I am asking him, at least I intended to. Will you repeat the question, Mr. Stenographer?

(The stenographer repeated the question as follows: "In other words he was to use this money that you brought to him for his personal purposes, clothing, hat, anything that he might want to spend it for?") A. I stated that in substance.

Redirect examination by Mr. Stanchfield:

Q. Judge Conlon, you stated in answer to one of the inquiries from Judge Herrick that you did not believe that candidate Sulzer had a cent? A. That was — I don't mean literally a cent; I thought he was poor.

Q. Isn't that literally what you just said to Judge Herrick? A. Yes, that is what I said.

Q. You stated yesterday that your acquaintance with candidate Sulzer at that time had been intimate for a period of twenty years or more? A. Yes, sir.

Q. During that twenty years he had occupied one public office or another, hadn't he? A. Yes.

Q. He had been for something like eighteen years a member of the Federal Congress? A. Yes.

Mr. Herrick.— One moment. This is not proper redirect, it seems to me.

Mr. Stanchfield.— I submit it is.

The President.— Overruled.

Q. He had been a member of the Legislature of New York? A. Five times I think.

Q. He had been speaker of the Assembly of New York? A. Yes, sir.

Q. And was a practicing lawyer? A. Well, he had a law office, I don't know how much practice he had.

Q. Haven't you read Sulzer's short speeches? A. In Congress or where?

Q. Anywhere and everywhere? A. I have read some and heard a great many.

Q. Haven't you read and heard him declare himself to be an eminent lawyer?

Mr. Marshall.— I object to that as improper —

The President.— Sustained.

Mr. Marshall.—And insulting —

The President.— Sustained.

Mr. Marshall.—And undignified in this presence.

The President.— The objection is sustained.

Mr. Stanchfield.— This is the last place in which one should lose one's temper.

The President.— Mr. Stanchfield —

Mr. Stanchfield.— If your Honor please, I did not provoke this discussion.

The President.— That is true. The Court has already reproved Mr. Marshall.

Mr. Marshall.— I wish to put myself correct on the record. I was making an objection to the statement made by counsel. My statement was being placed upon the record when your Honor made the ruling, but I thought I had your Honor's attention and the Court's attention to what I considered to be a manifest impropriety.

Mr. Stanchfield.— In the first place, Mr. Marshall was not in order; professionally speaking, the objection lay with Judge Herrick.

The President.— One moment, gentlemen. We will get along better —

Mr. Stanchfield.— Your Honor will have no trouble with the managers on that score.

Mr. Herrick.— He has had no trouble with the respondent's counsel.

The President.— Let this cease, and get back to work.

By Mr. Stanchfield:

Q. Judge Conlon, running back for a moment to your statement to Judge Herrick that you believed Governor or candidate Sulzer at the time did not have a cent, did you base that statement upon conversations you had had with Mr. Sulzer himself? A. No, sir.

Q. Did you ever talk with him upon the subject of his financial condition? A. I do not think I did.

Q. Did you know or do you know that during that fall he had deposited somewhere in the neighborhood of $40,000 or $50,000 in money in different banks in New York?

Mr. Herrick.— We object to that.

The President.— Objection sustained. I think the witness has already testified that he knew nothing about it.

The Witness.— No, nothing personal.

Q. On what did you predicate your statement to Judge Herrick that you did not believe he had a cent? A. Well, his appearance and the manner of living, habits, etc., I did not believe he had saved anything.

Q. Was his appearance in the fall of 1912 any different from what it had been in 25 years? A. No, I do not think it was.

Q. He dressed just as well in the fall of 1912 as he had in a quarter of a century? A. Just the same.

Q. He wore the same kind of a hat as candidate that he had for 20 years, the same style? A. Not the same hat he did wear (laughter).

The President.— Gentlemen, I submit to you, though you are fully members of the Court with myself, that is hardly proper to indulge in mirth here.

Q. I meant the same general style of a hat? A. Well, I think so.

Mr. Stanchfield.— I think that is all, Judge.

By Senator Duhamel:

Q. One moment, I would like to ask the witness a couple of questions: During your visit to the Governor one morning when you took him some contributions you say Mrs. Sulzer was present? A. Yes, sir.

Q. Did she show any interest in these contributions? A. She thanked me for bringing them there and engaged in the conversation; we were together, the three of us, his wife, himself and myself.

Q. What did the Governor do with the contributions? A. I don't think he did anything while I was in the room. I left them on the dining table. He was then preparing for his breakfast, sitting down at the table, and I don't think he did anything with them while I was there.

Q. Did Mrs. Sulzer show any intention of taking charge of the contributions? A. No, sir.

Mr. Kresel.— Mr. Brady.

DANIEL M. BRADY, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Brady, you reside in New York? A. I do.

Q. What is your occupation? A. I am president of the Brady Brass Company.

Q. In the fall of 1912, did you make a contribution to candidate Sulzer, after his nomination for Governor? A. I did.

Q. For how much? A. $100.

Q. Do you recollect whether you handed a check to candidate Sulzer, or to someone else to deliver to him? A. I gave the check to Judge Conlon.

Q. You didn't see candidate Sulzer in person? A. I did, I spent the entire evening, almost, with Governor Sulzer.

Q. Well, was that the same evening when you gave the check to Mr. Conlon? A. It was.

Q. But instead of handing it to candidate Sulzer, you handed it to Judge Conlon? A. I did.

Q. Now, did you have any talk with candidate Sulzer that evening, about contributing to his campaign, or to help him in any way? A. I never had a word in my life, either that evening or any other evening.

Q. Where is the check, Mr. Brady? A. I destroyed the check.

Q. Have you got your check book here, stub book? A. I destroyed the stub, too.

Q. So that you have neither one of them here? A. Neither one.

Mr. Stanchfield.— That is all.

Cross-examination by Mr. Herrick:

Q. Prior to your giving the check, had there been some conversation between you and Mr. Conlon and some others there, as to the financial condition of Mr. Sulzer? A. I probably talked with fifteen or twenty of the members, fellow members, of the Manhattan Club.

Q. And was the subject of his financial condition discussed by you?

Mr. Brackett.— If the Court please, this calls for a conversation, not with Judge Conlon, apparently, who was the messenger that carried it, but with some third parties entirely. Therefore, we object to it as hearsay and incompetent.

The President.— It must be limited to when Judge Conlon was present and took part in it.

Mr. Herrick.— Very well. I will so limit it.

The President.— Proceed.

Q. Was there a conversation in which either Judge Conlon took part, or when he was present, in relation to Mr. Sulzer's financial condition? A. Almost all of the conversations were had around the dinner table, and invariably Judge Conlon was present.

Q. That is Judge Conlon's table, isn't it? A. Popularly known in the Manhattan Club as Judge Conlon's table.

Q. Was the subject of Mr. Sulzer's financial condition discussed or talked of? A. It was referred to casually.

Q. Yes. A. That was not necessary to inform me as to what I thought regarding his —

Q. (Interrupting) You had your own opinion as to his financial condition. A. I had my own opinion as to his financial condition. I had known him many, many years.

Q. Let me ask, to get it. You have heard Judge Conlon testify as to his opinion, as to his financial condition just now? A. I did.

Q. If there is no objection I will ask it to get it there. Did your opinion coincide with him in that respect? A. I always regarded Governor Sulzer as neither a speculator or moneymaker, or anything but a poor man.

Q. And now, was it the subject of discussion in the presence of Judge Conlon, or by Judge Conlon, the propriety of your — some of you contribuitng to help him out because of his financial condition? A. Judge Conlon never directly or indirectly suggested a contribution or suggested anything else.

Q. Well, but — A. (Interrupting) The gentlemen gave freely and of their own accord, and that — so far as my information goes, quietly and without any display.

Q. After talking over his condition? A. After these various conversations.

Q. Yes, and the necessity of doing something to help him because of his financial condition? A. Yes.

Mr. Herrick.— That is all.

Redirect examination by Mr. Stanchfield:

Q. Mr. Brady, did you get your information or belief, or form your belief, as to Mr. Sulzer's financial condition from talks you had with Mr. Sulzer himself? A. I did.

Q. When did you talk, in the fall of 1912, with Mr. Sulzer, as to his financial condition? A. I had no conversation with him in 1912, regarding his financial condition.

Q. When had you had a talk with him on that subject? A. Probably a year or two ago.

Q. Well, that would be perhaps, then, a year before he became a candidate for Governor? A. Probably, yes, sir.

Q. You mean to say, then, that you had a talk with him on the subject of his financial condition? A. I did.

Q. What did he tell you with regard to it? A. We were discussing the —

Q. (Interrupting) Just what did he tell you with regard to his financial condition? A. He told me that he was still in Congress, fighting for the people, and a poor man, and I believed it.

Q. Is that the substance of the conversation? A. That was the substance of it.

By Senator McClelland:

Q. Did you receive any acknowledgment of this contribution from Governor Sulzer? A. None.

Q. Did you receive an acknowledgment from anybody? A. None.

Mr. Stanchfield.— That is all, Mr. Brady.

Mr. Herrick.— That is all.

Senator Bussey.— I would like to ask the gentleman why he destroyed the check and the stub? That seems to me to be a very unusual proceeding. And when he did it?

The Witness.— I am delighted that the senator put that question to me. I am not a politician, never was. I am a business man. It was a controversy between two factions. I am friendly to both sides. I didn't care to be mixed up in it, and I thought that was a pretty quick way of getting out of it.

The President.— Is there anything else of this witness?

Senator Bussey.— How would the destruction of that check let you out?

The Witness.— That was a mistaken impression on my mind, because I have lost a great deal of time in New York and Albany from my business in connection with the case.

By Mr. Stanchfield:

Q. Well, Mr. Brady, just for the record, when did you destroy that check and your stub? A. A matter of three or four weeks ago.

Q. After you had read in the papers about the Frawley investigation? A. It was some time after the —

Q. (Interrupting). After you had read in the papers about the Frawley investigation? A. No, after I had read in the papers that Governor Sulzer had been impeached.

Q. You, although a business man, I take it, knew that that check and that stub might be a subject of judicial investigation, didn't you? A. It was fair to assume that it would be.

Q. Well, when you destroyed it, didn't you think you were getting rid of the evidence, in your own mind? A. Well, I don't know whether I thought so or not; it was a fact.

Q. Did you try to? A. Sir?

Q. A fact that you tried to get rid of it as evidence? A. Not with any intention of concealing anything, sir.

Q. No, but to prevent its coming to the light? A. I didn't look at it from that point of view, sir.

Q. Well, what did you destroy it for, after you knew that it might be called for as evidence? A. Because I didn't want my check or my affairs paraded all over the country, and photographed from Maine to California.

Mr. Stanchfield.— That is all.

By Mr. Herrick:

Q. Let me ask you one question, Mr. Brady. Do you recall the indorsement on this check when it came back? A. It was drawn to the order of William Sulzer, and I am quite sure it was indorsed William Sulzer.

Q. Not Sarecky, by Sarecky? A. I am not clear as to that, it might have been.

Mr. Herrick— It is conceded, is it not, that this is in the Mutual Alliance Trust Company account of Sarecky?

Mr. Stanchfield.— Well, but it was indorsed by Governor Sulzer. Perhaps it was not proper, but he has already testified to it.

Mr. Herrick.— That is his impression now. I asked him if it was not by Sarecky.

Mr. Stanchfield.— Oh, you mean whether the name Sulzer was written by Sarecky?

The President.— It might have been Sarecky?

Mr. Herrick.— Or by Sarecky, as I understood him.

Mr. Marshall.— It is included in managers' Exhibit 27.

Mr. Herrick.— That is all.

Mr. Stanchfield.— That is all.

By Senator Patten:

Q. At the time of the destruction of the check and the stub book, did you perform that act of your own volition, or was it suggested to you by anyone? A. Suggested by no one, sir.

The President.— Is there anything further?

By Mr. Stanchfield:

Q. You were examined, Mr. Brady, on the 12th of this current month, were you not, before the managers? A. Yes.

Q. At 37 Wall street? A. Yes.

Q. Let me read you this testimony and see if you recollect it?

Mr. Herrick.— That is objected to.

The President.— Objection sustained. You may show it to him only to refresh his recollection.

Mr. Stanchfield.— I know. If your Honor please, I am reading it for the purpose of contradiction with reference to new matter brought out by them. I am not limited to what he says about it.

The President.— No, but I do not think you can impeach him.

Mr. Stanchfield.— I am not trying to impeach him. I am trying to —

The President.— But you cannot put this question, Mr. Stanchfield.

Mr. Stanchfield.—Will your Honor hear me for a moment?

The President.— Certainly.

Mr. Stanchfield.— Judge Herrick asked the witness upon the stand with reference to whether or no this check was indorsed by William Sulzer; then he asked him whether it was not indorsed by Louis A. Sarecky, or whether the indorsement by William Sulzer upon the back of the check was not made by Louis A. Sarecky. That is brought out, new matter, by counsel on the other side, and is a subject with reference to which they make him their witness. Therefore, upon redirect, have I not the right, confessedly, the right to show that upon another occasion, under oath,

the witness stated that that check bore the indorsement of William Sulzer, and no other?

The President.— I think not, as I understand the rule, unless it has been changed, you having put the witness on the stand cannot impeach him. The statements that he made outside of Court are not evidence; they are simply impeachment of the witness, and therefore I think they are inadmissible. Of course, you are not bound by his testimony; you can cross-examine him; you can call his attention, or ask him if he did not say something on some other occasion, or testified, and ask whether that refreshes his recollection, whether the — what is his recollection now on the subject.

Mr. Stanchfield.— If your Honor please, that is just what I was proposing to do. I was reading to him what the witness testified to upon another occasion, before another tribunal, with reference to the same facts.

The President.— The objection to your question was, it put it in evidence — it assumed that he had so testified on another occasion, and that fact you cannot put in, in my judgment. You can ask him if he did not so testify, and then being called to his attention, ask him if that does not refresh his recollection.

Q. Mr. Brady, were you asked before the board of managers this question: "Did you see Judge Conlon hand a check to Governor Sulzer?" And did you answer, "I did not"? A. That is correct.

Q. Speak so they can all hear you, please. Were you asked this question: "Did you know it ever got to him?" And did you answer: "Yes, sir"? A. I did.

Q. Were you asked: "Q. How did you know that?" And did you make this answer: "It bore the endorsement of William Sulzer when it came back"? A. That is correct.

Mr. Stanchfield.— That is all, Mr. Brady.

Mr. Herrick.— Mr. President of the Court, my question was for the simple purpose of ascertaining whether this was the same check as set forth on page 651 of the record, Daniel M. Brady, being Sarecky's account. That is the only purpose.

By Mr. Herrick:

Q. Now, to clear it up, did you give more than one check? A. Only one.

Q. Did you give out a check to Mr. Sarecky? A. I did not.

Mr. Herrick.— That is all.

Mr. Stanchfield.— That is all.

Mr. Stanchfield.— Will the counsel for the respondent inform us this morning whether or no Mr. Colwell has been heard from or is in the jurisdiction?

Mr. Herrick.— I asked Mr. Hinman to take charge of that matter and he says he hopes to hear by tonight, Mr. Stanchfield.

JOHN T. DOOLING, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. What is your full name? A. John T. Dooling.

Q. Where do you reside; will you kindly speak so that all the members of the Court can hear you; it is quite difficult for them to hear you unless you speak very loudly? A. New York City.

Q. What is your profession? A. I am a lawyer.

Q. Do you know the respondent, Governor Sulzer? A. I do.

Q. And for how many years have you known him, Mr. Dooling? A. I should say over twenty years.

Q. And have your relations with him over that period of twenty years always been cordial and intimate? A. They have been cordial and friendly.

Q. And did your friendly relations continue down to and including this candidacy for the governorship in the fall of 1912? A. They did.

Q. Did you see candidate Sulzer on or about the 15th of October, 1912? A. I did.

Q. Do you recollect where your interview with him took place? A. I saw him at his office in Broadway. I think it is 111 or 115.

Q. Did you have a chat with him or talk with him on the subject of the campaign? A. I had a very brief talk with him in his private office.

Q. Will you tell us, Mr. Dooling, what the conversation was? A. As I recall it I entered his room and I was with him for perhaps two minutes. I entered his private office and he was standing and I remained standing. I told him that I understood that he needed help. I handed him the check which I now have in my hand and I told him, as I stated, that I hoped that would help him. He shook hands with me and he thanked me and I left.

Q. At that time he had been nominated and was the candidate for the Democratic party for Governor? A. Yes, sir.

Q. Is that the check which you hold in your hand, which you handed him at that time? A. It is.

Mr. Stanchfield.— I offer that in evidence.

Mr. Herrick.— No objection.

(The check offered in evidence was received in evidence and marked Exhibit M-61.)

Mr. Stanchfield. On the end of the check (reading):

"John T. Dooling. Check No. 3727.

"*New York, October 15, 1912*

"THE GUARANTY & TRUST COMPANY."

What is the Broadway number?

The Witness.— 176 Broadway.

Mr. Stanchfield.—(Reading) "176 Broadway.

"Pay to the order of J. T. Dooling one thousand ($1,000) dollars.

"JOHN T. DOOLING."

(Indorsed) "J. T. Dooling" with the rubber stamp indorsement of Boyer, Griswold & Company upon it. It is likewise certified and payable through the New York Clearing House October 16th.

Q. This check — I see the certification mark, Mr. Dooling, is October 16th? It was not certified I take it, or is that the fact, that it was not certified when you handed it to candidate Sulzer? A. It was not certified when I handed it to him.

Mr. Stanchfield.— That is all.

Cross-examination by Mr. Herrick:

Q. Mr. Dooling, do you know Hugh J. Reilly? A. I do.

Q. Prior to this visit to Mr. Sulzer when you gave him this check had you had a conversation with Mr. Reilly? A. I think that I had more than one conversation with him and his counsel.

Q. Did you have any conversation with him in which he told you about Mr. Sulzer's financial condition?

Mr. Stanchfield.— I object to that.

Mr. Herrick.— I am not asking, may it please the Court —

The President.— Who was Reilly? I have forgotten now.

Mr. Herrick.— It is not in proof yet.

Mr. Stanchfield.— It is a long story, if the Presiding Judge please.

The President.— Anything in the evidence?

Mr. Stanchfield.— No.

The President.— I don't remember any.

Mr. Herrick.— I am not asking for the conversation, simply what it was about.

Mr. Stanchfield.— Now I object.

The President.— That is to some extent calling for the conversation.

Mr. Herrick.— It is not for what was said. I am asking if they had a conversation about his financial condition; not what was said.

The President.— That calls to some extent as to the conversation.

Mr. Herrick.— Pardon me, it seems to me in my recollection of the trial of cases, that you can ask if they had a conversation.

The President.— On the subject?

Mr. Herrick.— On the subject, but not go into what the conversation was.

Mr. Stanchfield.— I object to that upon the ground that it is hearsay and it does call for the substance of that conversation.

The President.— Just yes or no to that.

The Witness.— I had a conversation —

Q. Yes or no, the Judge says. A. Well, I don't think I can answer that question truthfully yes or no. I had it either with Reilly or with his counsel, possibly with both. I am not sure whether it was one or the other.

The President.— That is yes or no to the material point.

Q. And was your giving this money to Mr. Sulzer partially the result of that conversation?

Mr. Stanchfield.— I object to that as inconsequential and incompetent.

The President.— Objection sustained.

Q. How soon after you had this conversation relative to his financial condition did you give this check to Mr. Sulzer? A. Oh, it was within a couple of weeks.

Q. A couple of weeks? A. Yes.

Mr. Herrick.— That is all.

Witness excused.

The President.— Counselor, to whose order was that check written?

Mr. Stanchfield.— It was to the order of John T. Dooling, the witness.

The President.— And then indorsed by him?

Mr. Stanchfield.— Yes, and then certified the next day.

Mr. Kresel.— Mr. Boyer.

PHILIP BOYER, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Boyer, what is your business? A. Banker.

Q. And stock broker? A. Yes.

Q. What firm are you a member of now? A. William C. Langley & Company.

Q. They are in New York City? A. 10 Wall street.

Q. Were you ever a member of the firm of Boyer, Griswold & Company? A. Yes.

Q. What was the business of that firm? A. Banking and brokerage.

Q. Where was their office in the month of October, 1912? A. 42 Broadway.

Q. In the city of New York? A. Yes.

Q. Is the firm of Boyer, Griswold & Company now dissolved? A. Yes, it dissolved in March.

Q. Of this year? A. 1913.

Q. Do you know a man named Frederick A. Colwell? A. Yes.

Q. How long have you known Mr. Colwell? A. Well, he has been a business acquaintance of upwards of two years.

Q. Did you see Mr. Colwell on or about the 16th of October, 1912? A. Yes.

Q. Where? A. In my office.

Q. That is in the office of the firm of Boyer, Griswold & Company? A. Yes.

Q. You had some conversation with Mr. Colwell at that time, did you? A. Well, a business conversation?

Q. Yes, state what conversation you had with him. A. Well, as I remember it, Mr. Colwell told me he was going out of town that afternoon and wished to buy 200 shares of Big Four to take with him. He asked me if we could buy it on the Stock Exchange for cash. You understand, Mr. Kresel, the regular deliveries go through the day after the purchases are made.

Q. Yes. I will make that plain in a little while. Just continue your conversation. A. And I said yes, we would. We bought 200 shares.

Q. Was that all of the conversation? A. Well, excepting —

Q. As far as you recall it? A. Except in reference to the cash transaction.

Q. Will you speak a little louder? A. Yes.

Q. Go on and finish that. A. Mr. Colwell asked me if I would buy him 200 shares of Big Four for cash, delivery to be made the same day the purchase was made. I said yes, and gave the order to have the purchase made.

Q. What is the proper name of the stock which you call Big Four? A. Cleveland, Chicago, Cincinnati & St. Louis.

Q. Railroad stock? A. Railroad stock.

Q. Now, you were speaking about this being a cash transaction. Now, is this what you mean by it, that the ordinary purchase of stock on the Stock Exchange is for delivery on the following day? A. Yes.

Q. But this particular transaction with Mr. Colwell was for delivery on the same day? A. Exactly.

Q. That is, he gave you the order to purchase on the 16th of October, 1912, and he asked you to have the stock delivered to him on that very day? A. Yes.

Q. And that is what you denominate a cash transaction? A. Yes.

Q. Did your firm purchase this stock? A. Yes.

Q. Did Mr. Colwell pay for it? A. Yes.

Q. And how did Mr. Colwell pay for this stock, in what way? A. He paid for it with checks and cash.

The President.— How much did the price amount to?

The Witness.—At 60 it was $12,000.

Q. That is, the price was $60 a share? A. $60 a share.

Q. There were 200 shares? A. Yes, sir.

Q. Do you now recall the names of the persons whose checks were given by Mr. Colwell in part payment of this stock? A. No, but I have got the record here.

Q. You have the record? A. Yes.

Q. Now, will you get the record and tell us please? A. Yes, Mr. Reynolds has it.

Mr. Kresel.— Mr. Reynolds, let me have the book, will you?

Q. Now, will you state whose checks were given by Mr. Colwell to your firm in part payment of this stock? A. This is the first time that I have seen this entry. I will do my best. Could Mr. Reynolds be here with me?

Q. Did Mr. Reynolds make that entry? A. Yes.

Mr. Marshall.—We have no objection.

By the President:

Q. Were not those checks indorsed by this firm?

Mr. Kresel.— They were.

The President.— Doesn't that identify them?

Mr. Kresel.—Yes, sir.

The President.— Suppose you show him those checks.

Mr. Kresel.— There are some I cannot show him.

The Witness.— I guess I can give it. Do you want me to give the amounts?

By Mr. Kresel:

Q. Yes, give the amounts and the name? A. William Sulzer, $900.

Mr. Kresel.— Will you produce that check: I gave you notice to produce it.

Mr. Marshall.— We have not got it.

Q. Do you know on what bank it was drawn? A. No.

Q. Go on. A. Theodore W. Alpers, $1,000.

Q. I call your attention to Exhibit 60, this check for $1,000 made by Theodore W. Meyers, and call your attention to the endorsement thereon of Boyer, Griswold & Company, and that it was deposited to the credit of Boyer, Griswold & Company in the Manhattan Company on October 16, 1912, and ask you whether that was the check which you have inserted there as Theodore W. Alpers? A. It must have been.

Q. What is the next check? A. John Lynn, $500.

Q. Now, I show you Exhibit 56 and call your attention to the endorsement of Boyer, Griswold & Company and ask you whether that is the check ? A. Yes, that is it.

Q. What is the next check? A. Lyman A. Spalding, $100.

Q. I show you Exhibit 55; is that the check of Lyman A. Spalding which was given to you? A. Well, it must be.

Q. Is the endorsement of your firm on it? A. The endorsement of our firm is on it.

Q. Very well. Then it is that check? A. To the best of my knowledge it may have been cashed in the office another day though.

Q. The next? A. The next is Edward F. O'Dwyer or Dwyer.

Q. Edward F. Dwyer? A. Dwyer.

Q. How much? A. $100.

Q. Go on. A. John W. Cox, $300; Frank V. Straus Company, $1,000.

Q. Now, I show you Exhibit 51; is that the check which was given to you, the Straus check? A. Yes.

Q. It bears the endorsement of your firm? A. Yes; John T. Dooling, $1,000.

Q. I show you Exhibit 61; is that the Dooling check which was given to your firm? A. Yes, that is it.

Q. Are those all the checks? A. Yes, sir.

Q. What was the total amount of the checks which were delivered by Colwell? A. $4,900.

Q. $4,900? A. Yes, sir.

Q. Now, the price of the stock was $12,000, wasn't it? A. $12,000, yes.

Q. And your commission was how much? A. $25.

Q. So that altogether you were to get from Colwell, $12,025? A. Yes.

Q. You received $4,900 in checks, is that correct? A. Right.

Q. And the balance was paid in what form? A. In cash.

Q. In currency? A. Yes.

Q. Bills? A. I imagine so, yes.

Q. Currency anyway? A. Yes.

Q. All right. How much in currency did you get? A. $7,125. There is an item here of currency for that. Mr. Reynolds will tell you whether that is the currency.

Q. $7,125 in currency? A. Yes.

Q. Were those checks and the $7,125 in cash delivered by Colwell to your firm on the 16th of October, 1912? A. Yes.

Q. And was the stock delivered to him? A. Yes.

Q. By your firm? A. Yes.

Q. On that very day? A. Yes.

Q. Now, have you your ledger here? A. Well, it is a loose leaf ledger. I have sheets from it.

Q. Very well. Let me see the sheet which contains the entry of this transaction.

The President.— Are you going to take issue on the transaction?

Mr. Marshall.— I do not think there will be any serious dispute about the transaction, your Honor.

Mr. Kresel.— I just want to put in a copy. I have a copy all prepared.

The Witness.— I think you have a copy of it.

Mr. Kresel.— Yes, I have. I just want to see the original to show it to the other side to show them that it is a correct copy.

The Witness.— Here it is (handing same to Mr. Todd).

Mr. Marshall.— Let us look at it just a second (examines it).

Q. Now, please look at this paper which I hand you and state

whether that is a correct transcript of this transaction as it appears in your ledger?

Mr. Marshall.— You mean of that one account?

Mr. Kresel.— Yes.

A. Yes.

Mr. Kresel.— I offer that in evidence.

(Admitted and marked Exhibit M-62.)

Mr. Kresel.— The ledger entry is under the heading of F. L. Colwell, and on the debit side is the following entry: "October 16th, 1912, 200 C. C. C. & St. Louis at 60, $12,025." On the credit side: "October 16, 1912, 200 C. C. C. & St. Louis; D"—

Q. Does the "D" stand for delivered? A. Yes, sir.

Mr. Kresel.— And then again "$12,025."

Q. Mr. Boyer, will your records show from whom this stock was bought by your firm? A. Yes, it will.

Q. Will you tell us from whom it was bought? A. Bought from the firm of Jewett Brothers.

Q. Does your record also show the numbers of the certificates? A. Yes.

Q. Will you please give us those? A. I cannot make out the first whether it is a 9 or a G.

Q. Whose handwriting is that? A. Mr. Reynolds.

Mr. Kresel.— Very well, then I will get it from him. That is all.

Cross-examination by Mr. Hinman:

Q. Were these certificates of Big Four stock delivered that day, October 16th, to Mr. Colwell? A. Yes.

Q. Did you make the delivery? A. No.

Q. You do know that it was made? A. Yes, sir.

Q. Did you receive from Mr. Colwell the checks and the currency to which you have referred? A. No.

Q. Personally I mean? A. No.

Q. Did you personally see these checks or that currency? A. No.

Q. You had nothing to do with the endorsement of those checks and the handling of the deposit of the currency, as I understand? A. Absolutely none. That is done with a rubber stamp in the mechanical part of the office.

Q. Do you know what employee in your bank did receive those checks, who endorsed them and deposited them? A. Yes.

Q. Who was it? A. Mr. Reynolds.

Q. What person in your bank attended to the certification or obtaining the certification of these checks that had been delivered by Mr. Colwell to your bank? A. As I remember it they were handed in all certified.

Q. Is that your recollection? A. I never saw them. Mr. Reynolds can tell you that.

Q. You did not see them? A. I did not see them.

Q. That is what I am getting at; so you do not know about that personally. A. No, sir.

Q. So in any event you did not attend to that? A. No, sir.

Redirect examination by Mr. Kresel:

Q. Mr. Boyer, did Mr. Colwell say anything to you as to the person for whom he was purchasing this stock?

Mr. Hinman.— I object to that on the ground the witness has already testified he did not have anything to do with the transaction except in the beginning.

The President.— I suppose that may be the very thing as far as that part of his answer is concerned.

Mr. Hinman.— I withdraw the objection.

A. I testified before Mr. Colwell said he was buying the stock for his own account because he was going out of town.

Q. Otherwise he made no statement to you? A. None.

Mr. Kresel.— That is all.

By the President:

Q. That was to you? A. Yes, sir.

The President.— That is what I understood the witness; the original direction was given to him.

Mr. Kresel.— Now, Mr. Reynolds.

CHARLES A. REYNOLDS, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Reynolds, were you prior to the 1st of April, 1913, in the employ of Boyer, Griswold & Company? A. I was.

Q. And were you their cashier? A. I was.

Q. Did you have charge of making entries in their check book? A. Yes.

Q. Will you turn to these entries that Mr. Boyer was reading from under date of October 16, 1912? A. Yes, sir.

Q. Do you find there a certain list of checks? A. I do.

Q. Were those entries made by you? A. They were.

Q. In the regular course of your business? A. Yes, sir.

Q. Now, there is an entry there of the receipt of a check of William Sulzer for $900; was that check drawn to the order of Boyer, Griswold & Company? A. I do not remember, and there is no record here showing to what order it was drawn.

Q. What is your best recollection as to whose order that check was drawn to? A. I really could not say.

Q. You cannot tell? A. No, sir.

Q. Have you any recollection on that subject at all? A. Nothing at all definite.

Q. What is your best recollection about it? A. I really have none whatever, Mr. Kresel.

Mr. Kresel.— I wish the gentlemen would produce the check.

Mr. Hinman.—We have not got it, Mr. Kresel.

By the President:

Q. You saw the checks, did you? A. Yes.

Q. And you attended to making up the deposit? A. Yes.

Q. But you do know it was William Sulzer's check? A. I do.

Q. Purporting to be signed William Sulzer? A. The check was signed by William Sulzer.

Q. And certified? A. And was certified so it was evidently a correct signature.

The President.— It was afterward paid?

Q. It never came back, did it? A. It never came back.

By Mr. Kresel:

Q. Did you have all the checks certified that were given by Colwell in this transaction? A. They were already certified.

Q. When he delivered them to you they were certified? A. He did not deliver them into my hands but they came through the regular course of the office, and they were certified when they came to the cage.

Q. Do you remember whether this check of $900 of William Sulzer was drawn on the Farmers Loan & Trust Company? A. To the best of my recollection it was, but I am not sure.

Q. That is your best recollection? A. Yes, sir.

Q. And where were all the checks which Colwell gave in this transaction deposited? A. In the Manhattan Company.

Q. And that is where Boyer, Griswold & Company have their account? A. That is right.

Q. Now, Mr. Reynolds, who handed you the checks and the currency? A. Mr. Murray.

Q. Al Murray? A. Yes.

Q. An employee of Boyer, Griswold & Company? A. Yes.

Q. Do you recall in what form the currency was? A. It was all in bills.

Q. Of large denomination? A. It varied; some large, some small.

Q. Were there any thousand dollar bills among them? A. I don't recall whether there were any thousand dollar bills or not.

Q. And did you make a deposit of that currency to the credit of the firm of Boyer, Griswold & Company? A. I did.

Q. Did you personally deliver the stock to Mr. Colwell? A. I did not.

Q. Do you know who did? A. Mr. Murray.

Q. Mr. Murray? A. Yes, sir.

Q. Did Mr. Colwell give a receipt for that stock? A. He did not.

Mr. Kresel.— That is all.

Cross-examination by Mr. Hinman:

Q. Reference has been made to entries in these checks and of the currency on this book which you have been referring to and which the previous witness referred to. In what book are those entries? What do you call the book? A. It is on the stubs of the check book, on the back of the stubs.

Q. When were those entries made in reference to this transaction on the stub of the check book? A. On October 16th, immediately after the money was paid into the office.

Q. Did those checks and that currency come to you in order that you might make a deposit thereof? A. Yes.

Q. Did you make those entries on the stub of this check book as they now appear just before you made the deposit, and did you make them in connection with the making of the deposit? A. Yes.

Q. Do you know for how long a time those checks and that currency had been there in your office before they came to you? A. You mean in the possession of an employee of our office?

Q. Yes. A. The few moments of time to take them from one room to another.

Q. Did you see them delivered to the other employee? A. No, sir.

Q. Let me ask you again. Is it not the fact that you have no personal knowledge as to the time when those checks and that currency came into your firm's office? A. No personal knowledge, no.

Q. Did you observe the indorsements upon those checks as you entered them upon the stub of this check book? A. Yes.

Q. And as you handled those checks did you observe the face of the checks so that you knew by whom they had been drawn? A. Yes, more with the idea of seeing whether it was a perfectly good check than anything else.

Q. You say that some of these bills and the currency were

large and some small; what do you mean when you refer to a small bill? A. Ones, twos, fives, tens perhaps.

Q. Were there any one and two dollar bills in that currency? A. I could not say.

Q. Were there any $5 bills in that currency? A. I could not say as to any special denomination.

Q. Was it a large package of bills or small package when it was received by you? A. If piled up probably three-quarters of an inch high.

Q. Three-quarters of an inch high? A. A good sized package of bills.

Q. Was the package of bills when handed to you enclosed in a wrapper of any kind? A. Not that I remember.

Q. Do you know whether the bills when they came to you for deposit were in the same form and the same bills that had been received by your concern from Colwell? A. I could not say.

Q. You know nothing about that? A. No, sir.

Mr. Hinman.— That is all.

Mr. Kresel.— That is all. Mr. Murray.

ALEXANDER MURRAY, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Murray, during the month of October, 1912, were you in the employ of Boyer, Griswold & Company? A. Yes.

Q. And what was your position there? A. Well, charge of the margins and the order department.

Q. Now, on the 16th of October, 1912, do you remember transmitting to your representative on the Exchange an order to purchase 200 shares of Big Four? A. Yes.

Q. Was the stock purchased? A. Yes, sir.

Q. And did you get it from some broker from whom it was purchased? A. No, sir, I did not get it.

Q. Was it handed to you that day? A. Yes.

Q. By whom? A. Mr. Reynolds, the cashier.

Q. Did you deliver that stock to Frederick L. Colwell on that very day? A. I did.

Q. And where did you make the delivery? A. In the private office of Mr. Boyer.

Q. In the office of Boyer, Griswold & Company? A. Yes, in Mr. Boyer's private office.

Q. What did Mr. Colwell give you when you handed him the stock? A. He handed me certain currency and checks in payment thereof.

Q. Certain currency and checks ? A. Yes.

Q. What did you do with the checks and the currency? A. I immediately handed them to the cashier, Mr. Reynolds.

Q. Now, I want to show you Exhibits 61, 55, 51, 56 and 58, and ask you whether those checks were among the checks that you got from Mr. Colwell? A. I cannot say. I do not remember anything about the checks other than just seeing they were certified. I could not identify any one of them.

Q. But whatever you got — A. Whatever I got I handed to Mr. Reynolds.

By the President:

Q. It is certain whatever checks you gave him were certified before they were given to you? A. Yes, sir.

By Mr. Kresel:

Q. How long a time expired between the time that Mr. Colwell handed you the checks and money and the time you gave them to Mr. Reynolds? A. I simply received them from Mr. Colwell in one room and walked right out to the cashier as quickly as I possibly could.

Cross-examination by Mr. Hinman:

Q. Was there any occasion for doing that just as quickly as you could, that is, turning it over to the deposit clerk? A. The only occasion being that I had to watch a telephone for the Stock Exchange and I ran into the room and got the money and ran back as quickly as I could to answer that telephone.

Q. You went on the run both ways? A. No; I walked into the room and stopped a minute to receive the money from Mr. Colwell, handed him the stock and then got back as quickly as I possibly could.

Q. Who gave you the instructions to order the stock? A. I believe it was Mr. Boyer.

Q. What time in the day was it that he gave you that order? A. In the afternoon.

Q. What time in the afternoon? A. I don't remember the exact time.

Q. How long after the order was given by you to buy the stock was it before the stock was received at your office? A. I should say about half an hour.

Q. How soon after the stock was received at your office did you turn these checks and this currency over to the clerk, the deposit clerk? A. Possibly ten minutes.

Q. Were you present when Mr. Colwell had his talk with your Mr. Boyer? A. No, sir.

Q. Did you see Mr. Colwell in the office at any time that day? A. Yes, sir.

Q. When did you first see him? A. I was asked for a quotation on the stock and went into the room to give it to him. That was the first time I saw him.

Q. When were you asked for that, what time in the day? A. In the afternoon some time.

Q. How long was that before you gave the order for the stock?

The President.— Are you going to take issue on the purchase of this stock?

Mr. Hinman.— No, but there are some details that may become important. There will be no issue on the purchase of the stock, not the slightest.

Q. Do you know whether Mr. Colwell remained there all the time? A. No, sir, I do not.

Q. Did Mr. Colwell deliver the checks and the currency to you in person or did he deliver that to someone else first? A. As I said before, he delivered it directly to me and nobody else.

Q. Did you know him? A. Subsequently, yes, but not that day.

Q. Had you ever seen him or known him before that? A. No, sir.

Q. When the stock came there to your office, these 200 shares of Big Four, was the stock delivered to you? A. By Mr. Reynolds?

Q. To you? A. To me.

Q. What instructions if any did Mr. Reynolds give you then? A. None.

Q. None whatever? A. No, sir.

Q. Who gave you any instructions in connection with the stock in respect to obtaining the quotation? A. Possibly Mr. Boyer, but I understood the whole transaction. To the best of my knowledge Mr. Boyer told me what to do, and of course I did what he said.

Q. According to the best of your knowledge have you any recollection about it now? A. Mr. Boyer gave me the instructions.

Q. What instructions did Mr. Boyer give you? A. To buy the stock for Mr. Colwell and have it delivered to him as soon as possible, which he was going to pay for.

Q. Have you any means of fixing what time in the day these different transactions occurred, except it was in the afternoon? A. The natural form of procedure —

Q. No, I want your recollection. A. No; I could say safely after 1 o'clock, that is all.

Q. The checks as they were delivered to you — was there anyone present except you and Colwell? A. Mr. Boyer might have been sitting at his desk in that room.

Q. No, I simply want your recollection; do you recall now? A. No, sir.

Q. Did you make any notation of the checks or examine them at all? A. No, sir.

Q. Didn't you examine the checks? A. I examined the checks to see they were certified —

Q. Just listen to my question. Did you examine the checks? A. Yes.

Q. When they were delivered to you? A. Yes.

Q. What examination did you make of them? A. Just to see that they were certified.

Q. Anything else? A. No, sir.

Q. Did you examine them to see as to the amounts? A. No, sir.

Q. Did you deliver the stock to Colwell as he delivered the checks and currency to you? A. Yes.

Q. Did you immediately right then and there before you took the checks and the currency to the deposit clerk deliver the stock to Colwell; that is, were the acts almost simultaneous? A. No, sir.

Q. What did you do first? A. Just handed him the stock.

Q. He handed you the checks and currency, and you handed him the stock? A. That is the idea.

Q. And then you took the currency and the checks to your deposit clerk? A. Yes, sir.

Q. And you made no examination whatever of the checks except to see that they were certified? A. Yes, sir.

Q. Are you clear about that? A. I am clear to this fact, that I handed the stock to Mr. Colwell, and he in turn handed me the currency and checks.

Q. Which occurred first? A. I handed him the stock.

Q. Did you do anything in this connection except take them and see they were certified and hand them to the deposit clerk? A. I just saw that they were certified and possibly nine chances out of ten I saw I had the right amount of money.

Q. Well, now, then, that is what I am getting at. Did you do that? A. I think I did.

Q. Well, now, have you any recollection? Not what you think, but I want your recollection. Do you recall it? A. I can't say that I do.

(Witness excused.)

HENRY MORGENTHAU recalled.

Direct examination by Mr. Stanchfield:

Q. Mr. Morgenthau, have you been abroad during the past summer? A. Yes, sir.

Q. When did you return? A. On September 2d.

Q. September 2d? A. Yes, sir.

Q. Since your return have you had any personal interview with the respondent, Governor Sulzer? A. I have not.

Q. Have you had any communication with him by letter? A. I have.

Q. Have you had any by telegram? A. I think so; I am not sure.

Q. Have you had any communication with him by telephone? A. I have.

Q. Was that long distance telephone? A. Yes, sir.

Q. When did you have a long distance telephone with him? A. It was either September 2d or 3d.

Q. Immediately after your arrival in this country? A. Yes, sir.

Q. Now, did Governor Sulzer call you on the phone, or did you call him? A. Governor Sulzer called me on the phone.

Q. Where were you at the time? A. I was at my daughter's house, in Port Chester.

Q. New York? A. Yes, sir.

Q. Port Chester, N. Y.? A. Yes, sir.

Q. Did you have a telephonic conversation with him at that time? A. I did.

Q. Tell us what it was? A. He passed the usual complimentary talk about my return, and he asked me whether I would come up to see him at once, to Albany. I told him I would not; that I had to go to Washington, probably spending a week there, and that I did not think, now that I had accepted a national position, that I would care to come up to see him under the existing circumstances. So he said to me, "If you are going to testify, I hope you will be easy with me," and I answered him that I would testify to the facts.

Mr. Stanchfield.— Did you all hear that?

Q. Have you related all the conversation with him? A. I think so. All of any importance.

Q. Well, let me see if I cannot refresh your recollection. Wasn't there something said by him to you upon the subject of how your check to him should be treated in your testimony? A. I don't think he mentioned the check.

Q. Well, your contribution? A. No — I think — he said something about that I should treat the affair between us as personal.

Q. As personal? A. Something like that.

Q. That you should treat the affair between you as personal, and what did you say? A. That I could not.

Q. That you could not, and that followed that part of the conversation in which he asked you to be easy in your testimony? A. Of course, you have taken me by surprise. I don't remember the exact words, but that states the substance of it; which was mentioned first or last, I do not remember.

Mr. Stanchfield.— That is all.

Cross-examination by Mr. Marshall:

Q. You say you don't recollect the exact words of that conversation? A. I don't.

Mr. Marshall.— That was about the only question I wanted to put. That is all.

Mr. Stanchfield.— That is all, Mr. Morgenthau.

(Witness excused.)

Mr. Kresel.— Mr. Reynolds.

CHARLES A. REYNOLDS recalled.

By Mr. Kresel:

Q. Mr. Reynolds, I want to get the numbers of those certificates. Will you please state the numbers of the certificates of the Big Four stock that you delivered to Mr. Colwell? A. C-18866.

The President.— Those are the numbers of the certificates of stock that you delivered over to Colwell?

The Witness.— Yes, sir.

The President.— You didn't get them transferred. I suppose somebody else's name was given you?

The Witness.— They were in the name — I don't know what name they were in.

The President.— You only gave the order that morning for the purchase.

The Witness.— That day.

Q. Was each certificate for 100 shares? A. Yes, sir.

Mr. Kresel.— That is all.

One more question, and then I will be through. I want to recall Mr. Boyer.

PHILIP BOYER recalled.

Examination by Mr. Kresel:

Q. Was this transaction you have been testifying about the only transaction that Frederick L. Colwell ever had with the firm of Boyer, Griswold & Company? A. Yes, it was.

Mr. Kresel.— That is all.

Cross-examination by Mr. Hinman:

Q. Just one question. Have you any present recollection as to the time of day when Mr. Colwell had his first talk with you on October 16, 1912, in reference to buying 200 shares of Big Four stock? A. Will you repeat that, please?

The President.— Read it, Mr. Stenographer.

(The question was read by the stenographer as follows: "Q. Have you any present recollection as to the time of day when Mr. Colwell had his first talk with you on October 16, 1912, in reference to buying 200 shares of Big Four stock?")

The Witness.— No, I don't remember now particularly.

Q. Are you able to state whether it was before or after twelve o'clock, noon? A. No, I am not.

Q. Were you present at the time when Mr. Murray delivered the stock to Mr. Colwell? A. I don't think so, no.

Q. Did you remain in your office from the time that you had the first talk with Mr. Colwell, up to the time until after the transaction was closed, or don't you know about that? A. I don't know anything about that, because they were two entirely separate parts of the organization.

Q. Did you or Mr. Colwell go out of your office after you had had the first talk with him? A. He went out of my private office. I don't know whether he went out of the main office.

Q. To what employees in your office did you give any directions in connection with the purchase and delivery of this stock? A. To the order clerk, Mr. Murray.

Q. Did you give any instructions to anyone else? A. I don't remember doing so, but I must have instructed Mr. Reynolds that he delivered, a cash delivery.

Q. You have no recollection of it, but you assume that it must have been so? A. Yes.

Mr. Hinman.— Nothing further.

Mr. Kresel.— That is all. I call Mr. Gwathmey.

JAMES TEMPLE GWATHMEY, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Gwathmey, what is your business? A. I am in the cotton business.

Q. Cotton broker? A. Cotton merchant.

Q. Cotton merchant? A. Yes, sir.

Q. Do you know Mr. Sulzer, the Governor? A. I have met him.

Q. You have? A. Just shaking hands.

Q. You are not very intimate with him? A. I am not.

Q. Well, on the first of November, 1912, do you remember writing a letter to Mr. Sulzer? A. I don't recollect it, but I think you have a copy of it.

Mr. Kresel.— Yes. Will the gentlemen please produce the Gwathmey letter?

Mr. Herrick.— We haven't it.

Mr. Kresel.— You have not?

Q. Now, please look and state if that is a copy of the letter that you sent to Mr. Sulzer (counsel passes paper to witness). A. (After examining) Yes, sir, that is it.

Mr. Kresel.— I offer the letter in evidence.

(The letter offered in evidence was received and marked Exhibit M-63.)

Mr. Kresel.— This letter reads as follows:

"11-1-12.

(Standing for November 1, 1912.)

"*Hon. William Sulzer, 115 Broadway, City:*

"DEAR SIR.— Enclosed please find $100, which I wish you would hand to the people who are conducting your personal campaign, as I wish this money to be devoted to that cause alone.

"Yours very truly."

Q. And was it signed by you, Mr. Gwathmey? A. I think so, or my secretary.

Q. Either by yourself or your secretary? A. Yes, sir.

Q. Now, did you enclose a check — well, if the secretary signed it, did he sign your name, J. Temple Gwathmey? A. Yes.

Q. Did you enclose a check with that letter? A. I did.

Q. Now, please look at that and state whether that is the check (counsel passes paper to witness). A. (After examining) That is the check.

Q. And was the check —

Mr. Kresel.— I think it is already marked. Yes, I showed the witness Exhibit 38, Mr. Stenographer.

Mr. Herrick.— That is the one in evidence, not for identification?

Mr. Kresel.— No, no, it is in evidence.

Q. Was this check paid subsequently? A. I presume so.

Q. And the voucher was returned to you by your bank? A. I think so.

Q. Did you get an acknowledgment from Mr. Sulzer? A. I don't recollect; I think you have something there.

Q. Now, look at this, please, and state whether that is the acknowledgment you received (counsel passes paper to witness). A. (After examining) Yes.

Mr. Kresel.— I offer that in evidence.

(The letter offered in evidence was received and marked Exhibit M-64.)

Mr. Kresel.— This letter is on the stationery of the Committee on Foreign Affairs, and reads as follows:

"*115 Broadway, New York, November 4, 1912*

"*J. Temple Gwathmey, Esq., care George H. McFadden & Brother, 3 South William street.*"

Q. Is that the firm with which you are connected, Mr. Gwathmey? A. Yes.

Mr. Kresel.—(Reading):

"My dear Mr. Gwathmey.— Many thanks for your very kind letter. I certainly appreciate all you say and all you have done. With best wishes believe me,

"Very sincerely your friend,

"William Sulzer."

Mr. Kresel.—You may examine.

Mr. Herrick.— No questions.

Mr. Hinman.— Just a moment, if I may be permitted.

Cross-examination by Mr. Hinman:

Q. I will ask you to look at this check, Exhibit 38, and tell me whether or not when it was returned to you as a canceled voucher, it had on the back of it the indorsement, the rubber stamp indorsement of William Sulzer, and the indorsement of Louis A. Sarecky, and the stamp of the bank?

The President.— Doesn't the check show that for itself?

Mr. Hinman.—Well, I want to show that it was there when it was returned to him. That is, that indorsement was there then.

Q. Well, are the indorsements on the check as they appear today, were they on there when the check was returned to you? A. I never looked on the back of it before.

Mr. Kresel.— There will be no question made by the managers but that those indorsements were there.

By Senator Pollock:

Q. Will you please examine Exhibit 38, to tell me whether that has any indorsement except the name of William Sulzer and Louis A. Sarecky, including the bank indorsements? A. William Sulzer, Louis A. Sarecky. That is all.

Q. Anything else? A. Nothing that I see except the bank notation, probably.

By the President:

Q. Isn't there a stamp showing the bank? A. I presume that is what is here (indicating).

Mr. Marshall.— It is on the front.

Mr. Brackett.— That is what the senator asked for, including the bank indorsements.

Mr. Hinman.— He did.

By Senator Pollock:

Q. What I wanted to know is whether that check was deposited in the deposit account, or whether that check was presented to the paying teller of the bank, and was drawn on and the cash received by somebody?

The President.— How can he tell? He signed the check; that was all, and it comes back, and that is here.

Mr. Marshall.— I might answer the question of the senator by saying that managers' exhibit M-27 shows that that check was deposited to the account of Sarecky in the Mutual Alliance Trust Company.

Mr. Kresel.— I think I can clear up this mystery. The reason that there is no stamp of the bank as showing a deposit in that bank, is because this check is drawn on the very bank in which it was deposited, the Mutual Alliance Trust Company. That is correct. There is no question about that.

Mr. Brackett.—And the stamp of that company is there.

Mr. Kresel.— And there is a stamp on the face of the check, "Mutual Alliance Trust Company of New York, 35 Wall street, Paid."

Mr. Herrick.— And giving the date of deposit?

Mr. Kresel.— No, there is no date there, but there is no question but that it was deposited in the Mutual Alliance Trust Company; at least the managers will not claim otherwise.

Mr. Herrick.— That is all we want.

Mr. Kresel.— Is that satisfactory to you?

Mr. Herrick.— Entirely.

Mr. Kresel.— That is all, Mr. Gwathmey.

(Witness excused).

Mr. Kresel.— I call Mr. Neville.

GEORGE W. NEVILLE, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Neville, what is your business, please? A. I am in the cotton business.

Q. Are you a member of some firm? A. Stephen M. Weld & Company and Weld & Neville.

Q. Stephen M. Weld & Company, and what other firm? A. Weld & Neville.

Q. And your office is in the city of New York? A. Yes, sir.

Q. You are cotton brokers and investors? A. Merchants.

Q. Merchants? A. Yes, sir.

Q. Are you a member of the Cotton Exchange in New York? A. Yes, sir.

Q. And were you a member of the Cotton Exchange in the month of October and in the month of November, 1912? A. Yes, sir.

Q. Do you know the firm of Gwathmey & Company? A. Yes, sir.

Q. And are they cotton brokers and cotton merchants? A. Yes, sir.

Q. And members of the Cotton Exchange? A. Yes, sir.

Q. Do you know Mr. Mitchell, who is a member of that firm? A. Yes, sir.

Q. Do you know also Mr. Mandelbaum? A. Yes, sir.

Q. What is his first name? A. L. Mandelbaum — Leopold.

Q. Leopold Mandelbaum? A. Yes, sir.

Q. And is Mr. Mandelbaum likewise a member of the Cotton Exchange? A. Yes, sir.

Q. Now, on the 1st of November, 1912, did you give any money to Mr. Mandelbaum? A. I did.

Q. How much did you give him? A. My recollection is it was $200.

Q. In cash? A. Yes, sir.

Q. And on the same day, November 1, 1912, did you get this check from Gwathmey & Company? A. Yes, sir.

The President.— Is that another check in addition to the one the previous witness spoke about?

Mr. Kresel.— Yes, your Honor.

Q. Well, now, will you state, Mr. Neville, about this check of Gwathmey & Company, and about the $200 in cash which you gave to Mr. Mandelbaum, where did that money come from? A. The $200 was part of a large amount, a larger amount, that was contributed by several merchants in New York, to be given to defray the campaign expenses of several candidates running for various offices who were friendly to the merchants, or the merchants were friendly to them.

Q. I see. Well, now, without inquiring at the present time how much money was contributed in all, can you state to the Court the names of the persons or firms that made the contribution? A. I told you when you were in my office in New York the other day that I kept no record of those contributions.

Q. Yes, you did. A. I have since looked at my books and

found that I didn't keep any record of those contributions, but I cashed the checks, made the division, and told the contributors of the division made.

By the President:

Q. You cashed the checks, got the money, and then divided it up among the various candidates? A. Yes, sir; and Mr. Sulzer was sent $200.

By Mr. Kresel:

Q. And is that the $200 that you gave to Mr. Mandelbaum? A. Yes, sir. And if you would like an explanation how Mr. Mandelbaum gave the money I would be glad to give it to you.

Q. I think you better have Mr. Mandelbaum do that. Now, I still would like to get your best recollection as to the names of the persons that made the contributions. Now, one of them was Gwathmey & Company? A. Yes, sir.

Q. Now, can you from recollection tell us the names of some others? A. My recollection, as near as I can remember the matter, is, my own firm, Stephen M. Weld & Company, gave $100, and the firm of Hubbard Bros. & Company gave $100, and Gwathmey & Company gave $100; and I am uncertain about the others; I can't recall them, not near enough, your Honor, to give testimony.

By the President:

Q. Well, you say that you divided it? A. Yes, I divided it among three or four different candidates.

Mr. Kresel.— Now, I offer in evidence this check of Gwathmey & Company.

(The check offered in evidence was received in evidence and marked Exhibit M-65.)

Mr. Kresel.— I have no photograph of this check. I got it too late to make it.

The President.— Read it.

Mr. Kresel.— I shall read it. It is headed (reading):

"GWATHMEY & COMPANY.

2350 "*New York, November 1, 1912*

"FARMERS LOAN AND TRUST COMPANY,

"22 William Street.

"Pay to the order of George W. Neville $100 one hundred dollars.

"Signed,

"GWATHMEY & COMPANY."

It is endorsed: "George W. Neville. Pay Mutual Alliance Trust Company, or order. Stephen M. Weld & Company," and then the stamped endorsement of the Mutual Alliance and the National Bank of Commerce and the Farmers Loan & Trust Company.

Q. When you gave the $200 to Mr. Mandelbaum, what did you say to him? A. I can't recall just what I said.

Q. I mean in substance? A. In substance, here was $200, which we want given to Mr. Sulzer for his campaign expenses. That was the intent of the collection.

Q. And did you tell Mr. Mandelbaum to deliver the money? A. Mr. Mandelbaum and I started to go to deliver it, but I live in Jersey, and we were caught in a rainstorm and had to take shelter in one of the buildings on Broadway, and before the rain was over I would have missed my train if I had gone there, so Mr. Mandelbaum went alone, and I had to run to catch my train and got soaking wet to catch it.

Mr. Brackett.— I suggest that the stenographer read the answer. They could not hear it.

The President.— The witness says they started to give it to Mr. Sulzer in person; a rainstorm came up and they had to seek shelter, and before the rain got over, or when it got over, it was too late for him to catch a train. He left Mr. Mandelbaum and he went and caught his train. Thas is the point of it.

Mr. Kresel.— That is all, Mr. Neville, unless the gentlemen over there want to ask you something.

(Witness excused.)

Mr. Kresel.— I will call Mr. Mandelbaum.

LEOPOLD MANDELBAUM, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Mandelbaum, are you a member of the Cotton Exchange? A. Yes, sir.

Q. You are a cotton broker? A. Yes, sir.

Q. You know Mr. George W. Neville? A. Yes, sir.

Q. The gentleman just preceding you? A. Yes, sir.

Q. Do you remember going to Mr. Sulzer's office in the month of November, 1912? A. I don't know exactly the date, but the receipt will bear it out. We did.

Q. You did go to the office? A. Yes, sir.

Q. Do you remember where that office is? A. Not exactly; somewhere near the Trinity building, I don't know whether the first building or the second building.

Q. On Broadway? A. On Broadway.

Q. When you went there, did you have anything with you? A. I had $200 with me. That is, I had other things with me.

Q. Who gave it to you? A. Mr. Neville.

Q. What did Mr. Neville tell you to do with it? A. The way I came to — I can make a statement, can't I?

Q. Certainly. A. The way I came to go up to Mr. Sulzer was I went up with Mr. Neville. We were caught in a terrific rainstorm, and we went into a building on the corner of Wall and Broadway. We were in there about a half hour. It stormed fearfully, and Mr. Neville told me that he had to go. He had to make his train, and asked me to take the $200 and bring it up to Mr. Sulzer's office.

Q. And to say what about the $200?

Mr. Herrick.— Wait a minute.

Mr. Kresel.— Well —

Mr. Herrick.— That is objected to.

Mr. Kresel.— I was asking the witness to state what Mr. Neville told him to say about the $200.

Mr. Herrick.— I object to that as hearsay.

Mr. Kresel.— That is upon the same theory that the other conversations from the Governor's friends have been admitted.

The President.— I think this is a little different. You may do that in favor of a person, but you can't against them. There is the difference.

Q. You went to the office, did you? A. I did.

Q. What happened there? A. I went there, and Mr. Sulzer was not there. I met Mr. Sarecky.

Q. Mr. Sarecky. Go on. What did you say to him? What did you do? A. I told Mr. Sarecky I gave him $200 from Mr. George W. Neville for Mr. Sulzer.

Q. For what? A. I don't think I told him anything.

Q. Did you tell him who Mr. Neville was? A. I told him of course, who Mr. Neville was. He was a member of the New York Cotton Exchange and a friend of Mr. Sulzer.

Q. Did you tell him that? A. I think I did. I am not quite sure.

Q. Did you tell him where the money came from? A. I didn't tell him where the money came from because I didn't know.

The President.— Did you tell him whether it was to pay a bill you owed him, or anything else; did you make any allusion to what it was?

The Witness.— I did not. The inference, of course, on my part was —

Q. No, no. Don't tell us your inferences.

Mr. Herrick.— That is objected to.

Q. I want to know what you said to Mr. Sarecky? A. Not anything, except it was $200 George W. Neville requested me to

hand to Mr. Sulzer. Mr. Sulzer not being there, I handed it to Mr. Sarecky.

Q. Now, may I ask what message Mr. Neville sent to Mr. Sulzer with the $200?

Mr. Herrick.— That is objected to as incompetent.

The President.— That is not competent.

Mr. Kresel.— That is not competent?

The President.— No, you see it works a different way.

Q. Did you deliver the $200 to Mr. Sarecky? A. I did.

Q. What did Mr. Sarecky say? A. Mr. Sarecky said he was very much obliged for the money.

Q. Is that all he said? A. That is about all he said. Then I requested Mr. Sarecky that inasmuch as it is money I paid him for others, I would like to have a receipt, and I got that receipt.

Q. Now, look at that. Is that the receipt? A. It is.

Q. Is it? A. It is.

Mr. Kresel.— I offer it in evidence.

(The receipt offered in evidence was received in evidence and marked Exhibit M-66.)

Mr. Kresel.—(Reading):

"*New York, November 1st*

"Received from Mr. Mandelbaum, $200.

"LOUIS A. SARECKY."

Q. Have you stated, Mr. Mandelbaum, as far as your recollection serves you, all of the conversation that you had with Mr. Sarecky? A. I think I did.

Q. Did you have any talk with him about Mr. Sulzer's campaign? A. I don't exactly recall it, but I would not positively state that I didn't.

Q. What is your best recollection about it? A. I don't think I did. It was very late. In fact I never knew Mr. Sarecky. It was the first time I ever saw him.

Q. Did you know who he was when you gave him this money?

A. I didn't. He told me he was Mr. Sulzer's secretary. I never heard of him or saw him before.

Q. Did Mr. Sarecky say anything to you about Mr. Sulzer's campaign?

Mr. Herrick.— That is objected to as incompetent. Mr. Sulzer was not there.

The President.— Did he say anything — you inquired, I suppose, when you went to the office?

The Witness.— I did, your Honor.

The President.— Now, can't you tell according to your best recollection just what happened from that time?

The Witness.— I asked for Mr. Sulzer and Mr. Sarecky told me that Mr. Sulzer was not there; that he was his secretary, and that he would take the money, and I gave him the money.

Mr. Kresel.— All right. That is all.

Mr. Herrick.— Nothing.

(Witness excused.)

The President.—We will take a recess now, gentlemen.

Whereupon, at 12.30 p. m., Court adjourned to 2 p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2 o'clock p. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Todd.— Mr. D. W. Peck.

Mr. Marshall.— Before you call Mr. Peck I would like to recall Mr. Gwathmey for one minute.

J. TEMPLE GWATHMEY recalled.

By Mr. Marshall:

Have you that letter that Mr. Gwathmey produced?

Mr. Kresel.— Yes, here it is.

Q. Mr. Gwathmey, I show you Exhibit M-63. Do you wish to make any explanation with regard to that letter? A. No, sir.

Q. What were your politics in the fall of 1912? A. I am a Republican.

Q. Republican. Did you vote for any other candidate on the Democratic ticket that year besides Governor Sulzer? A. I did not.

Q. You wanted that fact to be understood at that time, did you? A. Yes, I did when I gave this letter.

Mr. Marshall.— That is all.

(Witness excused.)

DUNCAN W. PECK, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. Mr. Peck, you are the Superintendent of Public Works of the State of New York? A. I am.

Q. How long have you held that office? A. Nearly two years.

Q. You will have to speak very loud, so that the gentlemen on the last row can hear you, Mr. Peck. Do you know William Sulzer, the respondent? A. I do.

Q. How long have you known him? A. I think about 20 years.

Q. Has your acquaintance been friendly? A. It has.

Q. Do you recall when he was nominated for Governor of the State of New York? A. I do.

Q. After his nomination and before his election did you see him and have a talk with him? A. Once I did.

Q. Where was that and when was it? A. In the Rensselaer Inn, in Troy.

Q. What was the occasion? A. A political meeting there.

Q. A ratification meeting of the nomination of the Democratic candidates for State offices? A. I believe so.

Q. State the conversation that you had with William Sulzer, the respondent, at that time? A. I met him in the lobby and said "Governor, I would like to give you this for your campaign."

Q. What did you give him when you made that remark? A. I gave him a $500 bill.

Q. What did he say? A. He said "Thank you."

Q. Was there anything else said on that occasion between you and Governor Sulzer about that contribution? A. Yes, sir.

Q. What? A. I said there were no strings on it and he need not feel at all obligated to reappoint me.

Q. You were at that time the Superintendent of Public Works? A. I was.

Q. Since that have you had any conversation with the respondent, William Sulzer, in reference to that contribution? A. That was a confidential conversation. Must I give it?

The President.— Yes, you must give it.

Q. State the conversation, first stating when it was and where it was. A. I don't know when it was. It was somewhere after the 19th of July in the executive chamber.

Q. July, 1913? A. Somewhere after that time.

Q. In the executive chamber? A. In the executive chamber.

Q. In Albany? A. In Albany.

Q. Now, state the conversation. A. I had received a communication from the so-called Frawley committee.

Q. A letter? A. A letter.

Q. Have you that letter? A. No, I have not.

Q. Have you looked for it? A. I have.

Q. Have you been able to find it? A. I have not.

Q. What was the substance of that letter?

The President.— The point is, what passed between him and the respondent.

Mr. Todd.— If your Honor please, it has to do as I understand with what had passed between them.

The President.— When that appears, you can go back to it.

Q. Did you show this letter to the respondent, William Sulzer, at this time? A. I did.

The President.— Now you can go back to it.

Q. Will you state the substance of that letter? A. Why, it was a request to state what donation, contribution I had made; and whether a check or otherwise; and I don't remember all of it, but that was the gist of it.

Q. To produce and give that information to whom? A. To this committee.

Q. Frawley committee? A. Yes, sir.

Q. Now, state the rest of the conversation? A. I showed the letter to the Governor and asked him what I could do about it.

Q. What did he say? A. He said "Do as I shall; deny it."

Q. What else was said if anything? A. Why, I said, "I suppose I shall be under oath." He said "That is nothing. Forget it."

Q. Was there anything else said? A. Nothing more.

Mr. Todd.— Your witness.

Cross-examination by Mr. Hinman:

Q. Have you any means of fixing the date when you saw the Governor in the Rensselaer Inn at Troy? A. It was —

Q. And gave him this $500 bill? A. Why, it was the night of the Democratic ratification; I think the 18th of October.

Q. 1912? A. This year. Last year, rather.

Q. That is 1912? A. Yes.

Q. Where were you at the time? A. In the Rensselaer Inn.

Q. I mean in what particular room, do you remember? A. In the lobby.

Q. State whether or not there were other people there in the lobby at the time. A. There were a lot of people there.

Q. Was it before or after the meeting? A. It was after the banquet.

Q. In the evening? A. Sure.

Q. This conversation that you have detailed in the executive chamber; I ask you whether you made any memorandum or notes of what was said between you and the Governor? A. I did not.

Q. Are you giving here, or do you attempt to give here now the

exact language he used, or are you giving your recollection of the substance of it? A. The exact language.

Q. Word for word? A. Word for word.

Q. You can't be mistaken as to a word? A. No.

Q. Not in a word said by him or a word said by you? A. Not that conversation.

Q. Not a word? A. No, sir.

Mr. Hinman.— Nothing further.

(Witness excused.)

Mr. Kresel.— I will call Mr. Cox.

JOHN W. COX, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Are you Mr. Cox or Dr. Cox? A. I am both. I am a graduate of medicine and also Mr. Cox.

Q. Then Dr. Cox, may I ask you whether you are practicing your profession? A. I am not.

Q. Are you a member of the Manhattan Club in New York? A. I am.

Q. Do you know Governor Sulzer? A. Yes.

Q. How long have you known him? A. Let me see. I knew him prior to the Democratic national campaign in 1896. I should say about 17 or 18 years.

Q. And during Governor Sulzer's campaign for the governorship you were quite active in his behalf, weren't you? A. Well, I couldn't say I was quite active; I was interested in his election, yes.

Q. Well, what I mean is this: were you a member of any organization which was organized to help along his election? A. I was not.

Q. Do you remember what was known as the Business and Professional Men's Sulzer League, of which Mr. Hoyle was the chairman? A. Well, I can't deny that. You know, often people come up to you and ask you to sign something and lend your name, and while I don't remember anything of the kind, I may

have been; I cannot say; if I could see one of the papers to which my name was signed, I could tell you whether I signed it or not.

Q. I just wanted to inquire — A. (Interrupting.) I don't remember of such a thing.

Q. I just wanted to inquire whether you remember being one of the executive committee of that organization? A. I do not.

Q. You do not? A. I don't say that I was not, but I don't remember of being.

Q. Very well. Now, Doctor, you were subpoenaed to produce a certain check for $300. Have you it? A. I have. (Witness produces paper.)

Q. Now, did you draw this check? A. I did.

Q. On or about the date that it bears date? A. Exactly the date that it bears date.

Q. Now, after you drew the check, what did you do with it? A. I sent it to Theodore W. Myers.

Q. And who is Theodore W. Myers? A. He was treasurer for the purpose of raising some funds in the interest of the election of William Sulzer outside of the organization.

Q. I understand. And when you sent this check to Mr. Myers, did you send a letter with it? A. I did.

Q. Have you a copy of the letter? A. No; all my letters are longhand, and I don't take any copies of them.

Q. I see. Well, will you be good enough to give the Court the substance of that letter? A. Well, I do not, because I had a conversation with Mr. Myers over the telephone, and I told him I would send it to him; that is all; I don't remember what I said in the letter.

Q. Well, state if you will, the conversation that you had with Mr. Myers over the telephone?

Mr. Herrick.— That is objected to.

The President.— Who is Mr. Meyers? I do not remember.

Mr. Kresel.— It now appears from the witness' testimony, Mr. Myers was the treasurer of an organization which had been gotten together for the purpose of promoting Mr. Sulzer's election, and this is one of the checks which went into the Boyer-Griswold account, about which witnesses testified this morning.

The President.— I do not believe he can do that. You will have to ask the Court to infer what it may from the circumstances that he received it from the treasurer. Do you offer the check in evidence?

Mr. Kresel.— Not yet. I have not yet offered it. He did not receive it from the treasurer. He sent it to the treasurer.

The President.— I know, but I say you will have to rely on whatever inferences may be drawn if the respondent received the check.

Q. Did you have any talk with Mr. Sulzer about this check at any time? A. I never spoke to him about it. He never asked me for a contribution or a donation, or anything; I volunteered it.

Q. Either before you gave the check or since that time, you have had no conversation with Mr. Sulzer at any time? A. I never mentioned the amount of money to him, or any amount of money to him.

Q. I am not particular as to whether you mentioned the amount of money. Have you had any conversation with Mr. Sulzer about this check? A. Never.

By the President:

Q. Or about any contribution? A. No, sir.

Q. Did you speak about any contribution? A. No, your Honor.

By Mr. Kresel:

Q. Either by word of mouth or letter? A. Hold a minute. I will say this: That I told him I would do what I could to raise some money to help him along as best I could.

Q. To help him along in what? A. To help him along to become Governor of the State of New York.

Q. And when was that conversation and where? A. In the room of the Committee on Foreign Affairs in Washington.

Q. And was it before you gave this check or after that? A. Before.

Q. Before that? A. Yes. I did not say that I would give him anything at all myself

Q. You have already stated the conversation, as I understand it? A. Read the notes, please.

Q. How did you happen to go to see him in Washington, did he send for you? A. Oh, no, I was there. I often go to Washington, and paid my respects to him.

Q. Now, in addition to that conversation, have you had any talk with Mr. Sulzer about this contribution of $300? A. With whom?

Q. With Mr. Sulzer, or Governor W. Sulzer. A. I have no memory of ever speaking to him about it at all. I do not think I ever mentioned it to him.

Q. Well, did you have any other talks with him about money? A. I only knew that he would know all about it, because I sent the money, sent the check. That was quite sufficient. I never got an acknowledgment of it from him.

Q. Well, did you tell him that you would send a check to this treasurer, Mr. Myers? A. I did not.

The President.— He said that he did not say he would get any money at all, or that he would send him any money at all.

Q. Now, search your memory, Doctor, if you will, and tell the Court whether in addition to that talk that you had with him in Washington, you had other talks with him about raising money to help him become Governor? A. No, I do not think I did. I do not remember anything of the kind. I remember that some of my friends, and also friends of his came to me and asked me if I would be the treasurer, or to collect this money, and I said no, I would not, and then I think that I suggested Theodore W. Myers myself.

Q. As treasurer? A. Yes.

Q. And who was the chairman of this organization? A. It was not any organization. It was just simply somebody to collect the money.

Q. I see. A. Or to take the money, rather.

Q. In addition to your check for $300, what other checks or money did Mr. Myers, as treasurer, collect, in order to help Mr. Sulzer become Governor? A. I never asked him, never spoke of it, and do not know anything about any other check, with the ex-

ception of what he said he would give himself, and that was a conversation over the telephone. He told me he would give $1,000. I don't know whether he did or not. I hope he did.

Q. Now, Doctor, tell us how it came that you sent this check to Mr. Myers? A. Because I called him up over the 'phone and asked him if he would be treasurer, and he said he would.

Q. Treasurer of what, your check and his own? A. To take charge of the money.

Q. What money? A. Any money that might be collected for Mr. Sulzer.

By the President:

Q. You were speaking about collections from various persons, were you? A. His personal friends.

By Mr. Kresel:

Q. Was this check, regularly gone through your bank, and did the bank return this voucher to you? A. Yes, sir. I found that — I had to look for it; I found it with a stack of my vouchers after I — after this proceeding started.

Mr. Kresel.— I offer the check in evidence.

Mr. Todd.— Do you wish to see it?

Mr. Marshall.— Yes.

(Counsel examined paper.)

(The check was offered in evidence was received and marked Exhibit M-67.

Mr. Kresel.— This check bears the name of John W. Cox printed in the margin:

"No. 6320. *New York, October 9, 1912*

"THE CHATHAM NATIONAL BANK

"Pay to the order of Theodore W. Meyers, Treasurer, Three hundred dollars.

(Signed) "JOHN W. COX."

It bears the indorsement of Theodore W. Meyers and the stamped indorsement "Pay to the order of Manhattan Company, New

York, Boyer, Griswold & Company," and then the stamped indorsement of the Manhattan Company.

The Witness.— You will notice that the check is not properly indorsed.

Q. I see. It is not indorsed Theodore W. Meyers, Treasurer, but just Theodore W. Meyers; is that what you mean? A. That is what I mean.

Mr. Kresel.— Very well. That is all.

Cross-examination by Mr. Herrick:

Q. Doctor, in answer to a question, you said that you told Mr. Sulzer that you would raise some money to help him along? A. Yes, sir.

Q. Then the question was put to you, help him along to what, and you said to become Governor? A. Yes, sir.

Q. Did you say that to Mr. Sulzer? A. No, sir.

Q. You are a member of the Manhattan Club? A. Yes, sir.

Q. And there was more or less conversation about Mr. Sulzer there? A. Yes, sir.

Q. About his financial condition? A. Yes.

Q. That he was impecunious? A. Yes.

Q. And you and a number of other gentlemen there made up your minds to help him along? A. Yes, sir.

Q. That is, you were to do something for him personally? A. Yes, sir.

Mr. Kresel.— Wait a minute.

The Witness.— I insist; I am a witness.

Mr. Kresel.— I object to that. Oh, Mr. Witness, you are only a witness.

The President.— When an objection is made you must not answer.

Mr. Kresel.— I object to the question.

The President.— This witness —

Mr. Herrick.—We may be heard, may we not, Mr. President?

The President.— Yes.

Mr. Herrick.— These articles of impeachment charge that these moneys were contributed for a cause, or a principle or a ticket, and that Mr. Sulzer diverted them from the support of that cause, from the support of that principle and from the support of that ticket.

Some of these gentlemen have testified that they made these contributions to help him along personally; not for the support of any cause. You had a witness here this morning who was a Republican and who voted for nobody else; who contributed to help Sulzer along and nobody else, not to sustain any principle, but for his personal benefit.

That is all I am attempting to show here.

The President.— You are going beyond this present witness and you are trying to include others.

Mr. Herrick.— We have had the others who testified to that. I am confining it to this witness and am simply illustrating what I am attempting to do and I think the principle that underlies it.

The President.— You will have to confine it to this witness.

Mr. Herrick.— I am confining it to this witness.

Mr. Herrick.— I will recast the question.

Q. Was this contribution made by you for the personal benefit of Mr. Sulzer and not for the ticket as a whole?

Mr. Kresel.— One moment, I object to that.

The President.— There will be some difference of opinion. Quite a number of the members of the Court, the judges and senators, will take a different view from the Presiding Judge, so I think we better just take a ruling on this and get this out of the way. Let us take a vote on this and get it settled.

Mr. Herrick.— May I merely state, I do not want to argue.

The President.— Yes, you may.

Mr. Herrick.— I do not want to argue; I simply want to state. The articles of impeachment, by looking at them, you will see, charge these moneys were contributed for the support of a cause. I am not pretending to use the exact words, but they state it is for the support of the ticket as a whole, for the support of a principle; that is the substance of it, and that he diverted it from that purpose; that he stole it, inasmuch as he did divert it from the special use for which it is contributed, and we are simply now trying to show this contribution was made for his personal benefit and no other.

The President.— Do not answer this, witness. I overrule the objection.

Mr. Brackett.— May I make a simple statement?

The President.— You may have the same privilege.

Mr. Brackett.— Article 6 says, "that said money and checks were thus contributed and delivered to William Sulzer as bailee, agent or trustee, to be used in paying the expenses of said election and for no other purpose whatever."

Mr. Gwathmey's letter, although he was the Republican referred to by the counsel, who was supporting only Sulzer on the Democratic ticket, expressly says it is to be for his election expenses.

What we want to submit is, that the undisclosed intention of this witness — practically the same question as has been up before — is not competent evidence on the subject.

The President.— Now, do not answer.

Judge Hiscock.— May we have the precise question now asked read again?

The President.— Read the question.

(The question was read by the stenographer as follows: "Was this contribution made by you for the personal benefit of Mr. Sulzer and not for the ticket as a whole?")

Mr. Brackett.— May I also add that it calls for a conclusion.

The President.— Now, we will have a vote on this and let us get it out of the way for the future.

Senator McClelland.— Presiding Judge, for information, I would like to know whether we are considering the different forms or counts in this impeachment indictment collectively and the evidence is being taken generally as in support of the allegation of those separate counts, or whether we are taking up count no. 1 or article no. 1 and article no. 2. There is a great deal of confusion and we would like to have some sort of a clearing up of that particular phase of the matter.

The President.— I suppose if this is competent on any count in these articles, it is competent now. The objection, as I understand of the counsel for the managers, is that the testimony is in its nature incompetent.

Senator Carswell.— May I make a suggestion, if it is in order, that the counsel for the respondent could recast that question so it will clearly appear whether the money was to be used by him personally in his private capacity or for his personal benefit as a candidate for a particular office?

The President.— Counsel is at liberty to adopt the suggestion of a member of the Court or not.

Mr. Herrick.— Will you restate your suggestion, senator?

Senator Carswell.—Why, the question as it is now cast might well be a contribution for him for his own personal benefit as a candidate and not for the benefit of the party or the principles that party represents; and then again a different answer might be given to it with respect to this use personally for his own private purposes, apart from his candidacy.

I think the point that is sought to be ruled on at this time in connection with the question is whether or not it was to be used for his personal private uses, apart from his candidacy.

Senator Thompson.— I simply want to state I do not believe this question brings up the precise question ruled upon in reference to the testimony of the witness yesterday. I do not think this question brings it up.

The President.— I do not say it does absolutely, but I think we had better get a ruling of the Court on it.

Senator Thompson.— I think the question is so different that I am with the ruling of your Honor here and against the ruling of your Honor yesterday.

Mr. Herrick.— I intended to differentiate from the question yesterday.

Mr. Kresel.— Suppose you recast the question?

Mr. Herrick.— Read the question.

Senator Wagner.—As I understand the question it calls for the operation of the witness' mind at the time but not conveyed by him to anyone by any conversation. In other words, it is an undisclosed intent in his mind at the time. That is as I understand the question up before us.

The President.— I can say nothing more. If nobody asks for a vote on it on the ruling of the Presiding Judge, it will stand and the testimony will be admitted.

Does anyone call for a vote on the ruling? If so, it will be taken.

Mr. Herrick.— Now, repeat the question, Mr. Stenographer, please.

(The stenographer thereupon read the question referred to as follows: "Q. Was this contribution made by you for the personal benefit of Mr. Sulzer and not for the ticket as a whole?")

The Witness.— It was given to Mr. Sulzer for his personal benefit.

Senator Brown.— I desire to vote upon it. I think that the evidence is incompetent. And my purpose is not particularly to exclude this particular evidence, but to exclude all kinds of evidence, of which we are likely to have much. We are here to try the intent of Governor Sulzer, not the intent of this witness, or of any other witnesses, and from my point of view it is wholly incompetent. When the question was under discussion before, I referred to a citation which I had occasion to make in a case in the Court of Appeals some time ago, and it struck me that it is pertinent. A case in Chancery in England, where the

judge, presiding judge, said, that the plea is not good without showing that he certified the other of his pleasure, for it is common learning that the intent of a man is not triable, for even the devil does not know the intent of a man. Now, the great trouble with this class of evidence is that witnesses, long after, it would seem, give their intention at the time according to the wishes when they are testifying, and it opens the field which has heretofore, it seems to me, been almost unknown. I think that it ought to be excluded, and I move that it is the sense of the Court that the evidence is inadmissible.

The President.— Call the roll.

Mr. Herrick.— May I be heard for just a moment?

The President.— Yes.

Mr. Herrick.— This is intended obviously to bring out evidence that this contribution was made for the personal expenses of William Sulzer and not for the benefit of the rest of the ticket. The election law, the corrupt practices law, provides that certain expenses of a candidate need not be accounted for. To illustrate, the circulation of literature that is not issued at regular intervals, telegrams, letters and a variety of things that are included in his personal expenses, for which he need make no account at all. Now, when money is contributed for his own personal benefit, where he has a right to use it and not account for it, to a certain extent at least, he cannot be said to be diverting money that is given to him in his hands as bailee and trustee for somebody else. He cannot be bailee and trustee for himself.

The President.— I am very much in doubt as to whether that is so, but I will express no opinion now. Call the roll, Mr. Clerk.

Senator Duhamel.— Attention is called to the fact that a large number of the members of this Court are not members of the bar, and as one of this number, I ask a liberal ruling on all questions in view of the public sentiment of the origin of these charges and the character of the accusers, and that in our original capacity as senators, recognizing our obligations to our constituents, I believe when the Constitution was sustained that it was

intended that the people and their representatives should take some hand in these impeachments, otherwise they would have left it to the Courts. I therefore protest against the rulings — against rulings that are too technical.

The President.— What was that?

Senator Duhamel.— Rulings that are too technical. Mindful of the words of counsel that such proceedings as this may be the result of a conspiracy of crooks and criminals to save themselves from prosecution as the result of chicanery or of parties prompted by other ulterior motives.

The President.— Call the roll. The question is — you had better put it the same as the last, that is, Shall the ruling of the Presiding Judge be sustained or not? Those who think that it should be sustained will say yes or vote aye. Those who think the other way and think that the testimony should be excluded will say no.

Senator Argetsinger.— Aye.

Judge Bartlett.— Aye.

Senator Boylan.— Aye.

Senator Bussey.— Aye.

Senator Carswell.— No.

Judge Chase.— Mr. President, this question it seems to me is simply supplementary to testimony already given by this witness, in which he says in substance that he made the contribution to aid Mr. Sulzer toward his election as Governor. I want therefore to explain my vote, and at present I vote Aye.

Judge Collin.— No.

Judge Cuddeback.— No.

Judge Cullen.— Aye.

Senator Cullen.— Aye.

Senator Duhamel.— Aye.

Senator Emerson.— Aye.

Senator Foley.— No.

Senator Frawley.— No.

Senator Godfrey.— Aye.

Senator Heacock.— Aye.

Senator Heffernan.— Aye.

Senator Herrick.— Aye.

Judge Hiscock.— No.

Judge Hogan.—Aye.

Senator McClelland.— No.

Senator McKnight.—Aye.

Senator Malone.—Aye.

Judge Miller.— I vote aye, and I do it upon the broad ground stated by the Presiding Judge, and not on the theory that this question can be discriminated from the question we had up yesterday.

Senator Murtaugh.— I vote in the negative on the ruling of the President, as I think the evidence pertaining to the intention of the witness Cox is inadmissible, that the intent of the witness should be determined from his acts and statements at the time the transaction took place and, in this proceeding, the witness should not be permitted to testify concerning his concealed intention as to how the respondent should spend the contribution.

Senator O'Keefe.—Aye.

Senator Ormrod.—Aye.

Senator Palmer.—Aye.

Senator Patten.—Aye.

Senator Peckham.—Aye.

Senator Pollock.—No.

Senator Ramsperger.— Aye.

Senator Sage.— No.

Senator Sanner.— Aye.

Senator Simpson.— No.

Senator Stivers.— No.

Senator Thompson.— Mr. President, I vote aye because I think this question can be properly distinguished from the one ruled on yesterday.

Senator Torborg.— Aye.

Senator Velte.— Aye.

Senator Wagner.— Mr. President, I vote no in this case because I cannot under any principle of law understand how the witness can be called upon to testify now as to the operation of his mind at the time of the giving, which was not conveyed by any word of mouth either to the respondent or to any one of his agents.

Senator Walters.— No.

Senator Wende.— Aye.

Judge Werner.— Mr. President, if this were an ordinary civil case I should stand with those senators and judges who question the correctness of this ruling, but rules of evidence are mostly rules of exclusion, and there are occasions when we must rise above mere rules of evidence in the interest of ascertaining the truth. For that reason I vote to sustain the ruling of the Chair.

Senator White.— Aye.

Senator Whitney.— Aye.

Senator Wilson.— Aye.

The Clerk.— Ayes 33, Noes 14.

The President.— You may answer the question.

(The stenographer read the last question and answer, as follows: "Q. Was this contribution made by you for the personal benefit of Mr. Sulzer and not for the ticket as a whole? A. It was given to Mr. Sulzer for his personal benefit.")

By Mr. Herrick:

Q. Doctor, you are a member of the Manhattan Club, I believe you said? A. Yes, sir.

Q. There are quite a number of friends of Governor Sulzer also members? A. Yes, sir.

Q. His campaign, I suppose, was the subject of discussion somewhat there? A. Yes.

Q. And his financial circumstances? A. Oh, yes, all the time.

Q. You had heard his financial condition discussed? A. Oh, yes. I was always led to believe —

Mr. Brackett.— No, I object to what he heard.

Mr. Herrick.— Yes, that may go out.

Q. That discussion of his financial condition and what you had understood it to be, was that one of the causes of your making this contribution?

Mr. Brackett.— I make the same objection.

The President.— Objection sustained.

Mr. Herrick.— That is all.

By Mr. Brackett:

Q. Dr. Cox, you had heard the financial condition of Mr. Sulzer discussed prior to this time, had you not? A. Oh, for years.

Q. Have you ever passed around requests for contributions for him before this time? A. No; he had a position, he was in Congress, he was making $5,000 a year.

Q. How much a year? A. $5,000, that was some years ago.

Q. And you know that at the time these contributions were made that he was getting $7,500 a year as a Congressman? A. I did.

Q. Did you make the request for contributions because he was a candidate for Governor or not? A. Yes.

Q. Solely for that reason, was it not? A. Yes, because — can I go on?

Mr. Brackett.— Oh no, he said solely for the reason.

The President.— He has answered it.

Mr. Brackett.— He said solely for that reason. That is all.

By Mr. Herrick:

Q. Now, I will ask you, have you anything to add to solely for that reason? A. Yes.

Q. What? A. I know a great deal more about political donations than the average man.

Mr. Brackett.— I object to the question, What.

The President.— You asked him for the reason.

Mr. Brackett.— It is to the form of the question, What.

Mr. Herrick.— Counsel cut him off.

The Witness.— I have been acting treasurer of the Democratic National Committee, and I have been treasurer of individuals.

Mr. Brackett.— I don't know what to expect from a question of that kind, it leaves the whole field for the witness to go over.

Mr. Herrick.— I want to be liberal in that respect. He was cut right off. He wanted to add something to his answer.

The President.—The question that was put by Senator Brackett was, "Was that the only reason?" To that he answered "yes." He could say whether it was the only reason. If there were other reasons or not, he answered yes.

By the President:

Q. Do you want to give another reason? A. There was another reason.

By Mr. Herrick:

Q. Was there any other reason besides his being candidate for Governor that actuated you in making this contribution and soliciting contribution? A. Because he was put to extra expense.

Mr. Brackett.— Now, I object to the question on the ground

that that calls for his concededly undisclosed intention and reason and for the operation of his mind.

The President.— But the point is, you ask if this was the sole reason?

Mr. Brackett.—Yes.

The President.— Which you had a right to do, and that is for the purpose of impairing his statement that it was for him personally. They are not obliged to rest on that. They can ask if there was another reason.

Mr. Brackett.— The witness has said there were some expenses, I believe, extra expenses.

By Mr. Herrick:

Q. What extra expenses did you understand he would be put to?

The President.— I think you have gone far enough.

Mr. Herrick.—Very well, sir, I submit.

The President.—That is all, witness.

Mr. Kresel.— Now, Mr. Croker.

RICHARD CROKER, JR., a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Croker, where do you reside? A. New York City.

Q. What is your occupation? A. I am in the real estate business.

Q. You are in the real estate business? A. Yes, sir.

Q. Do you know the respondent, Governor Sulzer? A. I do.

Q. You have known him for quite some years? A. For a great many years, yes, sir.

Q. Did you see him shortly after his nomination for Governor in the fall of 1912? A. I did.

Q. Can you give us the date, the day; you handed him a check on that date, did you not? A. No, I did not, not the first time I saw him.

Q. Did you give him a check at all? A. I did.

Q. Have you it with you? A. I have.

Q. Will you produce it. A. (producing check.)

Mr. Stanchfield.—The check which you handed me is dated October 16, 1912.

Q. Did you see him on that date? A. Yes, on the 16th.

Q. On that date where did you see him? A. At his office.

Q. Where was his office at that time? A. I don't remember but I think it was in what is known as the Empire Building in Broadway, New York City.

Q. Do you recollect whether or not you saw him on that occasion after banking hours? A. It was after banking hours, that is, on the 16th day of October.

Q. That is the date that you gave him this check, isn't it? A. Yes.

Q. You never gave him a check on any other occasion during that campaign? A. No.

Q. Nor any money? A. No.

Q. So we will confine ourselves to this one occasion. That was while he was in the midst of his active campaign for election? A. Yes.

Q. Now, did you have any talk with him at the time when you gave him this check, upon the subject of his wanting cash? A. I did.

Q. I notice, Mr. Croker, that this check is made out payable to the order of cash. That is right, isn't it? A. Yes.

Q. Why did you make it out payable to the order of cash? What was said between you and Mr. Sulzer at that time, in other words, that led you to make it out payable to the order of cash? A. I think the reason was because Mr. Sulzer said that he was about to leave for a trip through the State, either that night, or starting early the next day.

Q. And what? That he would like it in cash? Was that what? A. That was the reason I made it out cash.

Q. Did he tell you in that conversation over what portion of the State, that trip, that contemplated trip, was to extend? A. Not that I remember.

Q. It was one of his regular campaign trips up the State? A. I really don't know.

Q. Do you mean to say he was about to start the next day on a trip up the State, and you didn't know what trip it was or what it was about? A. I don't recall at the present time.

Q. Was anything more said than what you have now testified to? A. Yes.

Q. On the subject of his trip or wanting cash? A. Not on either one of those subjects, that I remember.

Q. About what time on this date did you hand him this check? A. I think about four or five o'clock in the afternoon.

Q. I hand you that check for a moment. Will you look at the back of it. What endorsement, if any, is on the back of it? A. There is the name F. L. Colwell on the back.

Q. F. L. Colwell. Was he in the room when you and Mr. Sulzer were together on this date? A. No.

Q. Do you know Mr. Colwell? A. No.

Q. Did you ever see him in your life? A. No, not that I remember.

Q. Do you know, Mr. Croker, as a matter of fact, that that check was not cashed until the 31st of October? A. I don't.

Q. Will you look at the check and see if it doesn't show you upon its face the day when it was cashed? A. It is stamped "Paid 10/31/12."

Q. That would mean October 31st, would it not? A. (No response.)

Q. That would mean October 31st, would it not? A. I really don't know.

Q. You mean to say you don't know what those figures "10/31/12" on that check mean? A. I have got an idea, but I am not sure.

Q. What is your idea? A. I think it is the date.

Q. The date what? A. Of the month.

The President.— Is there any question that is the tenth month and thirty-first day?

Mr. Stanchfield.— There is not in my mind. I want the witness to give the testimony.

Mr. Herrick.— The check testifies for itself pretty well.

Mr. Stanchfield.— So does Judge Herrick.

Mr. Stanchfield.— I will read this check. You can mark it afterwards.

"No. 213. *New York, October 16, 1912*

THE EQUITABLE TRUST COMPANY OF NEW YORK.

Pay to the order of Cash
Two thousand dollars.

RICHARD CROKER, JR."

With the endorsement: "F. L. Colwell" upon the back, and the stamp "Paid," as before noted, on the 31st of October, 1912.

(The check offered in evidence was received and marked Exhibit M-68.)

Mr. Stanchfield.— You may cross-examine.

Cross-examination by Mr. Herrick:

Q. Mr. Croker, you say that you have been acquainted with Governor Sulzer for a number of years? A. Yes.

Q. He was an old acquaintance and friend of your father's, I believe? A. Yes.

Q. Were you also conversant with his reputed financial condition? A. I don't quite understand the question.

Q. I said, his reputed financial condition, Sulzer's? A. (No answer.)

Q. I will put it in another form. Was it your understanding from the speech of people, or from Sulzer himself, that he was impecunious?

Mr. Stanchfield.— Wait a minute, Mr. Croker. I object to that in that form.

The President.— It is really, what was his belief. Had you any belief on the subject of his financial condition?

Mr. Herrick.— Very well. I accept that. I didn't suppose that would be permitted.

The President.— Does that meet your objection?

Mr. Stanchfield.— It is all right. I shall take no time with it.

By the President:

Q. Had you any belief as to his pecuniary condition, no matter how you got it? A. Yes, I had.

Q. You had at the time? A. Yes, I had at the time.

By Mr. Herrick:

Q. Now, what was that belief? A. I felt that he depended absolutely upon the salary that he received from the public office that he was holding at the time.

Q. Did you believe that he had any resources except from the salary? A. No.

The President.— He said exclusively the salary.

Q. Now, you were asked if you had a conversation with him prior to the time that you gave him this check? A. I had a great many.

Q. No, but the one previous to giving him the check? A. Oh, yes.

Q. State that conversation, please? A. And where it took place?

Q. Yes. A. It was at his office, I believe, either one or two days before this October 16th.

Q. Well? A. During the conversation that I had with him, which, oh, included a number of topics, this matter of expense came up, and I made the remark to him that I supposed he was under a very heavy personal expense at that time, and would be for some time to come; he said that was so. I then said to him that I would like to help him to the extent of giving this — of giving $2,000 toward covering his personal expense.

Q. Well, now, what did you say to him when you gave him the check subsequently, if anything? A. The very last thing I said to him before leaving his office on that afternoon of October 16th,

was in substance that I wished he would consider the giving of this money a personal and confidential matter.

Mr. Herrick.— That is all.

Redirect examination by Mr. Stanchfield:

Q. Now, when you were talking with him on the first occasion, and you say he told you he was under heavy personal expense, what heavy personal expense did he tell you he was under? A. He didn't say.

Q. Are you quite sure about that? A. Quite sure.

Q. You have signed a statement, haven't you, about this matter? A. I don't think so; not that I remember.

Q. Haven't you been down to the office of the board of managers in New York? A. I have.

Q. And haven't you signed a statement? A. I have.

Q. Well, then, you do remember that you have signed a statement? A. Not to the effect that you mentioned.

Q. I am not asking you to what effect. I asked you if you signed a statement? A. I beg your pardon. You referred to a particular thing in that statement.

Q. You misunderstood me. Did you sign, Mr. Croker, a statement there? A. I signed a statement.

Q. Now, didn't you talk over with Mr. Sulzer at all the nature of the expenses that he was under? A. I did not.

Q. Did you have any talk with him at that time about this campaign book that he was getting up, or that was being printed? A. I don't remember that I did.

Q. Did you ever see that campaign book? A. Yes.

Q. What was it called? A. I don't remember; I think it consisted of speeches by William Sulzer.

Q. Didn't you see that at his office? A. No, I don't think so.

Q. And was the subject of the expense incident to the publication of that book the topic or theme of the discussion between you at that time? A. It might — no, that matter was not discussed.

Q. Well, was it at any time, at either of the interviews, the expense incident to the publication of that book, being heavy? A. Not that I remember.

Q. Well, how sure do you want to be about that now, that you didn't talk at all with him on the subject of his expense incident to the publication of that campaign book? A. No more so than I say that I don't recall it.

Q. You don't recall it? A. No.

Q. You can't recall that any expenses, that is, their nature or their character, were talked about between you? A. Not that I recall.

Q. But you did talk about the fact that he was under heavy expense? A. Exactly.

Q. And that expense was as a candidate for Governor, was it not? A. No.

Q. For what? A. Probably occasioned by the fact that he was a candidate for Governor.

Q. Very well, I will take it that way, occasioned by the fact that he was a candidate for Governor, and when you say occasioned by the fact that he was a candidate for Governor, you had in mind, with your political ancestry behind you, that running for office is an expensive luxury, didn't you? A. Yes.

Mr. Brackett.— The last question was an affirmative one.

The President.— Read the question and answer, stenographer, to the Court.

(The stenographer thereupon read the question and answer as follows. "Q. Very well, I will take it that way, occasioned by the fact that he was a candidate for Governor. And when you say occasioned by the fact that he was a candidate for Governor, you had in mind, with your political ancestry behind you, that running for office is an expensive luxury, didn't you? A. Yes.")

Q. You knew, Mr. Croker, as a candidate for Governor, that he would be required to make campaign speeches all over the State during the campaign? A. Yes.

Q. And that he would be compelled to carry along with him stenographers and reporters, and men for one purpose and another on those expeditions? A. I knew he would have to do that, yes, sir.

Q. Now, when you went to see him, you were his friend, that is right, isn't it? A. Yes.

Q. You had in mind that he would have to incur all these expenses? A. Yes.

Q. And you wanted to help relieve him of the burden incident to those expenses? A. Not to those particular expenses.

Q. Well, any expenses in connection with the campaign? A. Any personal expenses in connection with the campaign or in connection with anything.

Q. Any personal expenses in connection with the campaign or anything. What do you mean when you say — when you use the word "anything"? A. Well, I mean anything that would occasion expense.

Q. In connection with the campaign or outside of it? (No. response.)

Q. In connection with the campaign or outside of it? A. Do you want me to give you what I had in mind at that time?

Q. I want you to answer that question. A. I am trying to get it so I can answer it. If you won't be quite so quick with me I will try to give you the exact answer.

Q. Excuse me. I don't want to be quick with you. If I asked a question too rapidly I will withdraw it. You said you meant to contribute money to him in connection with the campaign or for any other expenses, as I get your answer, is that right?

Mr. Brackett.—Any other thing.

Q. Any other thing? A. Yes, I said that was it.

Q. I mean to treat your answer fairly. If not, you can speak for yourself. A. When I mentioned that about you wanting me to give you it quickly, it is very hard to give a complete answer at all times.

Q. Well, take your time. I haven't the slightest desire to debar you of it. When you used the expression for any other expenses or any other thing, what did you have in mind aside from campaign expenses? That is the meaning of my question. A. I had nothing particular in mind in regard to that; whatever expenses might come up.

Q. All that you did have in mind when you understood from him on this day that he wanted cash, that he was about to take a trip up the State, was expenses connected with the campaign? A. Not necessarily so.

Q. What else did you have in mind in the way of expenses? A. As I said a little while ago, whatever expenses might come up.

Q. What expenses did you have in mind? A. I didn't have any particular expenses in mind.

Q. None at all? A. No.

Q. You did have in mind the expenses incidental to the campaign? A. I thought that might be one source of expense.

Q. One source of expense? A. Exactly.

Q. When you went with this check for $2,000 he was then, you say, running for office? A. He was.

Q. Would you have taken that check to him then if he had not been a candidate for office? A. I don't think that is a fair question.

Q. You answer whether it is or not.

The President.—You cannot direct the witness to answer. The Court will tell the witness whether he shall answer.

Mr. Stanchfield.— I meant if the other side did not object.

The President.— Now, witness, answer the question.

Mr. Herrick.— May the question be repeated?

The President.— Repeat the question, Mr. Stenographer.

(The question was read by the stenographer as follows: "Would you have taken that check to him then if he had not been a candidate for office?")

The Witness.— It is impossible for me to say at this time.

Q. Why is it impossible for you to say? A. Because I cannot imagine the conditions which might exist under which I might have given him a check under other circumstances.

Q. He was then in good health, wasn't he? A. I really don't know whether he was or not.

The President.—You can pass that.

Mr. Stanchfield.—That is all, Mr. Croker.

Mr. Herrick.— One moment.

Mr. Stanchfield.— I will ask you one question.

Q. Since these impeachment proceedings were instituted, have you had any telephonic communication with Governor Sulzer? A. None.

Q. Have you seen him personally? A. I haven't.

Mr. Stanchfield.— That is all.

Mr. Herrick.— That is all.

Judge Bartlett.—I should like to ask the witness a question, please.

By Judge Bartlett:

Q. Mr. Croker, at whose instance, if anyone's, did you make this check payable to cash? A. I cannot tell positively but I think it was at Mr. Sulzer's suggestion.

Q. Do you remember what he said to you on that subject? A. You mean the subject as to whose order the check was to be made?

Q. Yes. A. I think after I had made the offer to give this money, I asked him how the check was to be made out. I think it came up that way.

Q. What did he say? A. I can give you the substance of what he said then.

The President.— That is sufficient.

Q. That will suffice. A. Which I think was that, owing to the fact it was after banking hours that day that he intended to leave either that night or early the next morning he would like to have that check made out to the order of cash.

Q. Did he explain how that would facilitate him at that hour in getting money? A. As I recall it now, nothing further was said about that.

By Senator Murtaugh:

Q. Did you go to Mr. Sulzer's office at Mr. Sulzer's invitation? A. No, I didn't.

By Senator Thompson:

Q. Mr. Witness, if you remember, how did you happen to go to Mr. Sulzer's office; what was the occasion of your visit? A. You mean of that particular date?

Q. Yes. A. I don't recall now. I made many visits to his office.

Q. You wouldn't like to give the reason as to why you went? A. I don't recall the reason now.

By Mr. Stanchfield:

Q. Well, Mr. Croker, this check was one of your checks taken from your check book? A. Yes.

Q. You hadn't filled it out when you went over to his office? A. No.

Q. Did you fill it out in his office? A. I think it was in his office it was filled out, yes.

Mr. Stanchfield.— That is all.

Mr. Kresel.— Mr. Houghton.

WILLIAM P. HOUGHTON, a witness called in behalf of the managers, being first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Are you in the employ of the Equitable Trust Company of New York? A. Yes; the Colonial branch.

Q. That is, you are attached to the Colonial branch of the Equitable Trust Company? A. Yes, sir.

Q. And its office is where? A. 222 Broadway.

Q. In the city of New York? A. Yes, sir.

Q. Do you know Frederick L. Colwell? A. I do.

Q. On the 31st of October, 1912, what position did you occupy

in the Colonial branch of the Equitable Trust Company? A. Paying teller.

Q. Paying teller. Did you on that day see Frederick L. Colwell? A. I did.

Q. Where? A. In front of my window.

Q. Did he present a check to you? A. He did.

Q. Did you see him write his name on the back of that check? A. I did not.

Q. Now I show you Exhibit M-68 and ask you whether that is the check he presented to you in the Equitable Trust Company? A. That is.

Q. When he presented the check to you, what did he say? A. Merely asked for the cash.

Q. He asked for the cash for this check, and did you give him anything? A. I did.

Q. What did you give him? A. Currency.

Q. How much? A. $2,000.

Q. Do you recall in what denominations you gave it to him? A. No, sir.

Q. Then he left the check with you? A. He did.

Q. Is that correct? A. Yes.

Q. How long had you known Mr. Colwell? A. Might have been 15 or 17 years.

Q. What had been your acquaintance with him? A. He lived in the block opposite to where I lived and I had been a member of his Sunday school class once.

Q. Now, the stamp on this check, the perforation on the check, what do the figures 10/31/12 stand for? A. The day the check was paid.

The President.— That is the 10th month, 31st day?

The Witness.— On October 31, 1912.

Q. That was the date you gave cash for it to Mr. Colwell? A. That is correct.

Mr. Kresel.— That is all.

Mr. Herrick.— Is that the Croker check?

Mr. Kresel.— That is the Croker check.

Mr. Herrick.— That is all.

Mr. Kresel.— That is all.

(Witness excused).

Mr. Kresel.— We are so near the hour of adjournment, shall I call another witness?

The Crier.— All witnesses are excused until Monday afternoon at 2 o'clock and 15 minutes.

The President.— Adjourn court.

Whereupon at 3.27 p. m. the Court adjourned to meet again on Monday, September 29, 1913, at 2.15 p. m.

MONDAY, SEPTEMBER 29, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 2.15 o'clock p. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.— Now, gentlemen.

Mr. Herrick.— Mr. President, last week counsel for the managers propounded certain questions to us relative to Mr. Colwell, as to his whereabouts, and as to whether he would be produced, in substance. One of the counsel for the respondent has finally located Mr. Colwell and had an interview with him. He is within a sanitarium and without the jurisdiction of this Court. He is under the impression that a warrant has been issued for his arrest because of his not testifying before the so-called Frawley committee. He assures counsel for the respondent that he will come here to testify, provided he is guaranteed he will not be arrested or molested. Counsel for the respondent believe his statement. If the counsel for the managers will give us assurance to that effect, we believe that we can rely upon him and bring him here, or have him come here. And if he is here we guarantee to place him upon the stand as a witness.

Mr. Kresel.— May it please the Court, in order —

Mr. Hinman.— May I inquire, if your Honor please, if Mr. Kresel was going to make a statement in reply to Judge Herrick.

Mr. Kresel.— No, no, not at present.

Mr. Brackett.— May the Court please, I would like to make an inquiry. I think this matter is a subject of consultation between counsel for the managers.

Mr. Hinman.— That is all right.

Mr. Brackett.— But, with a view of having full information I would like to inquire if the statement of counsel for the respond-

ent includes the proposition that the witness Colwell, or the person Colwell, in case the assurance is given that is asked for from the managers, if he will be in Court so he may be subpoenaed if desired, and called on behalf of the managers.

Mr. Herrick.— We can give no assurance as to the day he will be here. We can give no assurance unless Mr. Colwell is assured that he will not be placed under arrest.

After the interview that has been had with him, we are more confident than ever that we need him as a witness, and if we can get him within this State we will place him upon the stand.

The President.— Is there any answer to be made?

Mr. Brackett.— Not at present.

Mr. Hinman.— If it please the Court, you will remember that Mr. Brady has been a witness in this proceeding.

The President.— Yes.

Mr. Hinhan.— If you will turn to page 677 of the printed record you will note that when Mr. Brady was being examined by Mr. Stanchfield he was asked if in the fall of 1912 he made a contribution to candidate Sulzer after his nomination for Governor, and that he answered he did.

He was then asked if he handed a check to candidate Sulzer or someone else to deliver to him, and the witness answered "I gave the check to Judge Conlon."

Then he was asked if he didn't see Governor Sulzer in person, and he answered "I did. I spent the entire evening, almost, with Governor Sulzer."

He was then asked whether it was that same evening that he gave the check to Judge Conlon and he stated it was. I want a concession, if the counsel are willing to make it, that that check was handed by Mr. Brady to Judge Conlon at about eleven o'clock on election night, after the election had closed; and if the counsel will refer to the testimony taken before the board of managers in New York when Mr. Brady was examined, they will find that he so testified. If that concession can be made, it will obviate the necessity of asking the recall of Mr. Brady in order to examine him concerning that.

Mr. Kresel.— Will you leave that for the present so that I may refer to the testimony?

Mr. Hinman.—Yes.

Mr. Kresel.— May it please the Court: For the purpose of completing the record with regard to the Luchow contribution, I want to offer in evidence the letter received by Mr. Luchow. We omitted that the last time.

(Letter offered in evidence, received and marked Exhibit M-69.)

Mr. Kresel.— This letter reads as follows:

"115 Broadway, New York,
November 8, 1912

"August Luchow, Esq., 14th Street near Fourth Avenue, New York City:

"My Dear Mr. Luchow.— Many thanks for your congratulations and good wishes. I certainly appreciate all you say and all you did for me. With best wishes, believe me as ever,

"Sincerely your friend,
"Wm. Sulzer."

Mr. Kresel.— Now we will call Mr. Sorenson.

John S. Sorenson, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Sorenson, what is your business? A. Coffee importer and general exporter.

Q. And with what firm are you connected? A. Crossman & Sielcken.

Q. What is the business of Crossman & Sielcken? A. Coffee importers and general exporters.

Q. Where is their place of business? A. No. 90 Wall street.

Q. Who were the members of that firm on the 9th of October, 1912? A. George W. Crossman and Herman Sielcken.

Q. Where is Mr. Sielcken now? A. He is in Germany.

Q. And has Mr. Crossman died since the 9th of October, 1912? A. He has.

Q. Now, do you know Governor Sulzer? A. I do.

Q. Did you go to see candidate Sulzer on or about the 9th of October, 1912? A. I did.

Q. And where did you go to see him? A. At his office in Broadway.

Q. Do you remember the number? A. 115.

Q. New York City? A. New York City.

Q. When you went there what did you have with you? A. I had $2,500 in currency.

Q. In bills? A. In bills.

Q. Where had you obtained that money? A. I had drawn it from one of our banks.

Q. Did anybody instruct you to draw that money? A. Mr. Crossman did.

Q. That is the gentleman who has since died? A. Yes, sir.

Q. What did Mr. Crossman tell you to do with the money? A. He told me —

Mr. Herrick (interrupting).— That is objected to.

The President.— You may answer.

The Witness.— He told me to go to Mr. Sulzer and hand in the money.

Q. And prior to giving to him this money what had Mr. Crossman said to you about getting it? A. He had told me to — he told me to draw $2,500 in cash and bring it to him.

Q. And did you draw $2,500 at your bank? A. I did, sir.

Q. Did you draw a check for that purpose? A. I did, sir.

Q. Now, I show you this paper and ask you whether that is the check? (Counsel passes paper to witness.) A. (After examining.) That is the check, sir.

Mr. Kresel.— I offer the check in evidence.

Mr. Marshall.— Let us see it.

(Paper is passed to counsel.)

(The check offered in evidence was received and marked Exhibit M-70.)

Mr. Kresel.— We have no photograph of this check because it was just produced today. It has the name of Crossman and Sielcken printed on it. It is "No. 103,082. New York, October 9, 1912. The National City Bank, pay to the order of ourselves." Then in parentheses "disbursement account $2,500, Crossman & Sielcken, J. A. Sorenson."

Q. Is that the name? A. Yes.

Mr. Kresel.— Then it is indorsed Crossman & Sielcken, J. A. Sorenson, and underneath that the indorsement Joseph Schultz.

Q. Who is Joseph Schultz? A. The boy who drew the money.

Q. From your office? A. From our office.

Q. When you went down to 115 Broadway, did you see candidate Sulzer? A. I did, sir.

Q. What did you say to him? A. I told him I was sent by Mr. George W. Crossman "To hand you this."

Q. And how did you carry the money? Was it in an envelope or open, or how? A. Just in my hand, without any envelope.

Q. Your hand, and in what denomination was this sum of $2,500? A. Twenty-five $100 bills.

Q. Did you count it as you handed it to him? A. No, sir.

Q. Did you tell him how much you were handing him? A. No, sir.

Q. Have you, as far as you can now recall, stated everything you said to Mr. Sulzer at that time? A. I have.

Q. What did he say? A. "Thank Mr. Crossman for me."

Q. Is that all, as far as you recall? A. That is all.

Q. When did Mr. Crossman die? A. January 15, 1913.

Q. And where? A. New York City.

Q. And how long has Mr. Sielcken been abroad? A. He left here on the 10th of June, this year.

Q. And do you know how long he will remain abroad? A. I don't.

Mr. Kresel.— That is all.

Mr. Herrick.— That is all.

Mr. Kresel.— I will call Judge O'Dwyer.

EDWARD F. O'DWYER, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Judge O'Dwyer, you are a judge of the city court in the city of New York? A. I am.

Q. In the month of October, 1912, were you acquainted with William Sulzer, who was then a candidate for Governor? A. I was.

Q. How long had you known him? A. Over twenty years.

Q. Judge, did you give Candidate Sulzer, in the month of October, 1912, any money or check? A. I did.

Q. Was it money or a check? A. Check.

Q. Have you the cancelled check which was subsequently returned to you by your bank? A. I have.

Q. Will you please produce it? A. Yes.

Q. This check, Judge, is dated the 10th of October, 1912. Was that the day when you gave this check? A. To the best of my recollection it was.

Q. To whom did you give it? A. I left it for Mr. Sulzer at the Manhattan Club.

Q. With whom did you leave it at the Manhattan Club? A. I enclosed it in an envelope addressed to him, and left it there with the doorman or the clerk at the desk, with a request that they hand it to him when he came in. I had been in the club house expecting he would be in there that evening, and I could hand it to him personally, but as he did not come in, I left it at the club house with a request that it be handed to him.

Q. This check is drawn on a blank form. Is it a fact that you obtained this form at the Manhattan Club? A. That is a form found at the Manhattan Club. It is not one of my regular checks.

Q. And you drew that check right at the Manhattan Club? A. I did.

Q. Did you leave any letter with this check for Candidate Sulzer? A. I did not.

Q. Prior to leaving this check at the Manhattan Club, had you had any talk with Mr. Sulzer about giving him a check? A. I did not.

Q. Since leaving the check at the Manhattan Club have you received any acknowledgment of the receipt of it? A. I have not.

Q. Did you, after leaving this check at the Manhattan Club, have any talk with Mr. Sulzer over the telephone or otherwise? A. I had no talk with Mr. Sulzer after leaving that check, over the telephone. Subsequently, during the campaign, I think I may have met him and wished him good luck or a passing word of that kind, but I recall no conversation had with him, with Mr. Sulzer.

Q. With regard to the check? A. With regard to the check or any other subject.

Mr. Kresel.— I offer the check in evidence.

(The check offered in evidence was received and marked Exhibit M-71.)

Mr. Kresel:

"*New York, October 10, 1912*

"THE SEABOARD NATIONAL BANK

"Pay to the order of William Sulzer, One hundred dollars.

"EDWARD F. O'DWYER."

Certified October 16, 1912. Indorsed "William Sulzer, Pay to the order of Manhattan Company, New York, Boyer, Griswold & Company," and then a stamp "Manhattan Company, Received payment October 16, 1912."

That is all.

Mr. Herrick.— A single question.

Cross-examination by Mr. Herrick:

Q. Judge, had you contributed or did you thereafter contribute to the Democratic committee? A. I had.

Mr. Kresel.— That is all. I will call Mr. O'Brien.

JOHN F. O'BRIEN, a witness called in behalf of the managers having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. O'Brien, what is your business? A. I am in the milk business, milk products and by-products.

Q. Where is your place of business? A. My main office is in the Hanover Bank Building, in the city of New York.

Q. Prior to going into your present business, Mr. O'Brien, did you hold any public office in the city of New York? A. No, sir.

Q. Do you know the Governor, William Sulzer? A. Yes, sir.

Q. And when he was a candidate for Governor last October, did you know him then? A. Yes, sir.

Q. By the way, do you live in the city of New York, Mr. O'Brien? A. I do. My voting residence is there. My summer residence is on Long Island.

Q. And how long have you known Governor Sulzer? A. Probably eight or ten years.

Q. Are you a member of the National Democratic Club? A. I am.

Q. In the city of New York? A. Yes, sir.

Q. Now, while William Sulzer was a candidate for Governor did you send him a contribution? A. I did, yes, sir.

Q. Look at Exhibit 39 (counsel passes paper to witness). Is that the check which you sent him? A. Yes, sir (after examining).

Q. Did you send it by mail, Mr. O'Brien? A. I did, yes, sir.

Q. And did you enclose a letter? A. I did, yes, sir.

Q. Have you a copy of that letter? A. No, I have not.

Q. Was it written in pen and ink? A. It was, yes, sir.

Q. And you kept no copy? A. No, sir.

Mr. Kresel.— Will the gentlemen please produce the letter?

Mr. Marshall.— We have none.

Q. Will you state, Mr. O'Brien, the substance of what you

wrote in that letter? A. Why, as near as I can recall, I said, I enclose herewith a check for $50, my contribution — my check for $50 as a contribution. I regret I can't make it more. I don't think I said anything further than that. I believe I did say that I hoped that two years hence when you come up for reelection that I will be in a position to contribute again, or something of that kind.

Q. Well, subsequently did you receive an acknowledgment of that contribution? A. I did.

Q. Have you that letter? A. No, I have not. I thought I did have it until I made a search for it in my office, and yesterday I searched at home and I can't find it.

Q. Well, do you recall the substance of what the letter stated? A. As near as I can recall, it was something to this effect: I thank you for your great kindness and for all you have done for me. With best wishes. It was very brief.

Mr. Kresel.— That is all.

Mr. Herrick.— That is all.

Mr. Hinman.— Just a word. Was that check offered in evidence or only marked for identification?

Mr. Kresel.— No, it is in evidence. Do you want to see it?

Cross-examination by Mr. Hinman:

Q. If I may ask the witness if he recalls whether the endorsements on that check as they appear now appeared when the check was returned? A. I didn't see that check from the time I signed it until I sent it to Mr. Kresel a couple of weeks ago.

Mr. Kresel.— I am reminded that the check had not been read. It is dated New York City, November 2, 1912. Drawn on the Franklin Trust Company. Pay to the order of William Sulzer $50. Signed John F. O'Brien, endorsed with a stamp — that is what the gentlemen want to bring out — William Sulzer, and underneath that L. A. Sarecky, deposited in the Mutual Alliance Trust Company.

Now, has Mr. Fuller arrived?

ARTHUR L. FULLER, a witness called on behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Fuller, are you a member of the firm of Fuller & Gray? A. I am.

Q. And the business of that firm is that of bankers and brokers? A. The business of that firm is stockbrokers.

Q. Stockbrokers. And where is your office? A. 71 Broadway.

Q. Have you any branch offices? A. Yes.

Q. Where are the branch offices located? A. One in Brooklyn, one in Yonkers, one at 501 Fifth avenue, New York City.

Q. When was the business of Fuller & Gray started? A. June 1, 1911.

Q. Prior to that time—

Mr. Kresel.— I withdraw that —

Q. What is the full name of Mr. Gray, your partner? A. John Boyd Gray.

Q. Prior to associating yourself in business with him what was Mr. Gray's business? A. He was manager of an office in Yonkers.

Q. And was that a branch office of the firm of Harris & Fuller? A. It was.

Q. What is the full name of the Mr. Fuller who is a member of the firm of Harris & Fuller? A. Melville B.

Q. And are you and Mr. Melville B. Fuller related? A. We are.

Q. And what is the relationship? A. Brothers.

Q. Now, when you and Mr. Gray entered into this partnership did your firm take over the branch office of Harris & Fuller in Yonkers? A. We did.

Q. And that now constitutes your Yonkers office? A. It does.

Q. Now, is that same thing true with regard to the Brooklyn office? A. Yes.

Q. That is, the firm of Fuller & Gray took over the Brooklyn office of the firm of Harris & Fuller? A. Yes.

Q. Now, you say that you also have an office at 501 Fifth avenue? A. Yes.

Q. Did you likewise take that office over from Harris & Fuller? A. No.

Q. You took that office over from Boyer, Griswold & Company? A. Yes.

Q. Now, in the month of October, 1912, did your firm have in its employ a Mr. Sutton? A. October, 1912?

Q. Yes. A. Yes, I believe they did.

Q. And what is Mr. Sutton's full name? A. Effingham is all I know.

Q. Effingham Sutton? A. Yes, sir.

Q. Do you know, Mr. Fuller, whether Mr. Sutton was related to your partner, Mr. Gray? A. I believe he was.

Q. A brother-in-law? A. I believe so.

Q. That is, Mr. Gray married Mr. Sutton's sister? A. I believe that is it.

Q. You know that to be a fact, don't you? A. I have heard that. I suppose it is correct.

Q. And in October, 1912, in which of your offices was Mr. Sutton employed? A. The Brooklyn office.

Q. During that month did your firm also have in its employ a man named Coe? A. Yes, sir.

Q. What is his first name? A. Frederick, I think.

Q. Frederick Coe? A. Yes, sir.

Q. And in which of your branch offices was Mr. Coe located during the month of October, 1912? A. In the Yonkers office.

Q. Now, Mr. Fuller, you were subpoenaed to produce certain books of the concern of Fuller & Gray; have you them here? A. I have.

Q. Will you produce the ledger, please? A. They are out in the anteroom, I think. Mr. Coe is there.

Mr. Kresel.— Mr. Coe, will you produce them?

Mr. Hinman.— Have you a transcript?

The Witness.— I have a transcript in my pocket.

Mr. Kresel.— I have a transcript, but I want to see the original.

Mr. Hinman.—All right.

Q. Is the book which you now have before you the ledger kept by the firm of Fuller & Gray? A. Pardon me, I did not catch the question.

Mr. Kresel.— The stenographer will read it.

(The question was read by the stenographer as follows: "Is the book which you now have before you the ledger kept by the firm of Fuller & Gray?")

The Witness.—Yes.

Q. Now, will you turn in that ledger to an account known by the number "500"? A. Yes, sir.

Q. Have you it there? A. Yes.

Q. What folio of the ledger is that? A. 246. This is it here (indicating).

Q. Now, please look at this paper which I now hand you, and state whether that is a correct transcript of the account 500, as it appears in your ledger?

Mr. Hinman.—Any objection, Mr. Kresel, to my looking at this?

Mr. Kresel.— Not at all.

A. It is, as far as I can see.

Q. It is a correct transcript, is it not, with the exception that the word "transferred" which appears on the original, does not appear on the transcript? A. I do not see any "transferred" on the original.

Q. Just look lower down the page? A. That has nothing to do with the account. It is transferred from this into our future ledger, probably.

Q. I didn't inquire whether it had anything to do with it. A. The transcript has not the word "transferred" in it.

Q. Exactly. The word "transferred" which appears on the original does not appear on the transcript? A. It does not, no, sir.

Q. With that single exception, it is a correct transcript, is that right? A. Yes, sir.

Q. When was that account No. 500 opened? A. October 21, 1912.

Q. Before we go any further will you tell us this, is it a fact that the date of a transaction as it appears in your ledger, is the date when you either receive or deliver the stock which you either sold or purchased; is that correct? A. That is correct.

Q. In other words, if you buy 100 shares of stock for a customer of yours today, which is the 29th of September, it will be entered in your ledger under date of the 30th of September, because it will not be until tomorrow that you get the stock. Is that correct? A. That is correct.

Q. Now, you say the first entry in that account is under date of October 21, 1912? A. Yes, sir.

Q. Just read that entry, will you? A. October 21st, 100 CCC, 60, 1250.

Q. The meaning of which is that on the 21st of October you bought for this account 100 shares of stock known as CCC. Is that right, at a certain figure? A. We received 100 shares of stock at that figure.

Q. You received it. When did you buy it? A. The previous date.

Q. October 20th? A. October 20th.

Q. 1912? A. 1912.

Q. You received it on the 21st? A. According to our book we received it on the 21st.

Q. Did you receive any money from any person to the credit of that account on the 21st of October, 1912? A. No, sir.

Q. Did you receive any money to the credit of that account from any body on the 20th of October, 1912? A. No, sir.

Q. So that on the 20th of October, 1912, when you bought that 100 shares of stock, you had received no money from anybody with which to buy it. Is that correct? A. Yes, sir.

Q. In common Wall street parlance, you had no margin for that at all, did you? A. No, sir.

Q. Nor did you have any on the 21st of October, when you actually received the stock? A. No, sir.

Q. You were, at that time, a member of the firm, weren't you? A. Yes, sir.

Q. What was your particular part in the firm? Were you the inside man or the floor man? A. I am the floor man of the firm.

Q. That is, you represent your firm on the floor of the Stock Exchange? A. Yes, sir.

Q. And was Mr. J. B. Gray the office man? A. Yes, sir.

Q. Where is Mr. J. B. Gray? A. I beg pardon?

Q. Where is Mr. J. B. Gray? A. I suppose he is in our office in New York.

Q. Well, has he been there throughout all of last week, do you know? A. I don't know. I have not seen him in some time.

Q. When was the last time that you saw him? A. It is probably two weeks or more ago.

Q. During the last two weeks have you been at your New York office? A. Occasionally.

Q. And you have had no communication with your partner although you have been in the same city for the past two weeks? A. Oh yes, I have.

Q. Now, of course you could communicate with Mr. Gray over the telephone if you so wished? A. Surely.

Q. Do you know anything about the opening of this account No. 500? A. No, sir, I do not.

Q. Mr. Gray does, doesn't he? A. He does. I am the floor man of the firm, and therefore I am not familiar with the office end of it particularly.

Q. Did you at any time have any talk with any person who had anything to do with that account No. 500? A. I asked my partner if we were to carry this stock on margin; he said no, we were not; it was to be paid for.

Mr. Herrick.— That is objected to.

Mr. Hinman.— Never mind. He said they were not.

Q. Did you ask your nartner whose account No. 500 was? A. I do not recollect that I did.

Q. Did he ever tell you? A. No, sir, he did not.

Q. So that as you sit there now — A. (Interposing) I with-

draw that; yes, he has told me. I did ask at a later date whom it was for and he told me.

Q. And when was it that you asked him? A. After I testified before the Frawley committee.

Q. You testified in the month of August last, didn't you? A. I believe it was, yes.

Q. Well, who did he say was —

Mr. Herrick.— That is objected to.

The President.— Objection sustained.

Q. Now then, go through the account, Mr. Fuller. When was the first time that you received any money for account No. 500? A. We had a credit on October 22, 1912, of $1,500.

Q. How was it paid? A. There is nothing that shows here.

Q. What is the entry there? How does it read? A. Oh, yes, "Cash."

Q. Then it was a cash payment to your firm of $1,500 was it? A. Yes, sir.

The President.— Are you going to subpoena Mr. Gray?

Mr. Kresel.— In answer to your Honor's question, I want to say we have been trying to get Mr. Gray for ten days and we have been unable to locate him, and I am going to make use of this gentleman's good offices to get in touch with him and get him here.

The President.— Of course he can explain much better than this witness on the stand can as to these entries.

By the President:

Q. In fact, you really do not know anything about it except as you know the stock business and the custom as to how these entries are made? A. That is correct.

Mr. Kresel.— I offer in evidence, if your Honor please, the transcript instead of offering the original account.

The President.—Any objection?

Mr. Herrick.— No.

The President.— It will be admitted.

(Transcript offered in evidence admitted and marked Exhibit M-72.)

By Mr. Herrick:

Q. You have another copy of it here, haven't you? A. Yes, sir.

Q. The paper that you hand me is also a transcript? A. Yes, sir.

By Mr. Kresel:

Q. Now, Mr. Fuller, will you follow me with the original? I want to ask you three questions about this. Is it a fact that the account shows that on the 21st of October you bought for that account 100 Big Four?

Mr. Herrick.— We object to that. It is simply wasting time, it seems to me.

Mr. Kresel.— I do not want to waste time but I want it made plain; I do not want to have to be explaining it.

Mr. Herrick.— The exhibit shows for itself.

By the President:

Q. I suppose you use initials, don't you, something of the sort? A. Yes, sir.

The President.— So you have got to explain to the ordinary lay mind what those initials mean.

Q. On the 21st of October, 1912, you bought for this account 100 C. C. C. at 60. Now, C. C. C. stands for what stock? A. Cleveland, Cincinnati, Chicago & St. Louis.

Q. Otherwise known as the Big Four? A. Yes.

Q. On the 22d of October you bought another 100 shares of that same stock, did you not? A. Yes.

Q. On the credit side on the 22d of October there was paid to the account — there were two payments on that date, one of $1,500 and one of $1,000, both in cash, is that correct? A. Yes.

Q. On the 28th of October there is a payment of $500 in cash? A. Yes.

Q. On the 31st of October there was a payment of $8,825 in cash? A. Yes.

Q. And is it a fact that the account shows that on that date the two shares of C. C. C. thus bought were delivered? A. Yes, sir.

Q. To the customer? A. Yes, sir.

By the President:

Q. That paid it up; that last payment paid up for the stock in full? A. I don't know; I would have to calculate that.

By Mr. Kresel:

Q. It paid it all but $14.74 accrued interest, isn't that correct? A. Yes, that is correct.

Q. On the 4th of November, 1912, the account shows that an additional 100 shares of this same stock was bought, is that correct? A. Yes.

Q. According to the account, Mr. Fuller, on that date did you have any margin with which to buy this stock? A. According to the account, no, sir.

Q. The payment for that stock was made on the 6th of November, wasn't it? A. According to the account the stock was delivered on the 6th of November.

Q. And paid for at that time? A. There is an item here of figures. I suppose — it does not say that it is paid for; it says delivered.

Q. The amount of $5,512.50 is credited to that account on that day? A. Correct.

Q. Isn't that right? A. Yes, sir.

Q. Then the only other transaction in the account was the sale on the 25th of November of one $1,000 bond of the St. Louis & Southwestern road, is that right? A. Yes, sir.

Q. And was paid for by your firm on the same day? A. Yes, sir.

Q. Have you produced the check book of the account of Fuller & Gray showing the deposit of these various sums of money? A. I have.

Mr. Kresel.— Will you produce that, Mr. Coe?

Q. Mr. Fuller, this account was closed on the 30th of November, 1912, was it not? A. It shows a debit balance on that date, but the account is still open.

Q. There have been no further transactions in the account since November 25th? A. No, sir.

Q. Is that correct? A. Yes, sir.

By the President:

Q. Is there open in it this interest balance that you spoke of? A. A debit balance for interest.

Q. That is the only item? A. Yes, sir.

Q. And that is still due you? A. Yes, sir.

By Mr. Brackett:

Q. But there have been no transactions since that time? A. No, sir.

By Mr. Kresel:

Q. Now, please look at your check book, showing the deposits for October 22, 1912. (Counsel passes book to witness.) Can you find the entry there of a deposit of $1,000 in cash for account 500? A. (After examining book) Yes, sir.

Q. And a deposit of $1,500 in cash for account 500? A. On October 22d, none there on October 22d. (Witness examines book.) No, sir, there is no such item on that date.

Q. Is there another book? A. Yes, sir, we have several books here.

Q. Oh, well then, look at — A. (Interrupting) If you will let me have the books, I prefer to find them, if you please, if they are in there.

Mr. Brackett.— Showing you check book of the Yonkers National Bank; that is, a check book of Yonkers on that bank.

(Counsel passes book to witness.)

Q. Do you find the entry of the deposit of $1,500 in cash for account 500? A. Yes, sir.

Q. From the fact that that is entered in the Yonkers bank

book, does it indicate that the payment was made in Yonkers? A. I don't know.

Q. So that now we have it that both payments of October 22d were in cash, were they not? A. Question, please.

The President.— Mr. Kresel, what do you mean by "cash," currency as distinguished from —

Mr. Kresel.—(Interrupting) Check.

The President.—(Continuing) From check?

Mr. Kresel.— Exactly.

The Witness.— Is that what the counsel means?

Mr. Kresel.—We are waiting for the stenographer to read the question.

Mr. Hinman.— I am inquiring whether — Mr. Kresel answered the Court's question. I am wondering whether the witness agrees in that statement.

(The stenographer read the question asked to be repeated as follows: "So that now we have it that both payments of October 22d were in cash, were they not?")

The Witness.— They were.

Q. And when you speak of cash you mean currency as distinguished from check? A. Yes, sir.

Q. Now, the $1,500 in cash was deposited in the Yonkers bank. In what bank was the $1,000 deposited? A. The Home Trust Company of Brooklyn.

Q. And you had at that time a branch office in Brooklyn, did you not? A. We did.

By the President:

Q. You mean to say this, don't you, witness: Were those check books in your New York office, or was the Yonkers bank check book in the Yonkers office, and the other one in the Brooklyn office? A. They were all in the Brooklyn office.

Q. Both the Yonkers and the — A. All our check books in the Brooklyn office at that time, because it was our main office.

Q. Now, on October 28th. Please look at your deposits and state whether you find a deposit there of $500 in cash to the credit of this account? A. Yes, sir.

Q. And was that currency? A. Yes, sir.

Q. And in what bank was that deposited? A. Home Trust Company.

Q. Brooklyn? A. Yes, sir.

Q. Now look at your deposits of October 31st, and state whether you find there a deposit for account 500?

Mr. Brackett.— This book, sir. (Handing book to witness.)

Q. Look at the book which is now being handed you. A. I have deposits on October 31st. Yes, sir.

Q. How much? A. $8,825.

Q. $8,825. Was that in currency? A. Yes, sir.

Q. That was for account 500? A. Yes, sir.

Q. So that between the 22d and 31st of October, 1912, all the payments for account 500 were in cash; that is, currency, and they aggregate $11,825. Is that correct? A. I don't know the amount they foot up. I have not footed them up. They were all cash.

Q. Well, look at the transcript.

The President.— Is that the time when he says the stock was all paid for except the interest item of $14 and odd cents?

Mr. Kresel.— Yes, your Honor, that is the date.

Q. Well, isn't that near enough?

The Witness.— On October 31st, they amount to $11,839.74.

Q. Payments? A. Yes.

Q. And the $14.34 was not paid? A. No, that is right, less the $14.74.

Q. That is $11,825? A. Yes, sir.

The President.— Can't you ask him the direct question whether the stock was not all paid for in currency except the interest item, which is still unpaid?

The Witness.— Yes, your Honor, that is correct. It was.

Q. Then the last 100 shares of Big Four which was bought for account 500 was also paid for in currency, wasn't it? A. It was.

Q. On November 6th? A. Yes.

Q. And that was how much? A. $5,512.50.

Q. So, is it a fact, that the total payments into account 500, between the 22d of October, 1912, and the 6th of November, 1912, were $17,337.50, all in currency? A. Yes, sir.

The President.— Is that all?

Mr. Kresel.— That is all.

The President.—Anything further?

Cross-examination by Mr. Hinman:

Q. You have testified, as I understand it, and I am asking you to see if my understanding is correct, that this entry of stock on this Exhibit M-72, in the books of Fuller & Gray of 100 shares of the Big Four stock, had been purchased by your concern and received by it the day before, the day before the 21st? A. Well, according to our books, I am not familiar enough with books to tell you exactly when it did come in, or when it was purchased.

Q. You say according to the books that appears. What is there on your books that makes that appear, that is, makes it appear the stock was bought or came in the day before the 21st of October, namely, October 20th? A. There is not anything makes it appear it came in. It came in on the date on that transcript. That is the date we received it.

Q. What is there on your books which indicates that 100 shares of stock was bought by your concern or ordered on the day before, October 20th?

The President.— He has told you that according to the ordinary custom of the Stock Exchange, stock bought one day is delivered and paid for the next, unless bought for cash.

Mr. Hinman.— He has testified that according to the books it appears it was bought by them the day before. I want to see what there is on the books which indicates that.

The Witness.— We have a purchase and sales book which keeps a record of that.

Q. Have you that book here? A. Yes, sir.

Q. Will you look on that book and see if there is anything there which indicates this stock was bought on October 20th? A. This book shows 100 shares of stock bought on the 21st of October.

Q. Then were you in error when you stated that according to the books of Fuller & Gray that stock appeared to have been purchased on the 20th of October? A. Yes, sir, evidently so.

Q. That must be so? A. That must be so.

Q. Because October 20th was on a Sunday? A. Yes, sir.

Q. Let me see if I understand correctly. Do you recall now of having had anything to do personally in connection with these transactions which appear on this Exhibit M-72? A. Nothing whatever, no, sir. You mean as far as the bookkeeping is concerned?

Q. Yes. A. No, sir. None whatever.

Q. You have stated, in answer to Mr. Kresel's question, that in the account as it appears in your ledger, folio 246, the word "transferred" is written. Is that in connection with this account, or the manner in which it was handled on the books? A. Why, I really cannot say. I imagine it has something to do with the way it is handled on the books, the transfer of it.

Q. And nothing further than that it was transferred from one book to the other? A. I imagine that is what it means. I cannot say.

Q. Did you keep personally this account as it appears in the books, or make any of the entries in connection therewith? A. No, sir.

Q. I wish you would look at Exhibit M-72, which is a transcript of this account, and shows the fact that the payments of cash under date of October 22d, 28th and 31st, appear to have been cash, and then ask you whether or not there is any entry on that exhibit which indicates or shows that the 100 shares of Big Four stock entered on one side of the account, under date of November 4th, and on the other side of the account under date of

November 6th, indicate, as I say, whether there was any cash paid for that last entry? A. Why, it indicates that it was delivered.

Q. Yes. A. It indicates it was delivered for an amount against it of $5,512.50.

Q. The items of cash under dates of October 22d, 28th and 31st, appear as credits of cash? A. Yes, sir.

Q. And there is no such credit of cash under date of November 6th? A. No, sir.

Q. And that entry of November 6th relates, does it not, that other 100 shares of Big Four stock which you say was purchased on the 4th? A. Yes, sir.

Q. Do you know why, if cash was paid for that 100 shares of Bib Four stock, the entry of which appears under date of November 4th, it does not so appear in the account? A. I do not, no, sir.

Q. Do the entries indicate that that was handled in a different way than the other, that is, by the others, I mean transactions of October 21st, 22d and 31st? A. Why, it is different in the fact that the word "Cash" is not there.

Q. Not only is the word "Cash" not there, but there is something else there? A. The word "Delivered," or the abbreviation for delivered.

Q. And there is more than that difference. Now, as I —and I am not very familiar with keeping accounts, which is the reason I ask you,— on the credit side of this Exhibit M-72, appears under date of October 31st, an entry, 200 C. C. C. & St. L., delivered. Under date of November 6th, on the same side of the account appears the entry 100 C. C. C. & St. L. delivered, but there is nothing there that indicates whether it was cash or not. With the transactions of October 22d, 28th and 31st, it appears that it was cash. Can you explain why that difference is made in keeping the account, that is, from the books, I mean? A. No, sir, I cannot.

Q. And you can't state what the fact is outside the books because you had no personal knowledge of the transaction? A. No, sir.

Q. Have you any objection to my looking at this book for one moment? A. No, sir.

(Witness passes book to counsel.)

Q. In this folio which you have and regarding which you have been testifying regarding this account 500 on folio 246, let me ask you if there are other accounts in the same book that bear numbers only? A. Yes, sir.

Q. And many of them? A. Yes, sir; it is quite customary.

Q. And is that customary in the brokerage business in New York? A. Quite so; yes, sir.

Mr. Hinman.— Nothing further.

Mr. Kresel.— One minute, Mr. Fuller.

Redirect examination by Mr. Kresel:

Q. Whether your ledger shows that the item on November 6th was cash or not, your check book shows that it was cash? A. Our books speak for themselves.

Q. Well, now, I am asking you isn't it a fact that the check book shows that the payment on November 6th for account 500 was in currency? Now, look at it again. A. (Witness examines book.) Cash 500, yes, sir; cash, No. 500 account.

Q. Cash for No. 500 account, and the amount $5,512.50? A. Yes, sir.

Q. Now, you have stated that there are other accounts in your ledger which are carried under numbers. Have you an index there showing the name of the person whose account is carried under a particular number? A. (Witness examines book.) Indexed, but it doesn't give the name, no, sir; it gives the number but not the name.

Q. Well, now, look under No. 500. Is there any name given? A. (After examining.) No, sir.

Q. Have you any record in your office to indicate to whom account No. 500 belonged? A. Why, I couldn't say that we have that I know of; not that I know of.

Q. Well, take any other account carried by any other number. Can you tell us whether there is any record in your firm to indicate to whom that number belongs? A. Why, an account of this sort, I should say no.

Q. Well, what do you mean by an account of this sort?

By the President:

Q. Witness, how do you know, if you have several accounts, whose, in reality, they are? Do you keep a memorandum for that purpose? A. No, sir.

Q. Well, then, how do you carry it? A. If we carry an account on margin, of course, we know who it is; but where it is what we call a cash account and the account is closed on one or two or perhaps three transactions, why we don't need to keep any further record of it; but if we have open active accounts of course we know who they are; that is, I suppose the office must know whom they are for; I don't delve in that part of the business so long as I am fully satisfied that the business is all right and properly conducted.

Q. You buy and sell on the floor of the Exchange? A. I do, yes, sir.

Q. According to the orders that come to you from the office? A. Exactly, yes, sir.

By Mr. Kresel:

Q. This account No. 500 was an account on margin, wasn't it?

The President.— If we are going to get the witnesses that are actually conversant with that branch of the business, hadn't you better wait until they get on the stand, so that we can get the evidence directly?

The Witness.— I should say no.

Mr. Kresel.— May I follow that up a minute with this witness, seeing that he has answered?

The President.— Oh, yes. The Court merely suggests that it might save time, if you have other witnesses who are conversant with it they may tell directly what they know.

Q. Mr. Fuller, you say that this account No. 500 was not a margin account. On the 23d of October is it a fact that you were carrying 200 shares of Big Four for that account? A. Yes, sir.

Q. And is it a fact that the only payments you had received for that account were $2,500? A. Yes, sir.

Q. And is it a fact that the stock had cost $11,800 to purchase? A. Yes, sir.

Q. And isn't that a margin account? A. I should say no because it was understood that this stock was to be paid for outright at the time they bought it.

Mr. Kresel.— That is all.

By Senator Blauvelt:

Q. I would like to ask the witness if he knows to whom the 500 account belongs — or who was the customer — A. (Interrupting) Yes, sir, I do.

Q. (Continuing) — operating under the account 500? A. Yes.

Q. I would like to ask the witness the question then, who that account — in whose name — or who was the customer against whom you carried that account?

Mr. Herrick.— That is objected to upon the ground that it already appears that he was told by his partner only in August after the investigation before the Frawley committee.

The President.— You can ask him again: Did you know except from what your partner told you in August, whose the account was?

The Witness.— No, sir, I did not.

Q. Do you know now, of your own knowledge? A. From my partner, through my partner? Yes, sir.

Q. Of your own knowledge do you know who that account is from any source? A. I don't know from my own knowledge. I know I have been told by my partner.

The President.— I think that answers it. That is all, witness.

By Mr. Kresel:

Q. Mr. Fuller, may I trouble you to say to Mr. Gray that the managers are anxious to have him appear here as a witness? A. I shall be very glad to do so.

Q. Will you do that? A. I surely will, yes, sir.

Senator Walters.— May I ask the witness to whom this stock was delivered that was purchased?

Mr. Kresel.— May I state to the senator that I shall bring that out with the next witness. This witness has no personal knowledge. Mr. Sutton.

EFFINGHAM E. SUTTON, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Sutton, in October, 1912, were you employed in the Brooklyn office of the firm of Fuller & Gray? A. I was.

Q. Are you a brother-in-law to Mr. J. B. Gray? A. Yes, sir.

Q. Who is a member of that firm? A. I am.

Q. Beginning with the 21st of October, 1912, did your firm have an account on its books known as No. 500? A. Yes.

Q. Whose account was that, Mr. Sutton? A. William Sulzer.

Mr. Herrick.— Wait a minute. I move to strike out the answer.

The President.— He has not answered the question.

Mr. Herrick.—Yes, your Honor; he said "William Sulzer."

The President.— Due to my defect of hearing I did not hear it; it will be stricken out until you find out what his knowledge is on the subject.

By Mr. Kresel:

Q. On the 31st of October, 1912, did you see Mr. Coe? A. I did.

Q. Did you telephone for him? A. No, I did not.

Q. He was at that time in the Yonkers branch, wasn't he? A. I believe so.

Q. He did come over to the Brooklyn office? A. He did.

Q. Where you were on that day? A. Yes.

Q. Did you give Mr. Coe anything on that day; did you give him any stock? A. I don't know that I gave it to him.

Q. The question is whether you gave Mr. Coe on that day some stock? A. I did not give it to him myself, no.

Q. I mean, were you at the head of that Brooklyn office at that time? A. No.

Q. Who was? A. Mr. Clark.

Q. Did you receive a receipt from Mr. Coe on that day? A. I did.

Q. Whether you personally handed him the stock or somebody else did, was it done in your presence? A. It was.

Q. Now, what stock was handed to Mr. Coe? A. 200 shares of Big Four.

Q. 200 shares of Big Four? A. Yes.

Q. Did you give to Mr. Coe at that time instructions what to do with that stock? A. No, I did not.

Q. Did Mr. — whatever the name of the man is — what is his name? A. Mr. Clark.

Q. Did Mr. Clark? A. No, I do not believe so.

Q. You don't believe he gave him any instructions? A. No.

Q. Did Mr. Coe give you or Mr. Clark any moneys or checks at that time when he received the stock? A. Not to me or Mr. Clark.

Q. Prior to the stock being handed over to Mr. Coe had you received a telephonic communication from Mr. Gray? A. I had.

Q. And what were the instructions that he gave you? A. To be prepared to deliver 200 shares of Big Four by quarter after three.

Q. And what did you do then? A. There was a messenger sent over to the New York office and the stock was brought back from the New York office to the Brooklyn office.

Q. In other words, Mr. Gray, from New York, telephoned to you in Brooklyn to be prepared to deliver 200 shares of Big Four at a quarter past three? A. Yes, sir.

Q. Thereupon you sent a messenger to New York who brought the stock back to Brooklyn? A. Yes.

Q. And was that the stock which was handed in Brooklyn to Coe? A. It was.

Q. Coe coming from Yonkers? A. I don't know whether he came from Yonkers.

Q. He was at that time attached to the Yonkers office? A. Yes.

Q. But on this particular transaction he came to Brooklyn? A. He did.

Mr. Hinman.— Permit me, the witness I think in answering the last question either misunderstood Mr. Kresel or Mr. Kresel misunderstood the witness. The question infers that Mr. Coe came from Yonkers to Brooklyn for the purpose of taking part in this transaction.

The President.— No, he said he did not know even if he came from Yonkers. He said he was attached to the Yonkers office.

Q. Mr. Coe came to the Brooklyn office, is that right? A. He did.

Q. Mr. Coe on that day was regularly attached to the Yonkers office? A. He was.

By the President:

Q. That is all you know about where he came from? A. Yes.

By Mr. Kresel:

Q. Now, Mr. Sutton, will you state how you know whose account this 500 was; I think that is the only way I can put it.

The President.— What are the sources of your knowledge?

A. The only source of my knowledge is what has been told me.

Q. By whom? A. Mr. Gray.

Mr. Kresel.—That is all.

Mr. Hinman.— One moment.

Cross-examination by Mr. Hinman:

Q. On this October 31, 1912, you say Mr. Coe was at the Brooklyn office? A. Yes, sir.

Q. Was he there frequently? A. Not that I remember, no.

Q. Did you ever see him there before? A. Probably once or twice.

Q. And you have seen him there since? A. I have.

Q. What communication anyone else had had with Mr. Coe before he was there on the 31st you don't know?

The President.— How could he know?

Mr. Hinman.— Not unless it was in his presence. I withdraw it.

By Mr. Kresel:

Q. What did you have to do with giving the number 500 to that account? A. Well, at Mr. Gray's home we discussed —

Q. Listen. The members in the Court at the back of the room want to hear what you say. Won't you please speak up? A. It was at Mr. Gray's home and we were discussing a new account that was going to be opened, and there had been several accounts opened with numbers and he wanted a number and I suggested 500.

Q. And was it in connection with that that you learned from Mr. Gray who the person was whose account was to be known by the number 500? A. It was.

Q. Now, I ask you to state whose account No. 500 was?

Mr. Herrick.—That is objected to; it is hearsay.

The President.— You can get Mr. Gray here and have him testify; that is the better way.

By Mr. Hinman:

Q. What part did you have to do with the bookkeeping? A. I was on the purchase and sales.

Q. You were a bookkeeper and keeping the books? A. Yes, assisting.

Q. Were you in charge of it or an assistant? A. I was in charge of portions of the books.

Q. What portions of the books did you have charge of in October, 1912? A. Purchase and sales.

Q. Are these accounts kept in one book or more than one? A. More than one.

Q. What particular book or books in that department did you keep, the purchase and sales department? A. There is just the purchase and sales book.

Q. Was there more than one book being kept at the time in that department? A. Yes.

Q. How many? A. There were several.

Q. Which one or ones did you keep, or did you keep them all? A. Just purchase and sales.

Q. I am speaking now of the book or books in which the account, the purchase and sales accounts were kept.

The President.— What the counsel wants to know is whether you kept several concurrently or only one after the other, as one was used up. A. As one was used up we would use another.

Q. So you only had one at a time? A. One at a time, yes, sir.

Q. Then, in that department in October, 1912, the purchase and sales department, only one book was kept during any one period? A. Yes.

Q. More than one? A. Yes, but not by me.

Q. Which one did you keep? A. Only the purchase and sales.

Q. Take the purchase and sales, did all the purchase and sales—

The President.— You are playing at cross purposes. The witness does not understand.

By the President:

Q. Witness, did you have more than one at a time of purchase and sales books? A. No, I did not.

Q. For instance, on the 21st of January was there only one book that the entry of purchases or sales would be entered in? A. Yes.

By Mr. Hinman:

Q. There was more than one book?

The President.— No, he says there was only one.

Q. Let me ask you again: On the 31st day of October, 1912, was there more than one book kept in the office of Fuller & Gray of purchases and sales or in connection with the purchases and sales? A. There were.

Q. How many books were being kept on the 31st of October, 1912, in relation to that? A. There were several.

Q. What were they? A. The blotter and the ledger.

Q. Any more? A. Purchase and sales also.

Q. Describe this purchase and sales book; you have got the blotter and now take the purchase and sales book, what were they? A. The purchase and sales book was — the day an order was executed it would be entered in the purchase and sales book and then transferred to the blotter and from the blotter transferred to the ledger.

Q. Were any other books used in connection with this purchase and sales account at the time? A. No.

Q. Which one of those books did you keep?

The President.— He says half a dozen times that he kept the purchase and sales book. Of course their business was that of stock brokers and purchases and sales went through all their books.

By the President:

Q. Was there one book that went by the name of purchase and sales book? A. Yes, sir.

Q. Was that the book you kept? A. Yes, sir.

The President.— Now I think we have got it. You are taking up a great deal of time on it.

Mr. Hinman.— If I may be permitted he stated there was only one kept, in answer to your Honor's question.

The President.— That was because he did not understand your question.

Mr. Hinman.— I want to get it correct. It may be I am to blame for it.

The President.— Proceed.

By Mr. Hinman:

Q. In which book was the original entry made? A. Purchase and sales.

Q. And that was the book which you kept? A. Yes.

Q. Did anyone else there keep that book in October, 1912, ex-

cept yourself? A. If I did not happen to be at the office Mr. Ehrich would take care of it, the cashier.

Q. And when you were at the office did you always do that work or was it sometimes done by others? A. Most always I did it, sometimes by others.

Q. And what others besides yourself would keep that book?

The President.— Is there going to be a question raised as to these purchases?

A. Mr. Ehrich.

Q. Did you make the original entry in this purchase and sales book on October 31st, 1912? Was that the first entry made in connection with this account 500? A. I do not exactly remember whether I entered it or not.

The President.— Show it to him.

Mr. Hinman.— I am testing his recollection. He has testified here as to what Mr. Gray told him.

The President.— No, that was excluded.

Mr. Hinman.— It stands on the record here that this witness has testified that Mr. Gray did tell him something which was that Mr. Gray told him whose account it was and I want to get at that.

The President.— Then you may open the door for the other side.

Mr. Hinman.— I shall not inquire what he told him but I want to fix the date.

By Mr. Hinman:

Q. Have you any recollection outside of the books as to any time you made any entries in connection with that account?

The President.— I shall rule that out.

Q. May I inquire when Mr. Gray gave you the information as to whose name the account was in? A. I believe it was in the latter part of November.

Q. What year? A. 1912.

Mr. Kresel.— May I now ask the witness what the conversation was?

The President.— No.

Mr. Brackett.— May I ask a question?

The President.— Yes.

Mr. Brackett.—Isn't it part of the res gestae to make declarations of Gray to this man competent as indicating —

The President.— I think not, Mr. Brackett.

Senator Healy.— May I ask a question?

The President.— Yes.

Senator Healy.— Will you please indicate whose account you believe 500 to be?

Mr. Herrick.— That is objected to.

The President.— It is not his belief. It is the legal proof. That is not evidence that is competent.

Senator Emerson.— Can he tell us who does know?

The President.— He says the other partner, Mr. Gray, knows.

Mr. Kresel.— Our difficulty is we cannot get Mr. Gray.

The President.— You shall have the opportunity.

Mr. Brackett.— We shall need more than an opportunity to get him. We have been trying to.

The President.— I think now you will have an opportunity which you can avail yourselves of and which will be successful.

Mr. Kresel.— Mr. Coe.

FREDERICK A. COE, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath testified as follows:

Direct examination by Mr. Kresel:

Q. In the month of October, 1912, were you employed with the firm of Fuller & Gray at their Yonkers office? A. I was.

Q. And did you have charge of that office? A. No, sir.

Q. Who did? A. Mr. Hart, the manager.

Q. Wasn't he the manager of the Brooklyn office? A. Mr. Clark was the manager of the Brooklyn office.

Q. Mr. Clark was the manager of the Brooklyn office? A. Yes.

Q. What was your position in the Yonkers office? A. It is hard to define. I did anything that came up; telephoned orders on the direct wire; answered the phone; made deposits; anything that came along in the course of the day; Mr. Hart and I just interchanged; the one that was handiest to the customer did the business.

Q. Do you remember, Mr. Coe, whether you were at the Yonkers office on the 31st of October, 1912? A. I was.

Q. You were there all day, were you not? A. On what day?

Q. The 31st of October, 1912, I am talking about. A. No.

Q. You made a trip to Brooklyn? A. I made a trip to Brooklyn.

Q. But up to the time that you left Yonkers to go to Brooklyn you had been there all of that day? A. I left Yonkers about noon.

Q. You had been there all the forenoon? A. Yes.

Q. Now, who instructed you to go to Brooklyn? A. Why, it came on the phone. Either Mr. Gray or Mr. Colwell; some one in the Brooklyn office; I don't know who.

Q. Either Mr. Gray or Mr. Colwell? A. Yes.

Q. You mean Frederick L. Colwell? A. Yes, I do.

Q. Was Mr. Frederick L. Colwell at that time connected with your firm? A. He was not; he was a customer.

Q. Is it your recollection now that it was Mr. Colwell that telephoned you to come to Brooklyn? A. I hardly know; I think it was Mr. Gray or Mr. Colwell. I don't remember.

Q. You have no distinct recollection now as to which one it was? A. I do not.

Q. But you went to Brooklyn? A. I did.

Q. What were your instructions to do there? A. To get 200 shares of Big Four stock, deliver it to Mr. Colwell at the Nassau Bank, and receive the money for it.

Q. Well, now, then, Mr. Coe, from the fact that the message

was that you were to get 200 shares of Big Four and deliver it to Mr. Colwell, does that in any way refresh your recollection as to whether it was Mr. Gray that sent you that message or whether it was Mr. Colwell? A. It was — I don't remember which.

The President.— I think you have got that.

Q. Now, you went to the Brooklyn office, did you, and did you get 200 shares of Big Four? A. I did.

Q. Did you give a receipt for it? A. I did.

Q. Have you — A. I did not at the time, no; not until I came back to the office.

Q. You did not, but you took the stock? A. No.

Q. Who gave you the stock? A. I think Mr. Ehrich, the bookkeeper.

Q. How many certificates were there? A. Two.

Q. Two hundred shares? And each certificate of 100 shares? A. Yes, sir.

Q. Do you remember to whom they were made out? A. I do not.

Q. And when you got the 200 shares of stock, did you give any money for it? A. I did not.

The President.— No, he says his instructions were to take the stock and deliver to whom? Someone at the Nassau Bank?

The Witness.— Mr. Colwell, yes, sir.

The President.— And get the money from him?

Q. What did you do with the stock, Mr. Coe? A. I took it around the corner to the Nassau Bank, and met Mr. Colwell there and gave it to him.

Q. Did he give you the money? A. He did.

By the President:

Q. Did he give you the money? A. He did.

Q. In what, checks or currency? A. In currency, $8,825.

Q. What was that, the Nassau Bank of Brooklyn? A. The Nassau Bank of Brooklyn.

Q. Around Court street? A. Court street.

By Mr. Kresel:

Q. How far from the office of Fuller & Gray in Brooklyn, was the Nassau Bank located? A. Oh, just around the corner.

Q. Just around the corner? A. Yes, sir.

Mr. Brackett.— How many feet or yards?

Q. Can you tell the distance between the office of Fuller & Gray in Brooklyn and the Nassau Bank? A. I am not very well acquainted in Brooklyn; I very seldom go there, but I think it was on the — towards the subway, towards the City Hall, one block on the corner, I think.

Q. What was the number in Brooklyn of the office of Fuller & Gray? A. 200 Montague street.

The President.— Is it worth while to go into this detail?

Mr. Kresel.—Yes, if your Honor please, we think that is important. However, I shall not pursue it any further. We have gone far enough now.

Q. Was there any reason given why you should be brought from Yonkers to Brooklyn to deliver this stock to a man a block away from the very office where you got it from? A. Well, yes.

Q. What was it? A. Mr. Colwell at one time was a partner of Harris & Fuller, and I understood he did not care for them to know that he had an account with Fuller & Gray and the young men at the Brooklyn office were in contact every day with the office of Harris & Fuller, whereas I was not.

Q. Now, after getting the new account of $8,825 in cash what did you do with it? A. I took it back to 200 Montague street.

Q. And to whom did you deliver it? A. To Mr. Ehrich.

Q. Did you get a receipt from Mr. Colwell for this stock? A. Not that day.

Q. When did you get a receipt? A. I think the next day he came into the office in Yonkers, and I had him sign a receipt for me.

Q. Have you that receipt? A. I have not.

Q. What has become of it? A. The receipt was put in an envelope with some other papers, and was put in Mr. Gray's desk;

when he cleared out his desk in February, preparatory to taking most of his effects to New York, a great many things were destroyed; some were put carefully away in Yonkers, so carefully I have not been able to find them; some were taken to New York, and up to this time I have not been able to find that receipt.

Q. Have you the receipt that you gave to the Brooklyn office for the stock?

The President.— That appears.

Mr. Kresel.— I want to see if the numbers of the certificates are there. May I have that?

(Mr. Fuller produces paper.)

Mr. Kresel.— Yes, the numbers are there.

Q. Is this the receipt (counsel passes paper to witness). A. (After examining.) Yes.

Mr. Kresel.— I offer that in evidence.

Mr. Hinman.— Just let me look at it, Mr. Kresel.

(Counsel passes paper to Mr. Hinman.)

Mr. Hinman.— Thank you. (After examining.) Well, do you want it marked?

Mr. Kresel.— Yes, please.

(The paper offered in evidence was received and marked Exhibit M-73.)

Mr. Hinman.— Will you read that.

Mr. Kresel.— This receipt has the imprint "Fuller & Gray."

"No. 538 *Brooklyn, N. Y., Oct. 31st, 1912*

Received from Fuller & Gray One hundred shares CCC, certificate no. C25824; 100 shares CCC certificate no. C24602." Is that correct, Mr. Coe, that last number?

The Witness.— Well, I don't — C25824.

Q. No, the second one? A. Oh, here — I think it is. I did not make out the receipt.

Q. 24602? A. I did not make out the receipt.

Q. Now, Mr. Coe —

Mr. Herrick.—Whom is it signed by?

Mr. Kresel.— Signed Frederick A. Coe.

Q. Prior to this 31st of October, 1912, had you ever before delivered any stock from Mr. Colwell? A. I had not.

Q. And subsequent to this time did you deliver any more stock to Mr. Colwell? A. Yes, once.

Q. When was that? A. Sixth of November.

Q. Sixth of November, 1912? A. 1912, yes.

Q. Tell us about that delivery? A. Well —

Q. How did you come to do it, what time did you do it? A. The same thing. I was telephoned to come down to Brooklyn and deliver 100 shares of Big Four, at the Home Trust Company this time.

Q. This time at the Home Trust Company in Brooklyn? A. Yes.

Q. And did you go to the Brooklyn office of Fuller & Gray? A. I went to the Brooklyn office.

Q. And did you get a certificate for 100 shares of Big Four? A. Yes.

Q. And did you meet Mr. Colwell at the Home Trust Company in Brooklyn? A. I was to meet him at half past two, but he did not get there till some time later.

Q. You met him there finally? A. Yes.

Q. Did you deliver stock to him? A. Yes.

Q. Did he give you anything? A. He did.

Q. What did he give you? A. $5,512.50.

Q. In cash? A. Yes.

Q. That means currency? A. Yes, currency.

Q. You turned that into Fuller & Gray, did you? A. Yes.

Q. You gave Fuller & Gray a receipt for that stock, did you? A. I did.

Q. Is this second paper I now hand you the receipt? A. Yes.

Mr. Kresel.— I offer that.

(The paper offered was received in evidence and marked Exhibit M-74.)

Mr. Kresel.— This receipt is (reading):

"No. 544. *Brooklyn, N. Y., November 6th, 1912*

Received from Fuller & Gray 100 shares Cleveland, Cincinnati, Chicago & St. Louis, certificate no. C2568."

Underneath — now see if I am right — underneath was written No. 25.

Q. Is that right, and that was subsequently changed to 500, is that right? A. I didn't make out the receipt.

Q. I didn't ask you whether you made it? A. It looks so.

Q. Isn't it the fact that first was written No. 25? A. Yes.

Q. And then it was changed to No. 500? A. Yes.

Q. And is that your signature, Frederick A. Coe? A. It is.

The President.— Strictly, if it appears on the face, you are as competent to testify or state what it is as the witness.

Q. Do you remember whether the No. 25 was written on this paper before you signed it? A. I don't.

Q. Do you remember whether the number now appearing there, 500, was on the paper before you signed it? A. I don't.

Q. When you met Mr. Colwell at the Home Trust Company, did you see him draw any money from that institution? A. He did not.

Mr. Kresel.— That is all.

Cross-examination by Mr. Hinman:

Q. Harris & Fuller names have been used here. What concern was that? A. Why —

Q. What was their business? A. Why, they are stockbrokers, 45 Broadway.

The President.— And were they such in October and November, 1912? A. They were.

Q. Do you know whether Mr. Colwell, of whom you have spoken, had a desk in their office? A. I don't.

Mr. Hinman.— Nothing further.

(Witness excused.)

Mr. Kresel.— Now, Mr. Fuller.

MELVILLE B. FULLER, a witness produced on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Fuller, are you a member of the firm of Harris & Fuller? A. I am.

Q. They are bankers and brokers in the city of New York? A. They are.

Q. On the 18th of November, 1912, did William Sulzer, who is now the Governor, take an account with your firm? A. The date again, please.

Q. November 18, 1912? A. I could not say.

Q. Well — A. Oh, 1912, yes.

Q. On the 18th of December, 1912, did William Sulzer have an account with your firm? A. He did.

Q. On the 18th of November, 1912, did William Sulzer make any payment on that account? A. I would have to refer to my books or my —

Q. Refer to anything you please, sir. Have you your books here? A. I have, in a safe deposit vault in Albany.

Q. Perhaps I can help you out.

Mr. Herrick.—You have a transcript. You can use that.

The Witness.— Mr. Kresel said he would give me notice. They have been in a safe deposit vault for two days. He said he would give me time to get them here.

The President.—What was the witness' answer?

The Witness.—They are in a safe deposit vault in Albany, and have been there for two days. Mr. Kresel said he would give me ample time to get them here. I heard from him just now.

Q. See if that will refresh you recollection? A. This is a transcript of William Sulzer's account.

Q. I didn't ask you what that was. I asked you whether that will refresh your recollection so as to enable you to answer the

question, whether on the 18th of November, 1912, William Sulzer made a payment to your firm. A. He did.

Q. How much? A. $10,000.

Q. How was it paid? A. In bills.

Q. To whom was it paid? A. To me, personally.

Q. On the 16th of December, 1912 —

Mr. Hinman.— Mr. Kresel, pardon me, you said the 18th of December.

The Witness.— November.

Mr. Kresel.— I said the 18th of November.

Q. On the 16th of December, 1912, did Mr. Sulzer make another payment to the account? A. He did.

Q. How much? A. $6,000.

Q. In cash? A. In cash.

The President.— What do you mean, bills?

The Witness.— Currency, bills.

Mr. Kresel.—That is all.

Mr. Marshall.— Just wait a minute.

The President.—Any cross?

Mr. Marshall.— Just one second, your Honor.

Mr. Hinman.— If the Court please, in order to avoid discommoding Mr. Fuller, we are willing now to take up this account of Harris & Fuller, and have it explained; or, if the Court prefers, and Mr. Fuller is willing, we can let it stand until later, and have him come back.

The President.— The Court has certainly no preference, and prefers to accommodate the witness, if possible.

Cross-examination by Mr. Hinman:

Q. Have you before you, Mr. Fuller, a statement or a transcript of the account of the firm of Harris & Fuller with William Sulzer? A. I have.

Mr. Kresel.— One minute, please. I shall object to the introduction of any copies of the books of Harris & Fuller, and I shall insist that the books be produced.

The Witness.— I can have them here in fifteen minutes, sir.

The President.— Well, if objection is made the objection is good, so you will have to get them here. In the meantime your examination will be suspended.

The Witness.— Do you want them now?

The President.— Yes, you can go down and get them.

(Witness excused.)

Mr. Todd.— I call the Clerk of the Assembly.

Mr. Brackett.— George R. Van Namee. He has been sworn.

GEORGE R. VAN NAMEE recalled.

Examination by Mr. Todd:

Q. Will you produce the original direct primary bill which was introduced at the session of the Legislature in 1913? A. I have it here (producing).

Mr. Todd.— I offer that in evidence.

(The bill offered in evidence was received in evidence and marked M-75.)

Senator Duhamel.— Which direct primary bill? There were several introduced in the Assembly and Senate.

Mr. Todd.— I will read that.

The President.— After he has got one marked he will explain which one that bill is.

Mr. Herrick.— Do you intend to read the bill?

Mr. Todd.— I don't intend to read the bill, but I intend to describe it definitely enough so the members of the Court will understand it was the bill favored by the respondent.

The President.— Doesn't the printed bill show who introduced it?

Mr. Todd.— This bill was introduced by Mr. Eisner.

The President.— Does that identify it to you, Senator?

Senator Duhamel.— That will suffice.

Mr. Herrick.— What date?

Mr. Todd.— I believe the other side will concede it was the one favored by the respondent, or do you want that proved?

Mr. Marshall.—Let me see it.

Mr. Herrick.— There are so many of these bills.

Mr. Marshall.— It does not show the date of its introduction.

The Witness.— I can give that.

Mr. Marshall.— It does not show the date of introduction or the introductory number.

Q. Will you state the date when this bill, managers' Exhibit 75, was introduced in the Assembly? A. Introduced by Mr. Eisner on April 22d, 1913, introduction number 2215, print number 2758.

Q. Will you produce the original direct primary bill which was introduced at the extraordinary session of the Legislature in 1913? A. I have it.

Q. When was this bill introduced, and by whom? A. By Mr. Eisner, June 16th, 1913, introductory number 4, print number 4: at the extraordinary session.

Mr. Todd.— We offer it in evidence.

(The bill was received in evidence and marked Exhibit M-76.)

Mr. Todd.— The clerk of the Assembly desires to keep the original bill. Any objection on the part of the defense?

Mr. Herrick.— If he will say they are correct copies we will take them.

The Witness.— Yes, they are public prints.

Mr. Herrick.— Yes, we will take them.

Mr. Todd.— Will the stenographer mark the substitutes for these originals?

(The copies of the two bills already marked Exhibits M-75 and M-76 respectively, were received and marked Exhibits M-75 and M-76 respectively.)

Q. Will you produce the original bill introduced in the Assembly by Assemblyman Sweet, introduction number 1046, printed number 2139? A. That is not quite correct. The print number was originally 1101, and on amendment it was 2139. The introductory number is 1046.

Mr. Hinman.—What was that introductory number?

The Witness.— 1046.

By Mr. Todd:

Q. Well, it is the bill in relation to the bridge at Minetto? A. That is the bill.

Q. When was that bill introduced by Assemblyman Sweet? A. February 13, 1913.

Q. What action was taken on it by the Assembly? A. It was passed March 31st by a vote of 130 to no — 130 ayes and noes none.

Mr. Todd.— I offer it in evidence.

(The paper offered in evidence was received and marked Exhibit M-77.)

The President.—Did it pass the Senate?

Mr. Todd.—We will show that later.

The President.— I was going to say, perhaps the other side will concede it.

Mr. Marshall.—We will concede it. Was it amended?

The Witness.— No. I have the whole record.

Mr. Todd.— I understand it is conceded that this bill was passed by the Senate.

Mr. Herrick.— It was passed by the Senate. What was the vote in the Senate, do you know? Do you know that? Have you got that?

The Witness.— I don't know, but I have the whole history of the bill.

By Mr. Marshall:

Q. It passed the Senate on the 2d day of May, 1913? A. Yes.

By Mr. Todd:

Q. Have you the original bills, introduced by Assemblyman Prime, one known as the State route bill and the other known as the bill establishing certain State routes in the counties of Essex and Warren? A. I have.

Q. Produce them. A. Here they are, sir.

(Witness produces papers referred to by counsel.)

Mr. Marshall.— Let me see that Sweet bill.

The Witness.—You took it.

Mr. Marshall.—As printed?

Mr. Todd.— Here it is.

Mr. Marshall.— No. no, the Sweet bill.

The Witness.— Oh, the Sweet bill: yes. there was an amendment. It was not the original — the original bill was amended; I have them both, though.

Mr. Todd.— Do you want anything else?

Mr. Marshall.— That is all I want to see at present.

Mr. Todd.— I offer in evidence the bill of Assemblyman Prime —

Q. What was the introductory number? A. That is it (indicating).

Mr. Todd.— Bearing introductory number 2032.

The Witness.— March 27. 1913.

Q. And was it introduced on March 27, 1913? A. Do you want me to give the whole history of it?

Mr. Todd.— Just a minute.

(The bill offered in evidence was received and marked Exhibit M-78.)

Mr. Hinman.— What is the title of that one?

Mr. Todd.— The title of the bill just offered is "An act to amend the highway law in relation to additional State routes in the counties of Essex and Warren."

I offer in evidence another bill introduced by Mr. Prime on April 2, 1913, bearing introductory number 2143.

Mr. Hinman.— 2343?

Mr. Todd.— 2143. That is an act to reappropriate for the improvement of a new State route in the counties of Essex and Warren the unexpended balances of moneys appropriated by chapter 133 of the Laws of 1911. I offer that in evidence.

(The bill offered in evidence was received and marked Exhibit M-79.)

Q. What action was taken on Assemblyman Prime's bill, Exhibit No. 78, being the bill to amend the highway law in relation to additional State routes in the counties of Essex and Warren?

The Witness.— On April 22d it was reported to second reading in the Assembly; on April 23d to third reading and passed by a vote of 128 ayes and 2 noes.

The President.— I think you may omit the intermediate action and go right to the question of whether the Assembly passed it or not?

Mr. Todd.— That is satisfactory. That is all we want.

Q. What happened to the bill introduced by Assemblyman Prime to reappropriate certain unexpended balances, which has been marked Exhibit M-79? A. It was passed in the Assembly on April 29th by a vote of 96 ayes, noes 20.

Q. Have you the original bill introduced by Assemblyman Patrie? A. I have.

Q. What is the introductory number and the printed number? A. Introductory number —

Mr. Marshall.— (Interrupting) Just a moment please. Under what count is this material? I ask the counsel under which of the articles of impeachment he is now proposing to proceed?

Mr. Todd.— It has to do with the article of impeachment which relates to the trading of executive approval for —

Mr. Marshall.— (interrupting) Article 7?

Mr. Todd.— (Continuing) for the votes of members of the Legislature.

Mr. Marshall.—There is no reference in Article 7 of transactions except transactions with relation to the bills introduced by Hon. S. G. Prime, Jr., and Hon. Thaddeus C. Sweet. That has reference to — the counsel is now offering a bill introduced by Assemblyman Patrie. There is no reference to that at all in the articles. We have had no notice with regard to it. We have not been invited to try that issue.

Mr. Todd.— We believe that the testimony is competent upon —

Mr. Marshall.— It is a different situation altogether from the question which was presented under the articles of impeachment which related to the receipt of money.

Mr. Todd.— We believe that the same rule applies and that this proof is competent the same as the proof that has been admitted upon the contributions made by parties other than those named in the articles; that the language of the section is the same substantially — or the language of the article rather.

Mr. Marshall.— No.

Mr. Todd.— It states that among other, I believe.

Mr. Marshall.— No, there is no such thing, I think not.

Mr. Todd.—That is my recollection.

Mr. Marshall.— It was (reading) "That the said William Sulzer then being the Governor of the State of New York, unmindful of the duties of his office and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State, and was guilty of the corrupt use of his position as such Governor and of the authority of said position, and of a violation of section 775 of the Penal Law of said State, in that, while holding a public office, to wit, the office of Governor, he promised and threatened to use such authority and influence of said office of Governor for the purpose of affecting the vote or political action of certain public officers; that among such public officers, to whom the said William Sulzer promised, or threatened to use his authority and influence as Governor, for the purpose of affecting their votes, said persons to whom such promises or threats were made were Honorable S. G. Prime, Jr.," and then Thaddeus C. Sweet. But there is nothing to indicate anything with regard to Mr. Patrie or any other assemblyman. It might be omitted — under their theory without any reference to Sweet and no reference to Prime and then proceed to try the case with regard to some assemblyman with whom we have no notice — whose name we have not even heard and as I said as to which we have no opportunity to investigate.

The President.— This is plainly distinguishable from the other cases. In the other cases it was, while certainly admissible on one ground, the admission of these other contributions to show that the scienter, as it is called, of the respondent to show that it did not happen by accident. The cases were too numerous to regard that way. But in this case of course there is nothing of the kind here. It is charged here that there was a direct agreement with certain members of the Legislature if they would support the bill that the respondent advocated that he would sign their bills, otherwise not. I don't see how there is any question of scienter in there at all. I think therefore this is incompetent; the objection is sustained.

Mr. Todd.— That is all.

The President.— Any cross-examination?

Mr. Marshall.— No cross-examination.

Mr. Herrick.— Do you want a concession that those bills passed the Senate also? We gave it to you with regard to one bill.

Mr. Todd.— Yes, I would like a concession — if you are willing to give it — that the two bills introduced by Assemblyman Prime and offered in evidence were passed by the Senate.

Mr. Marshall.—All right, conceded.

Mr. Herrick.— Conceded.

The President.— Will you admit — it seems to the Court it is hardly worth while to take up time with matters that are a public record.

Mr. Herrick.— I have conceded it, that it passed the Senate.

The President.— That it passed the Senate and was submitted to the Governor for action, as required by the Constitution.

Mr. Marshall.— Yes, we have conceded that.

The President.— You have got that, counselor, and that will enable you to dispense with that part of the case.

Mr. Todd.— That is all.

(Witness excused.)

Mr. Todd.— Mr. Platt.

Mr. Kresel.— We want Mr. Platt, the Governor's secretary.

CHESTER C. PLATT, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. You are an official of the State of New York? A. Yes.

Q. What is your office? A. Secretary to the Governor.

Q. You have been served with a subpoena duces tecum requiring you to bring certain documents here? A. Yes.

Q. And you produced the bill introduced by Assemblyman Sweet bearing introductory number 1046 and printed number 2139? A. I have them here, yes, sir, I have that bill.

(Witness produces papers referred to.)

Q. And there are some other documents accompanying that bill? A. Yes.

Q. Is there a report there from the—from Mr. Delaney, the Commissioner of Efficiency and Economy? A. Yes, there is; and there is various other correspondence relating to the bill.

Mr. Todd.—I would like to have the report of Commissioner Delaney marked for identification.

(The paper offered for identification was received and marked Exhibit M-80 for identification.)

Q. Have you also produced a report upon this bill made by the Superintendent of Public Works? A. (Witness examines papers.) Yes, there seems to be a report by Mr. Peck, not signed, but it is noted in lead pencil by Mr. Peck.

Mr. Todd.—I offer that in evidence — or rather, I would like to mark it for identification.

(The paper offered for identification was received and marked Exhibit M-81 for identification.)

Q. Is there also a brief there filed by Assemblyman Sweet in favor of the bill? A. There is.

Mr. Todd.—I would like to have that marked for identification.

(The paper offered for identification was received and marked Exhibit M-82 for identification.)

Q. You also produce the printed bill in the form that it came to the Governor? A. Yes.

Q. And is the jacket on this bill in the same condition that it was when it came to the Governor's office; that is, so far as the markings on it are concerned, showing the history of the bill? A. I don't know about that, about the marking.

Q. Hasn't the bill been in your custody? A. It has been on file in our office, but rather in the custody of Mr. Waldron and Mr. Taylor; they handle the bills.

Q. You understand that the history of the bill — the true history of a bill is shown by the marking on that jacket? A. Yes.

Mr. Marshall.— May I look at the jacket?

(Paper is passed to counsel.)

Q. Have you also accompanying this bill among the papers that were before the Governor, a letter written by Alexander E. Kastel to T. C. Sweet, dated March 20, 1913, with four photographs annexed? A. Yes, I do.

(Witness produced papers referred to.)

Mr. Todd.— I ask that that be marked for identification. Make two markings, one for the photographs and one for the letter.

(The letter offered for identification was received and marked Exhibit M–83 for identification, and the photographs were marked Exhibit M–84 for identification.)

Q. Will you produce a report made by Commissioner Carlisle upon Assemblyman Prime's bill appropriating certain moneys for State routes in the counties of Essex and Warren? A. That report was not to be found in our office, but I have obtained a copy of it from Mr. Carlisle, a carbon copy; there is his signature.

(Witness produces paper.)

Q. Now, have you another report from Mr. Carlisle from this same bill? A. I have not.

Q. Have you looked for another report? A. We find nothing in our office from Mr. Carlisle relating to this bill, so I asked for this report and obtained it.

Q. Well, you recall, don't you, that there were two reports made upon these bills by Commissioner Carlisle, were there not? A. No, not that I remember; not that I knew.

(The carbon copy of report offered for identification was received and marked Exhibit M-85 for identification.)

Q. By these bills I mean the Prime bills? A. No, I didn't know of two reports.

Mr. Todd.— That is all.

The President.— Any cross-examination?

Mr. Stanchfield.— One moment.

Q. Mr. Platt, is there kept in the executive chamber a record or book of statements that from time to time are quoted in the newspapers as coming from the Governor? A. No.

Q. Who has the record of statements issued by the Governor upon public affairs? A. Mr. Graves has something in that line.

Q. What is the first name of Mr. Graves? A. George Graves.

Q. Is there a book in which those statements which you say Mr. Graves keeps in the executive chamber? A. He has copies of some statements that have been given out, Neostyle copies.

Q. To whom is the substance of those statements ordinarily dictated? A. To Mr. Smith, the executive stenographer.

Q. Is he there now? A. I think he is.

Q. What is his name? A. Benjamin Smith.

Q. So that the stenographer who took down these statements would be Benjamin Smith, and the man who would have the record of them would be George Graves? A. That is correct.

Mr. Stanchfield.— That is all.

Mr. Stanchfield.— Mr. Graves.

GEORGE B. GRAVES, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Graves, are you employed in the executive chamber? A. I am.

Q. Have you been during the past summer? A. Yes, sir.

Q. During the months of June, July, August and September? A. I have.

Q. What has been your position there? A. Engrossing and record clerk.

Q. And have you a book or a record as was described by the last witness, Mr. Platt, containing statements upon public matters that have been issued by the Governor from time to time? A. I have the statements given to the press, I have not the books. I do not have charge of the books.

Q. You have what? A. Neostyle statements given to the press; I keep those, but I have not the books.

Q. In what form are they kept? A. Just Neostyle copies. I have brought one with me, which I can show you.

By the President:

Q. What is the term you use? A. Neostyle copies.

Q. What is that? A. It is a duplication of typewriting.

By Mr. Stanchfield:

Q. Have you those statements for the latter part of July, 1913? A. Yes, I have.

Q. Have you them with you? A. I have several with me.

Q. See if you have with you the statements that were issued by the Governor to the press on the 30th of July, 1913? A. No, I haven't that with me.

Q. There is such a statement? A. Well, I could not say. Any particular bill I would have to look at it to find out.

Q. Not with reference to any bill. Do you recall reading during the summer a statement coming from Governor Sulzer on the subject of the Schiff transaction? A. Yes, I recollect it very well, of course.

Q. In which he made a statement in regard to it? A. Well, I can't remember that, about the statement.

Q. You say you remember very well that he made a statement on the subject? A. I remember the subject well, but I do not remember the statement.

Q. It is that statement that I want. Will you get it and produce it here? A. If I have it I will do so.

Q. Well, you have it, haven't you? A. I can't tell.

Q. What makes you sceptical about it; haven't you looked to see? A. No, I haven't; it was not in my subpoena, and I did not look for that at all.

Q. Will you kindly step down and get it for me and bring it up here at once? A. Yes.

The President.—While he is doing that we can save time by putting in another witness.

Mr. Todd.— Mr. Sweet

THADDEUS C. SWEET, a witness called on behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. Where do you reside, Mr. Sweet? A. Phoenix, N. Y.

Q. What office do you hold in the government of the State of New York? A. Member of Assembly.

Q. From what county? A. Oswego.

Q. How long have you held that office? A. This is the fourth year.

Q. During the regular session of 1913 of the Legislature did you offer for passage in the Assembly an act to provide for the construction of a bridge over a part of the Oswego river at Minetto? A. I did.

Q. And is this the act which I show you —

The President.—You have got that, and the fact that it was passed by the Senate.

Mr. Todd.— I do not think the date of the passage by the Senate was conceded. I would like to have that on the record.

The President.—Yes.

Mr. Todd.— It appears on the jacket that it passed on May 2, 1913.

Mr. Marshall.— That has been admitted as being the date.

Q. Will you state the object of this bill?

Mr. Herrick.— The bill speaks for itself; it is in evidence.

Mr. Todd.— I think, if the Court please, rather than boring the Court by reading a long bill, that the witness could quickly state the reason for the bill and its requirements.

The President.— Is there any objection to giving the purport of it? What was it to construct?

Mr. Todd.— It was to construct a bridge.

By the President:

Q. In your county? A. Yes, sir.

Mr. Todd.—And appropriating certain moneys for it. I desire to show the need of that bridge there.

The President.— That we can hardly consider. The Legislature has to determine that. The Legislature is the body to determine, subject to the approval or veto of the Governor, the propriety and necessity of legislation. Courts cannot consider legislation except from one point of view, whether it is constitutional or not. When it is constitutional, the question of the propriety of the legislation is exclusively for the Legislature.

By Mr. Todd:

Q. In the place where you desired this new bridge to be constructed, had there been a bridge theretofore? A. There had been a bridge to Minetto across the river.

Q. And what had happened to that bridge?

Mr. Marshall.— Objected to as immaterial.

The President.— Objection sustained.

Q. After the bill had gone to the Governor, did you have occasion to go to see him about it? A. I did.

Q. Before you went to the Governor, had a report been made upon this bill by John H. Delaney, Commissioner of Efficiency and Economy of the State? A. I could not say whether the report had been made before I went to the Governor or not.

Q. I show you managers' Exhibit 81 for identification, and ask if you will look at that and refresh your recollection? A. This is not anything that I filed with the bill. It went from the Department of Efficiency and Economy.

Q. Does the date of that paper which you hold in your hand make it possible for you to answer my question as to whether or not this report had been made to the Governor before you talked with the Governor about the bill? A. I think it had not.

Mr. Todd.— I now offer this report in evidence.

Mr. Marshall.— That is objected to as immaterial and irrelevant.

The President.— I will make the same ruling as before.

Mr. Todd.— This is a report, if your Honor please, in reference to the bill under consideration, made by the Commissioner of Efficiency and Economy of the State of New York. It was one of the papers which was before the Governor at the time that he had this bill under consideration.

The President.— I do not see that this Court can enter into that question. The question, as I have already said— legislation is left to the Legislature, subject to the approval or disapproval of the Governor, and subject, of course, to being passed over his veto, and we cannot sit in review of that in this Court. The gist of this article does not relate to whether the bill was a wise one or unwise, but whether there was any bargaining done. There the vice, if it exists, exists in this charge.

Mr. Todd.— It is our view of it that this has some bearing upon the intent of the Governor in the action that he took upon this bill. We desire to show that it was approved by the Commissioner of Efficiency and Economy and that it was approved by the Superintendent of Public Works; that that action occurred after the Legislature had passed upon the bill; and while I quite concur in what your Honor says about the action of the Legislature, this was subsequent action by officers of the State of New York charged with the duty to advise the Governor in the premises.

The President.— Yes, but under the Constitution, the responsibility for approval or disapproval is vested in the Governor. I do not think that this Court can consider that question, whether it was wise or unwise.

Mr. Stanchfield.—If the Presiding Judge will pardon me for a moment. This testimony is introduced under the seventh charge. The exact language is this:

> "Honorable Thaddeus C. Sweet, a member of Assembly for the county of Oswego, for the year 1913, the threat being that if the said Sweet did not vote for certain legislation in which said William Sulzer was interested, and, as Governor, was pressing to passage, he, said Sulzer, would veto a bill that had already passed the Legislature and was pending before him, appropriating certain moneys for the construc-

tion of a bridge in said county of Oswego, the said Governor at the time of said threat well knowing that the said assemblyman, Thaddeus C. Sweet, was desirous of having said bill for said appropriation signed."

The contention of the board of managers is, as bearing upon the proposition as to whether or no the threat was coercive or intimidative in its nature and character, they have the right to go behind the finding of the Legislature which passed this bill, and show to the Court in its entirety that this legislation was for the public good, and that it was warrantable legislation, such legislation as the duty was imposed upon Mr. Sweet in his legislative capacity to introduce and the passage of which it was his duty to advocate and to force by every means in his power.

As bearing upon the question between Mr. Sweet and the Governor, as to whether after this threat was made to Mr. Sweet, I think we have a right to show as well that the propriety of this legislation was submitted by the Governor to the Department of Efficiency and Economy, of which Mr. Delaney was the head, and that that department reported back to the Governor for his information that this legislation was fit and proper to pass.

I think we have a right to show all these facts as part of the transaction and as bearing upon the question as to whether Mr. Sweet is giving a truthful narrative as to what took place between him and the Governor at the time alleged in this charge.

The President.— I think not. The Court adheres to its ruling that cannot be admitted. We must assume that the Legislature did what it thought wise to do, and the Governor had the same privilege as the Legislature, and we cannot sit in review of the propriety of their acts. If this witness had any particular interest in the bill, assuming that every assemblyman has an interest in the bills relating to the affairs of his constituents, that is what he was elected for, let us see what passed between him and the Governor, that is competent; but beyond that I do not think you can go.

Q. When did you visit the Governor in respect to this bill? A. The exact date I do not remember, but it was about two weeks after the Legislature had adjourned.

Q. And when did the Legislature adjourn, May 3d? A. About that time.

The President.— This was a bill the Governor could hold over for thirty days?

Q. This was one of the 30-day bills? A. It was.

Q. Did you have a talk with the Governor in reference to this bill on the occasion that you visited him? A. I had.

Q. Will you state the conversation? A. As the Governor was about to leave the executive chamber, I having had an appointment with him for that morning, and he not being able to see me, I had sat through the previous whole day, and I approached the door as he was leaving, and said, "Governor, I had an appointment with you this morning. I wish I might see you before you go, as I am anxious to get home."

He said, "Assemblyman, what can I do for you?"

I said, "I am here in the interest of some legislation pending in your department, particularly my Minetto bridge bill."

He said, "Assemblyman, how did you vote on my primary bill?" I said, "I voted against it."

He then said, "How are you going to vote in the extraordinary session?"

I said, "According to the sentiment and in the interest of my district."

Q. He laid his hand on my arm, stroking it, and said, "See Taylor, Assemblyman."

The President.— Said what?

The Witness.—"See Taylor, and smooth him the right way."

The President.— Speak up a little louder, and look at the furthest member of the Court.

Mr. Stanchfield.— Let the stenographer repeat that.

The President.— I think they will understand even better from him than from the stenographer, but you can have it either way. Now, speak louder, and commence the conversation.

The Witness.— You want the beginning of the conversation?

The President.— Just as you have narrated it.

Judge Werner.— We have heard most of that. We don't want that repeated.

Senator McClelland.— From "See Taylor." That is just what we want to get.

The President.— He has said, "See Taylor," he hasn't said anything since that time.

The Witness.—"See Taylor"— is that right?

The President.— Now, speak loud. After "See Taylor," what occurred?

The Witness.—"See Taylor, smooth him the right way, Assemblyman, and bring your bill to me, but remember, Assemblyman, I take good care of my friends." I left him. I saw Mr. Taylor that afternoon.

Mr. Brackett.— Did you smooth him?

The Witness.— I didn't have to.

Mr. Marshall.— I object to that as improper.

The President.— Objection sustained. What occurred between Taylor and you?

The Witness.—I said, "Mr. Taylor, I come to you at the direction of the Governor, in the interest of my legislation pending." He got out a file containing my bills and went over them, and as he came to them, one referring to an amendment of the charter of the city of Fulton, he said, "There is no use considering this bill, because the Governor holds that his home rule bill will take care of the feature of this proposed legislation."

Another bill was pertaining to the Fulton city charter, and he said, "This bill meets the same fate."

I then said, "How about my Minetto bridge bill?"

He said, "I haven't anything to do with that bill. That carries an appropriation, and it is with Mr. Delaney, the chairman of the Bureau of Efficiency and Economy. You will have to see him." He said, "What have you saved out of this wreckage?"

I said, "Not very much of anything, so far."

He said, "How about your Montcalm Park bill?"

I said, "I am very anxious to have that bill approved."

He said, "I will put that bill across for you, Assemblyman."

I thanked him and asked him to call me when the Governor took action upon it, which he did.

I said, "Where will I find Mr. Delaney?"

He said, "I think Mr. Delaney has gone to New York to attend the Anhut trial, but his office is in the Assembly parlor, on the third floor."

I came up to the Assembly parlor and inquired for Mr. Delaney, and was informed that he was in New York. They did not know when he would return.

I then went home; I came back, I believe, the following week and sought Mr. Delaney and stated to him my conversation.

Mr. Marshall.— I object to conversation between Delaney and the witness.

The President.— He was referred to Taylor by the respondent here.

Mr. Marshall.— Not referred. Mr. Taylor merely said that matter called for an appropriation, and that was in Mr. Delaney's department, but the Governor did not refer the witness to Delaney.

The President.—He referred him to Taylor and Taylor referred him to Delaney.

Mr. Marshall.— Referred him to Taylor with regard to the latter, and said, "See Taylor and smooth him the right way," or words to that effect. The Governor did not, therefore, refer the witness to Delaney any more than any other citizen of the State.

The President.— What was it the witness said that Taylor told him about Delaney? I thought he told him he must see Delaney.

Mr. Todd.— He did, if your Honor please, tell him that.

The President.— I think it may be admitted.

The Witness.— Just give me the last of my statement.

(The stenographer repeated as follows: "I came back, I believe, the following week, and sought Mr. Delaney, and stated to him "—)

The Witness.— Mr. Taylor had informed me that my Minetto bridge bill was pending in his department.

He said he believed it was.

I told him of my interview with the Governor, and my desire to have the bill approved, and at the request of the speaker of the House, stating —

Mr. Marshall.— May it please the Court, I would like to make this further suggestion:

Doesn't this conversation with Mr. Delaney come within the ruling that your Honor made that the report of his communication to the Governor was not competent? This is entirely in the same direction.

If we could review the action of a Governor in any case and have the question of the sufficiency of the reason which prompted him in favoring or vetoing a bill investigated upon a subsequent occasion, why the threat of such investigation might prevent almost any Governor from acting independently with regard to matters which came before him, especially those which call for an appropriation.

The President.— I do not see the force of that argument, because he has referred this witness to Taylor with that expression and Taylor sent him to Delaney.

Mr. Herrick.— Hardly that. He says he didn't have charge of that; that where it contained an appropriation the Department of Efficiency and Economy had charge of it.

Mr. Todd.— The language of the witness, as I recall it, was, you will have to see Delaney about that, that is his department.

Mr. Herrick.— That may all be, but he sent him to Taylor. He sent him to Taylor as his legal adviser, his agent, as far as that is concerned, his personal attorney, so to speak.

The President.— It is not on the merits of the bill. Of course, as the court has already said — or the Presiding Judge has said — we cannot review the action of a Governor so far as the merits are concerned. The question in this case is, Did he make a corrupt bargain concerning that action? That is the question, not the merits.

Mr. Herrick.— This didn't have anything to do with that.

The President.— We will see, when we hear what passed between him and Delaney.

Mr. Herrick.— What we really claim is that an agent cannot delegate authority. The Governor sent him to Taylor. Now, according to the witness, Taylor sent him over to an entirely different person.

The President.— Proceed. What took place between Taylor, Mr. Delaney and yourself?

Q. Proceed with the conversation. A. I said, as near as I can pick it up, that the speaker of the House had requested all members having bills pending in the Executive Department, to file any and all briefs or documents pertaining to the bills, with the bills, with the Governor for his consideration; and that I had several instruments which I desired to lodge with the bill. Among them was a letter from the Superintendent of Public Works, Mr. Peck.

Q. Is this the letter that I show you, marked Exhibit M-81, for identification? A. It is.

Mr. Todd.— I offer it in evidence.

Mr. Marshall.— I object to that.

The President.— I do not see its competency now. Proceed.

The Witness.—A letter from Mr. Castle, deputy state engineer, on barge canals.

Q. And is this the letter from Mr. Castle, Exhibit M-83 for identification? A. It is. Some photographs of the original bridge before it collapsed. The work of the barge canal con-

struction at that point. Some photographs showing a temporary suspension bridge spanning of the original bridge that collapsed. I stated to him the importance and urgency of the matter at length, and he asked me to put on paper what I had stated to him.

I went to the Ten Eyck Hotel and dictated a brief and came back and lodged that.

Q. Does your brief that you have just referred to — is this it, marked Exhibit M-82 for identification? A. It is. I gave him the brief with the other papers, and he examined them, examined the photographs, and said that he readily appreciated the urgency of the situation, and would do all he could to further its favorable action at the hands of the Governor. I left after asking him if he would wire me as soon as the Governor took action on the bill.

Mr. Marshall.— Does that cover the whole conversation with Mr. Delaney?

The Witness.— No, sir.

Q. State the rest of the conversation. A. The conversation I didn't relate was the reasons why the bill should be approved, that the original bridge was one in which the State had participated in construction and maintenance since the original canalization of the Oswego river, in the year 1828; that through the barge canal construction they had diverted half of the flow of the river.

Mr. Herrick.— We are now getting the report of the superintendent, which you excluded.

Mr. Todd.— It was asked for by Mr. Marshall.

Mr. Marshall.— I asked as a preliminary question to a motion to strike out this question on the ground that it merely indicated a view on the merits of this case, of the witness and the arguments which he presented to Delaney, and the fact that Delaney said he would give the matter consideration, and therefore it was entirely incompetent and immaterial and comes within the ruling which your Honor has heretofore made.

The President.— We will wait until it is finished.

Mr. Herrick.—That is the only purpose of my question.

The President.—You stated you gave the reasons which you had for its passage.

The Witness.— I was stating this —

The President.— I do not think it is necessary to go into detail. I think that comes within the rule. Then you say you left Delaney?

The Witness.— I did.

The President.— Now, then, what occurred?

Q. Did Mr. Delaney at that time, or shortly thereafter, prepare the report which I show you, marked Exhibit M-80 for identification? A. It so stated. I did not see the document prepared.

Q. What happened to your bill?

Mr. Marshall.— Isn't this the proper time to renew my motion to strike out the testimony of the witness as to his conversation with Delaney, as being incompetent and immaterial and being merely an argument made by him to Delaney as to the merits of the bill?

The President.— I think I will let it stand.

The Witness.— My bill was vetoed.

Q. How did you vote on the primary bill at the regular session—

Mr. Herrick.— That is objected to.

Q. Of the Legislature?

The President.— He said he told the Governor he voted against it. Hasn't he said that already?

The Witness.— Yes, sir.

Q. And how did you vote on the direct primary bill at the extraordinary session?

Mr. Herrick.— That is objected to.

The President.— Objection sustained. How is that material? Had it been vetoed before?

The Witness.— No, sir.

Mr. Todd.— We anticipate, if the Court please, that the fact that the witness did not smooth Mr. Taylor the right way has some bearing upon the question.

The President.—If this witness was against it, it shows he did not receive the price of the corrupt bargain.

Mr. Todd.—It also goes to show this man did not make a bargain. We do not claim there was a bargain made.

The President.—The objection is sustained. I do not see its relevancy.

Mr. Todd.— We desire to show the attempt to make the bargain.

Mr. Parker.— It was not really a bargain, it seems to us back here. It was an attempt at coercion, I suppose it is.

The President.— How does this show, whether it failed or succeeded, how does that make any difference with the Governor's defense or lack of defense?

Mr. Parker.— It seems to me if it is not of very great importance, it is certainly of no harm for the Court to know precisely what was done by this assemblyman.

The President.— I do not see its competency.

Mr. Stanchfield.— I call Mr. Graves to the stand.

Mr. Herrick.— If Mr. Fuller is here, is there any objection to having his testimony completed now?

Mr. Stanchfield.— Just a minute. I want to have Mr. Graves take the stand.

GEORGE B. GRAVES recalled.

Examination by Mr. Stanchfield:

Q. Do you produce, in response to my request, what purports

to be a statement by the Governor, Albany, New York, July 30, 1913? A. I do.

Q. Is that the statement produced from the record which you say you kept in the executive chamber? A. Yes, sir.

Q. And this is the original of it? A. No. It is one of many copies on file.

Q. Is this a copy? A. It is one of many copies now on file in the office.

Q. Is this produced from the files in the executive chamber? A. Yes, it is.

Q. Do you say you have many other copies in the executive chamber besides this? A. I have several copies, I do not know just how many.

Q. Where is the original of it? A. I never saw the original copy.

Q. To whom was this statement made? A. It was one of the copies which was given out to the press at the time.

Q. Were you present at the time? A. No, I simply got copies the next day and put them in the files.

Q. Put them in the files, and this is from the files? A. That is from the files.

Mr. Stanchfield.— I will have that marked for identification.

(Paper marked Exhibit M-86 for identification).

Mr. Stanchfield.— That is all, Mr. Graves, now.

Mr. Marshall.— May I look at that?

Mr. Stanchfield.— Yes.

Mr. Todd.— Spencer G. Prime, 2d.

SPENCER G. PRIME, 2D, called as a witness in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. Where do you reside? A. Upper Jay, Essex county, New York.

Q. You are an assemblyman in the State of New York for the county of Essex? A. Yes, sir.

Q. How long have you occupied that office? A. This is my second year.

Q. You introduced in the Assembly two acts in relation to the building of highways in the counties of Essex and Warren during the regular session, did you not? A. Yes, sir.

Q. One of the acts was to reappropriate an unexpended balance of about $750,000 for the construction of highways in the counties of Essex and Warren, was it not? A. Well, approximately $733,000, somewheres along there.

Q. And the other act was to authorize the construction of certain highways in the counties of Essex and Warren? A. Two new State routes.

Q. The effect of these bills was to have these roads built at the expense of the State and not the expense of the counties of Essex and Warren?

Mr. Marshall.— I object to that. The bills will show for themselves.

Mr. Todd.— It is for the purpose of saving the reading of the bills.

Mr. Marshall.— Have the bills been put in evidence?

The President.— It is to save the reading of them.

Mr. Marshall.— If that is a short description of them, all right.

The President.— Of course it merely saves time. Do the bills provide for doing these roads entirely at the expense of the State?

The Witness.— The unexpended balance bill is a little different bill than the regular appropriation, the money coming from the State —

The President.— That is what we want.

The Witness.— The money coming from the State and not from the localities. The money is assigned to the county under the old $50,000,000 appropriation.

The President.— It was State money?

The Witness.—Yes, sir.

The President.— That had been assigned to your county?

The Witness.—Yes, sir.

Q. When these bills passed the Senate they were in the thirty-day class before the Governor, were they not? A. Yes, sir.

Q. And did you have occasion to visit the Governor in reference to his approval of these bills? A. I visited the Governor about two weeks before the bills were signed.

Q. Were you alone? A. No, sir.

Q. In whose company? A. Accompanied by Senator Emerson and a Mr. William Cameron of the Attorney General's office.

Q. Where does Mr. Cameron reside? A. I think at Glens Falls, Warren county.

Q. And Senator Emerson is Senator James Emerson who represents your senatorial district at the present time? A. Yes, sir.

Q. Where did you see the Governor on this occasion? A. We saw him in the executive chamber.

Q. There was a conversation between the Governor on the one hand and you three gentlemen from Essex and Warren on the other? A. No conversation which I had other than to say hello. There was a conversation between Senator Emerson and the Governor.

Q. Will you state that conversation? A. When we came into the executive chamber the Governor was in the inner office and when he came out — we waited about three-quarters of an hour I should say, and when he came out he interviewed the reporters and after the interview Mr. Lemmeron, who was one of the employees of the office, brought us up before the Governor and I think Senator Emerson introduced him, and he said "Governor" he said, "we are down here on the highway measures affecting the counties of Essex and Warren," and he said, "We are very anxious to get your signature to these bills," or something of that nature.

Q. What did the Governor say? A. And the Governor turned and said, "Senator, you voted against my direct primaries bill." The senator said "Yes, Governor, but I have a copy of your bill in my pocket," and he then reached and brought out some paper and exhibited it to the Governor, and the Governor said "You

had better read the bill." The senator said to him, "I am going to read it, read it thoroughly so I can understand it."

"Go back home and read the bill"— meaning the direct primary bill—" and come back on Friday or Saturday and tell me how you feel as to the measure."

He turned around then and spoke to Mr. Cameron and he said, "Arrange a meeting for me in Glens Falls," naming the date — whether it was Friday — it was some future date — a date anyway — saying he wished to speak in Glens Falls and wanted Mr. Cameron to get the hall and arrange the meeting for him.

If I remember aright, the senator then said, "Governor, this bill is a bill which affects the people of the North," and he explained the merits of the bill and requested that the bill be signed, but just — Oh, he then said, the Governor said, "Well, I will see you on Friday," and as we turned to come out of the executive chamber he made a statement, a remark to the effect that, "You for me, I for you," and we went out.

Q. How did you vote on the direct primary bill at the regular session? A. I didn't vote.

Q. How did you vote at the extraordinary session?

Mr. Marshall.— Same objection as before.

The President.— I do not see its competency.

Mr. Todd.— Do I understand that your Honor does not permit that?

The President.— I think it is not competent. Cross-examine.

Mr. Todd.— I am not through.

Q. These two bills were signed by the Governor, were they not, on the last day of thirty-day period, June 2d? A. They were, sir.

Q. And became laws, and are now chapters 785 and 786, Laws of 1913? A. Yes.

Mr. Todd.—That is all.

Mr. Herrick.— Is that all?

Mr. Todd.— I am through with him.

Mr. Herrick.— You can go.

(Witness excused.)

Senator McClelland.— I would like to ask a question. Did the Governor take any action upon the bill after the words, "You for me and I for you?"

The Witness.— Why, do you mean whether that statement was made before the bill was signed?

Senator McClelland.— Repeat the question.

(The question was read by the stenographer as follows: "Did the Governor take any action upon the bill after the words 'You for me and I for you?'")

The Witness.— By action, he signed the bill. Is that what you mean?

Senator McClelland.— That is what I mean.

The President.— He signed after that. The bill had not been signed when you had that conversation.

The Witness.— The bill was signed on the 2d of June and this conversation was two weeks before that?

The President.— Yes.

Senator McClelland:

Q. What I want to find out is how much time there was after the remark was made and the bill was signed?

The Witness.— Two weeks.

Senator McClelland.— A week?

The Witness.— Two weeks, and I shouldn't be certain, perhaps more.

The President.— That is all.

By Mr. Hinman:

Q. Just a question. In the meantime as between the time that

you had your talk which you have referred to and the time when the bill was signed, had the Governor been up in your country and held a meeting? A. I am not certain as to that.

Q. You spoke of Mr. Cameron arranging — A. You mean in the county of Warren?

Q. Yes. A. He held a meeting in the county of Warren, I know that.

Q. And spoke there? A. Yes, sir.

Mr. Marshall.— We would not be able to finish with Mr. Fuller tonight so it might be as well not to put him on the stand now.

Mr. Kresel.— We had relied on Mr. Fuller for this afternoon. We haven't any other witness here now.

The President.— Well, this should not happen again. We will adjourn.

Mr. Kresel.— If your Honor please, may I call a witness just to identify papers?

The President.— Yes.

Mr. Kresel.— Mr. Becannon.

CHARLES M. BECANNON, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Mr. Becannon, are you an employee of the Garfield National Bank in the city of New York? A. I am, sir.

Q. Have you, pursuant to a subpoena served upon your bank, produced a transcript of the account of H. J. Reilly, Jr., with your bank from the 1st of July, 1912, to date? A. I have, sir.

Q. Is that a correct transcript (indicating)? A. It is.

Q. Now, please see if that is the paper (counsel passes paper to witness). A. (After examining) It is.

(The paper offered for identification was received and marked Exhibit M-86 for identification.)

Mr. Kresel.— That is all.

Mr. Hinman.— Is there any objection to my seeing it before it is offered in evidence?

Mr. Kresel.— I haven't offered it in evidence.

Mr. Hinman.— I knew that. Is there any objection to my seeing it?

Mr. Kresel.— Let me look it over first. I will show it to you in the morning.

The President.— Is there anything else, gentlemen, before the Court adjourns?

Mr. Kresel.— Nothing else.

Mr. Todd.— I would like to offer in evidence, in connection with the proof under article 7, the message of the Governor to the Assembly or to the Legislature on April 10, 1913, urging the passage of the direct primary bill, and also the message of the Governor to the Legislature at its extraordinary session on June 16, 1913.

(The message of the Governor of April 10, 1913, was received in evidence and marked Exhibit M-87.)

(The message of the Governor submitted at the extraordinary session on June 16, 1913, was received in evidence and marked Exhibit M-88.)

The Crier.— All witnesses are excused until tomorrow morning at 10 o'clock.

The President.— Adjourn Court, Crier.

Thereupon, at 5.35 o'clock p. m. an adjournment was taken until Tuesday, September 30, 1913, at 10 o'clock a. m.

EXHIBIT M-77.

STATE OF NEW YORK.

2d Rdg. 703. Nos. 1101, 2139. Int. 1046

IN ASSEMBLY

February 13, 1913.

Introduced by Mr. Sweet — read once and referred to the committee on ways and means — reported from said committee with amendments, ordered reprinted as amended and placed on the order of second reading.

AN ACT

To provide for the construction of a bridge by the State over a portion of the Oswego river and the barge canal at Minetto, in the county of Oswego, to connect with a bridge to be built by local authorities over a portion of such river, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Superintendent of Public Works is hereby authorized and directed to construct a bridge and westerly approach thereto over a portion of the Oswego river and over the barge canal, in two sections, whereof the first section with its westerly approach, as hereinafter defined, shall be a reinforced concrete arch bridge, and the second section, as hereinafter defined, shall be a bascule or convertible bridge. Such bridge shall extend from a point, to be determined by the county and town superintendents of highways and approved by the Superintendent of Public Works, upon the west bank of the Oswego river at a point about three hundred feet south of Benson avenue in Minetto, in the town of Oswego, in the county of Oswego, easterly to the westerly line of the barge canal channel in such river, which portion shall constitute the first section of said bridge, and thence continuing easterly over the barge canal being the second section of such bridge, to connect with a bridge to be built by the towns of Volney and Oswego as hereinafter provided. No part of the easterly abutment or pier of the bridge to be built by the Superintendent

of Public Works shall be west of the face of the approach wall of the barge canal lock number five, Oswego canal. An abutment or pier shall be constructed by the Superintendent of Public Works at the easterly end of the first section and westerly end of the second section of such bridge. Such bridge shall be at the elevation of and connect with the bridge to be built by the towns of Volney and Oswego in such manner as to form, together with such town bridge, one continuous bridge over said canal and river. The first and second sections of this bridge above referred to shall, when constructed, be under the supervision, care and control of the State in the same manner and to the same extent as bridges over the barge canal. The said towns of Volney and Oswego may construct, with moneys to be provided for in such towns in the manner prescribed by law for the construction of other bridges whereof the expense is to be borne by two or more towns, a reinforced concrete arch bridge over that portion of the Oswego river which lies between the easterly terminus of such State bridge and the easterly bank of such river, in the town of Volney; and the State bridge hereby authorized to be constructed may, if the Superintendent of Public Works so determines, and if the town boards, respectively, of the towns of Volney and Oswego consent thereto, be supported at the easterly end of the second section by the pier or abutment to be constructed by the said towns at the westerly end of said town bridge; and the town boards of said towns are authorized to consent to the use of said pier by the State for the purpose aforesaid. The plans and specifications for the construction of said town bridge shall be submitted to the State Engineer and Surveyor for his approval, and until such approval no part of the moneys hereinafter appropriated for the construction of such State bridge shall be available. After such approval, the first section of such State bridge shall be constructed in such manner as to conform as nearly as may be in kind and quality with such town bridge. The State bridge, including both sections, provided for in this act, shall be constructed according to plans and specifications to be furnished by the State Engineer and Surveyor.

§ 2. For the purpose of constructing the State bridge provided for in section 1 of this act, the sum of fifty thousand dollars

($50,000), or so much thereof as may be necessary, is hereby appropriated, to be paid out by the State Treasurer upon the warrant of the Comptroller to the order of the Superintendent of Public Works, upon vouchers approved by him; but no part of the money hereby appropriated shall become available, except for plans and specifications and advertising for bids, until a contract or contracts for the construction of such State bridge within the amount of the appropriation shall have been entered into by the Superintendent of Public Works.

§ 3. This act shall take effect immediately.

EXHIBIT M–78.

STATE OF NEW YORK.

No. 2373. Int. 2032.

IN ASSEMBLY

March 27, 1913

Introduced by Mr. Prime — read once and referred to the committee on internal affairs.

AN ACT

To amend the highway law, in relation to additional State routes in the counties of Essex and Warren.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and twenty of chapter thirty of the Laws of nineteen hundred and nine, entitled "An act relating to highways, constituting chapter twenty-five of the consolidated laws," is hereby amended by inserting therein three new subdivisions, to read as follows:

Route 22-a. Commencing at a point at the end of county highway number sixteen hundred and fifty-one in the village of Newman, and running thence northerly through Wilmington Notch and High Falls, thence easterly at or near Upper Jay to connect with route number twenty-two, Essex county.

Route 22-b. Commencing at a point on county highway number eight hundred and ninety-one outside of the village of Ticonderoga and extending westerly through the towns of Ticonderoga and Schroon through the village of Chilson, to a point on route number twenty-two at or near Severance hill, being within the boundaries of the county of Essex.

Route 22-c. Commencing at a point on county highway number ten hundred and twenty-three, and running thence northerly and westerly to Pottersville on the easterly side of the Schroon river, terminating at route number twenty-two, all within the boundaries of Warren county.

§ 2. This act shall take effect immediately.

EXHIBIT M–79.

STATE OF NEW YORK.

No. 2547. Int. 2143.

IN ASSEMBLY

April 12, 1913

Introduced by Mr. Prime — (by unanimous consent)— read once and referred to the committee on ways and means.

AN ACT

To reappropriate for the improvement of new State routes in the counties of Essex and Warren the unexpended balances of moneys appropriated by chapter one hundred and thirty-three of the Laws of nineteen hundred and eleven.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The unexpended balances of moneys appropriated by chapter one hundred and thirty-three of the Laws of nineteen hundred and eleven, for the construction and improvement of certain State routes as then existing, or the just proportion thereof available for the construction or improvement of such routes within the counties of Essex and Warren, are hereby reappro-

priated for the construction and improvement of any new State routes created or to be created within the counties of Essex and Warren by act of the Legislature at the session of nineteen hundred and thirteen, payable out of moneys realized from bonds issued in accordance with the provisions of chapter four hundred and sixty-nine of the Laws of nineteen hundred and six, as amended by chapter seven hundred and eighteen of the Laws of nineteen hundred and seven; such moneys to be applied to the several new routes in such counties in such manner and in such proportion as the State Commission of Highways may determine, excepting that as between the two counties the apportionment shall be on a fair and equitable basis, computed according to the relative mileage of such new routes in both counties. The moneys hereby appropriated shall be expended according to the provisions of article six of the highway law.

§ 2. This act shall take effect immediately.

TUESDAY, SEPTEMBER 30, 1913

SENATE CHAMBER
ALBANY, NEW YORK

Pursuant to adjournment the Court convened at 10 a. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Kresel.— If your Honor please, Mr. Fuller is here with his books. May we finish with him?

The President.— Just take your own course.

Mr. Kresel.— Mr. Fuller.

MELVILLE B. FULLER recalled.

Mr. Kresel.— I understood the counsel for the respondent desired to cross-examine.

Mr. Hinman.— Not until you are through.

Mr. Kresel.— Well, for the present I am through.

Mr. Hinman.— All right.

Mr. Marshall.— We are through.

The President.— Any cross-examination?

Mr. Hinman.— Nothing further.

Mr. Kresel.— Well now, just a minute.

Mr. Stanchfield.— Will your Honor allow me to have this witness step aside for a moment in order to make some formal proof?

The President.— Yes.

Mr. Stanchfield.— Mr. Platt, will you please take the witness stand.

CHESTER C. PLATT recalled.

Direct examination by Mr. Stanchfield:

Q. In August and September of the current year you have been acting as Secretary to the Governor, have you not? A. Yes.

Q. I hand you, Mr. Platt, a letter dated September 15, 1913, and ask you whether or no you wrote that letter? (Counsel passes paper to witness.) A. (Witness examines paper.)

Q. Can't you recognize your signature? A. That is my signature, but I don't think that I dictated the letter.

Q. Well, is it your signature? A. That is my signature.

The President.— Did you dictate that letter? Is it a typewritten letter?

The Witness.— It is a typewritten letter.

By the President:

Q. And did you dictate that, and is that your signature? A. I did not dictate it, but I signed it.

Q. Did you read it when you did sign it, or had you read it before you signed it? You knew what you were signing, in other words, did you? A. I presume I read that, but I don't know anything about the subjects mentioned in the letter. It was dictated by some other person in our office, signed by myself.

By Mr. Stanchfield:

Q. Let me get your attitude of mind. Did you, or did you not, know what you signed when you wrote the letter? A. I did not write the letter.

Q. When you signed the letter, did you know the contents of what you were signing? A. I signed so many letters —

Q. Answer my question, please. A. I was going to answer it.

Q. No. You were going to say about signing many letters. That is not the question. The question is whether you knew the contents of the paper that you hold in your hand, at the time when you signed it? A. I don't know whether I did or not. I am not sure whether I read it or not when I signed it. It is to a person whom I do not know.

The President.—You have answered the question. If the counsel wants more he will ask for it.

By Mr. Stanchfield:

Q. If to a person whom you do not know, it is pretty familiarly addressed, is it not? A. No, sir. It is addressed in a formal way.

Q. Is it your notion of familiarity in writing to a man that you don't know, that it is formal to address him as "Dear Mr.?" A. I did not dictate this letter.

Q. No; that is not the question. That letter is addressed to "Dear Mr.," isn't it? A. No, sir; it is not. It is addressed to "Dear Dr. Brown."

Q. "Dear Doctor?" A. Yes, sir.

Q. Do you call that a formal address to a man that you do not know? A. It is quite common. I have signed correspondence in that way.

Q. Did you see that man to whom that letter was written in Albany during the past summer? A. I do not remember that I did.

Q. Would you know him now if you saw him? A. I do not know whether I have ever met this Dr. Brown or not.

Q. Would you know him now if you were to see him? A. If I could see the man I might remember that I had met him.

Q. The name then does not at the moment convey anything to you? A. No.

Q. You use the word "enclosure" in there, do you not? A. The word "enclosure" is in the letter.

Q. Do you know what that word "enclosure" referred to? A. No, I do not.

Q. Although you signed the letter you do not know what that word meant, is that right? A. I do not know what that enclosure was mentioned there. I know the meaning of the word, of course.

Q. But you do not know what the enclosure was? A. No.

Mr. Stanchfield.— I will have that marked for identification.

Mr. Herrick.— May we look at it?

Mr. Stanchfield.— No, not now.

(Paper marked Exhibit M-89 for identification.)

Mr. Stanchfield.— That is all for the moment, Mr. Platt.

MELVILLE B. FULLER recalled.

Direct examination by Mr. Kresel:

Q. Mr. Fuller, have you before you the letter of Harris & Fuller containing the account of William Sulzer who is now Governor? A. I have.

Q. Will you please turn to that account? A. Yes, sir.

Q. What folio in your ledger do you find that account in? A. Page 612.

Q. And when does it appear that account was opened? A. March 18, 1910.

Q. Now, on the 18th of March, 1910, when this account was opened, what was the first transaction for the account? A. We received 100 Pittsburg, Cincinnati, Chicago & St. Louis stock.

Q. From Mr. Sulzer? A. From Mr. Sulzer.

Q. And did you sell it for his account? A. We did.

Q. On the same day? A. Probably, although it did not go out until the 21st.

Q. You got it on what day? A. The 18th.

Q. And your book shows then that on the 21st, at any rate, of March, was it? A. March, 1910.

Q. That stock was sold for the account and the proceeds thereof paid over to Mr. Sulzer? A. That is right.

Q. And then there was one other transaction in May, was there not? A. May 17, 1910.

Q. And what was that transaction? A. We received 100 shares of the same stock from Mr. Sulzer.

Q. And did you likewise sell it for him? A. We did.

Q. And when did you pay him the proceeds of that sale? A. May 17th, the same day.

Q. Now, as far as your ledger account shows then, was the account closed at that time? A. The account was closed May 17, 1910.

Q. Do you recall, Mr. Fuller, with whom in your firm those two transactions were had? A. I do not.

Q. In March, 1910, you knew Mr. Sulzer? A. I did.

Q. You had known him for a number of years prior to that time? A. I had.

Q. And hadn't he had dealings with your firm before that time? A. He had.

Q. Had he had a running account with your firm prior to March, 1910? A. He had.

Q. And some time before that date, that account had been closed? A. Yes.

Q. Now, then, the next transaction that your firm had with Mr. Sulzer was on June 17, 1910, wasn't it? A. No, sir.

Q. June 27th? A. Yes, sir.

Q. June 27th, 1910? A. Yes, sir.

Q. Now, before we enter into an analysis of that account, Mr. Fuller, I want to ask you whether it is a fact that the dates of entries in your books are the dates when the transactions are completed? A. Yes.

Q. That is to say, if you buy 100 shares of stock for a customer on the 20th of October, you don't get the stock until the 21st of October, is that correct? A. I get the stock the next business day.

Q. The next business day? A. Yes.

Q. And the entry in the account of your customer for whom you buy that stock is made as of the date when you get the stock? A. That is correct.

By the President:

Q. And also, when you sell the stock, as to your getting the money? A. Yes, sir.

By Mr. Kresel:

Q. Is it likewise true, Mr. Fuller, that the first and original entry of the purchase and sale of stocks for your customers is made in the purchase and sales book? A. The first entry is made when I purchase it.

Q. That is it; and the first entry, I mean the first book that it is made in, is the purchase and sales book? A. In the office, yes.

Q. In your office? A. Yes.

Q. And from the purchase and sales book the entries are posted into the blotter, are they not? A. Yes, sir.

Q. And from the blotter into the ledger? A. Yes, sir.

Q. Was it the custom in your firm, Mr. Fuller, to make entries of the numbers of the certificates of stock which you bought or sold? A. Always.

Q. And those appear in the blotter, do they not? A. They do.

By the President:

Q. That is where they first appear in your books? A. When I receive them I receive them on my blotter, and there all entries are made for my information.

By Mr. Kresel:

Q. When you receive stock from a customer, either as security or for the purpose of selling the stock, is there an entry made of the receipt of that stock on the blotter? A. Yes, sir.

Q. Now, this account was opened then, on June 27, 1910? A. Yes, sir.

Q. Which was the first transaction in the account? A. I loaned Governor Sulzer $6,000 on 100 shares of CCC, the cash value of which that day was $8,200.

Q. Do you say, Mr. Fuller, that you received those 100 shares of Big Four stock — isn't it Big Four it is called? A. Yes, sir.

Q. On the 27th day of June, is that the very day that you received it? A. On the 27th of June, 1910.

Q. Well, on the same day, did you buy any Big Four for the account of Mr. Sulzer? A. We did.

Q. How much did you buy for him? A. 100 shares.

Q. So that we have the transaction this way now, is it not: He came in on the 27th of June, he handed you a certificate of 100 shares of Big Four; you gave him $6,000; at the same time he directed you to buy for him 100 shares of Big Four, and you bought it? A. That is right. It came in the next day.

Q. The stock that you bought came in the next day? A. Yes, sir; the 28th.

Q. And that is the reason why it was entered in the account under date of the 28th of June? A. That is right.

Q. You bought 100 shares of Big Four at 80, did you not? A. We did.

Q. And you paid out for the account of Mr. Sulzer, then, $8,012.50? A. No, sir.

Q. How much did you pay out? A. We paid out $8,000, and charged him $12.50.

Q. Very well. Then the amount with which the account was charged, we will put it that way, was $8,012.50? A. That is right.

Q. You had also given him $6,000? A. That is right.

Q. So that you had laid out altogether $14,012.50 for his account, had you not? A. That is right.

Q. As against that, you had 200 shares of Big Four, is that correct? A. Yes, sir.

Q. You say that on the 27th of June, when Mr. Sulzer brought in the 100 shares of Big Four it was worth 82? A. Yes, sir.

Q. The 100 shares that you bought for him, however, you got at 80? A. That might have been due to a fluctuation in the value that day.

Q. I have no doubt it was. Now, will you please turn to your blotter and to the entry therein showing the receipt of the 100 shares of stock for Mr. Sulzer? A. (After examining books)—I am afraid that these books only go back to the beginning of the account that the Frawley committee asked for, January 1, 1912.

Q. You mean that you have not here with you the blotters antedating January, 1912? A. It appears not.

Q. Of course you were asked to produce them here, were you not? A. I turned the subpoena over to my office and my clerk I supposed had the books.

Q. Is there any doubt but that those blotters are in existence? A. Absolutely none.

Q. You have them in your office? A. Positively.

Q. What I wanted to find out, if I could, was the number of

the certificate which Mr. Sulzer handed over to you on the 27th of June, 1910? A. I can give that to you.

Q. Have you that with you? A. I have a memorandum that I had prepared.

Q. Well, will you give me that, please? A. On what date, please.

Q. June 27, 1910? A. (Witness examines paper) Certificate No. 24427.

Q. Any serial ledger? A. No, sir.

Q. Now, did Mr. Sulzer personally bring this 100 shares of stock in to you? A. I couldn't state.

Q. Do you remember to whom he spoke when he came there, whether to you or to one of your partners? A. I do not.

Q. Have you any personal recollection at all as to the opening of this account? A. It was referred to me.

Q. And have you any recollection of having any conversation with Mr. Sulzer at that time? A. No.

Q. When an order is given to a customer to buy stock is that order written out? A. Not always.

Q. What is the general custom in your office with regard to that? A. We might receive an order over the telephone, over our private wires; a customer might give it verbally to my partner.

Q. And when given in whatever manner, is there not an order written out in your office as a record to be kept? A. Yes, sir.

Q. Have you with you those order slips referring to this account? A. No, I have not.

Q. Now, when you deliver stock to a customer do you take a receipt from the customer for that stock? A. We do.

Q. Do you know, Mr. Fuller, what the market value of the Big Four stock was on June 28, 1910? A. I do.

Q. What was it? A. 80.

Q. Was that the asking price or the bid price? A. It was the price at which we bought 100 shares of stock.

Q. On the 28th? A. No, the 27th, I beg your pardon.

Q. I am speaking now of the 28th? A. I don't know.

Q. You don't know? A. No, sir.

Mr. Kresel.—Your Honor, if you will pardon us for a moment,

until we get some books. (Producing copies of the Commercial and Financial Chronicle.)

The President.— Maybe the other side will admit the quotations that you want.

Mr. Marshall.—We will concede that, and we will permit counsel to prepare a statement from the Chronicle as they appear there. We concede the accuracy of the book, and the counsel need not spend any time, but may prepare a schedule, and we will verify it.

Q. Mr. Fuller, the Commercial and Financial Chronicle is a publication which is the standard for market values on the Exchange?

Mr. Marshall.—We concede that.

The President.— He concedes that, Mr. Kresel. You can read from that book whatever was the quotation of that stock the day to which you refer.

Q. According to the Commercial and Financial Chronicle, Big Four stock on the 28th of June was 78?

The President.—You can read it. You need not ask him about it. You may read it as being the fact.

Q. On July 7, 1910, Big Four stock was 72. At 72, Mr. Fuller, the value of the security that you held on July 7th was $14,400, was it not? A. Correct.

Q. You had advanced for the account $14,012.50? A. That is right.

Q. Not including interest? A. No.

Q. So that the margin on that account on the 7th of July was some $387.50, was it not? A. The date again, please?

Q. July 7, 1910.

The President.— It is the difference between those two amounts. A. $387.50.

By Mr. Kresel:

Q. Less any interest that might have accrued on the account, is

that not correct? Without stopping to consider how much it was. I just want to bring out the fact that interest was to be deducted from that? A. About six days.

Q. Six days' interest? A. Yes, sir.

Q. Now then, on July 9th this Big Four stock was selling at 70, having dropped from 80 to 70 between the 21st of June and the 9th of July. On that day the 200 shares of stock were worth only $14,000, were they not? A. Yes, sir.

Q. And you had advanced $14,012.50, plus interest? A. Yes, sir.

Q. So that the margin was absolutely wiped out on that day, was it not? A. Yes, sir.

Q. Did you communicate with Mr. Sulzer at that time with reference to putting up some margin? A. We did.

Q. Have you copies of the letters here? A. I have.

Q. Please produce them. A. I had my bookkeeper here but I sent him back on the boat last night.

By Mr. Kresel:

Q. Now, will you turn to that letter? A. What date, please?

Q. On or about July 9, 1910. A. (After examining) On July 6th is a letter.

Q. You have produced here, Mr. Fuller, a copy of the letter written to Mr. Sulzer on the 6th of July, 1910? A. That is right.

Mr. Kresel.— I offer that in evidence. Gentlemen, I don't suppose you have the original.

Mr. Marshall.— We have not.

Mr. Kresel.— This letter reads as follows:

"*July 6, 1910*

"*Hon. William Sulzer, New York:*

"DEAR SIR.—Your account has been in bad shape for the past week, and you have not responded to our calls for margin. At today's price it is short $1,000 of the required amount, and we beg to request you to make a deposit of this sum with us tomorrow.

"Yours very truly,

"HARRIS & FULLER."

Q. What was the required amount of margin, Mr. Fuller? A. 10 per cent at least.

Q. 10 per cent? A. Yes.

Q. Now, does that mean 10 per cent on the par value or the actual value? A. On the par value.

Q. Par value? A. Yes, sir.

Q. That is to say, for every 100 shares of stock the required margin was $1,000? A. Yes.

Q. Now, may I turn, with your permission, to the letter ahead of this which I see you have marked? A. I would like to look at it.

(Counsel passes book to witness and witness examines the same.)

Q. Prior to July 6th when had you written to Mr. Sulzer about his account? A. June 29, 1910.

Q. June 29th, that is just two days after it was opened. Will you read that, please, into the record? A. (Reading.)

> "At the closing prices tonight your account is short $1,000 of the required margin. Kindly deposit a check to this amount with us and oblige,
>
> "Yours very truly,
>
> "HARRIS & FULLER."

Q. Now, then, to go back one more. Did you write him also on the 28th of June? (After examining book.) A. We did.

Q. Now, what did you write him then? A. (Reading) "Your note of June 4th, 1910, in reference to your nephew received. I regret to say through some oversight or carelessness in our office that this letter was only handed to me today. I trust you will pardon this seeming inattention for that reason. Business in the brokerage line has never been worse than the past few months, which fact I stated to Mr. Lowry when he called. Also that we were reducing our force in anticipation of a very dull period, and for the present I could not see my way clear to engage his services."

Q. Well, that was with reference to something that had nothing to do with the account?

Senator Healy.— I would like to ask that the stenographer be instructed to read that communication that was taken down. We can't hear here.

Mr. Kresel.— This last communication, may I state, for the benefit of the senator, was not with reference —

The President.— It was with reference to employing some body that the respondent had recommended.

Mr. Kresel.— Right.

The President.— It really had nothing to do with this case.

Mr. Kresel.— Your Honor knows that I have had no opportunity to see these letters. Therefore your Honor will pardon me for having that letter read. It had nothing to do with it.

Q. Now, then, Mr. Fuller, after your communication to Mr. Sulzer of the 28th of June — 29th of June, asking for additional margin, did you get it? A. (After examining book.) Yes.

Q. Did you get it before the 6th of July?

The President.— Let him tell when he got it.

The Witness.— July 14th.

Q. Well, we will come to that part of it, but prior to the 6th of July you didn't get any margin? A. No.

Q. Did you get any reply to your letter of the 29th of June? A. (After examining paper) No.

Q. Did you hear from Mr. Sulzer, either by letter or telegram or telephone? A. Not that I know of.

Q. Now, did you get any reply to your communication of the 6th of July? A. On the 14th of July, yes.

Q. Now before that? A. No.

Q. Now, on the 14th of July, what did you get from Mr. Sulzer? A. 200 shares of CCC stock.

Q. Before we come to that, Mr. Fuller, can you tell us how the certificate of 100 shares of Big Four, which Mr. Sulzer brought in on the 27th of June, was made out? A. In his name.

Q. In his name? A. Yes.

Q. William Sulzer? A. Yes.

Q. And it had the number that you gave us? A. Yes.

Q. Now then, you say that on the 14th of July, he brought in 200 additional Big Four? A. Yes.

Q. And have you the numbers of those certificates? A. I have.

Q. And what are they, please? A. C24405-6.

Q. And were those made out in Mr. Sulzer's name? A. I believe they were.

Q. And what did Mr. Sulzer say in handing over this stock? A. I could not say.

Q. Did you see him? A. No.

Q. Do you know who, in your firm, spoke to him on this occasion? A. I do not.

Q. Now, the $6,000 that you gave Mr. Sulzer on the 28th of June, was that given by check? A. It was.

Q. Have you that check? A. I have.

Q. May I see it, please? A. Yes. (Producing check).

Mr. Kresel.— I offer that check in evidence.

(Check offered in evidence, admitted and marked Exhibit M-90.)

Mr. Kresel.— This check is drawn on the 27th of June, 1910, on the Gallatin National Bank "Pay to the order of William Sulzer $6,000." Signed "Harris & Fuller." Indorsed, "For deposit, William Sulzer," and deposited in the Carnegie Trust Company June 27th, 1910.

Q. Now, on the 14th of July, 1910, when Mr. Sulzer brought in the 200 additional Big Four, did you give him any money? A. Prior to that date?

Q. On that date? A. No.

Q. Didn't you give him $7,000? A. Yes, sir. I beg your pardon, we did.

Q. Was that given by check? A. Yes.

Q. Have you that? A. My ledger states, July 14th, 200 CCC received, $7,000. I do not seem to have the check here.

Q. Well, according to the ledger, it would indicate that on that day, when he brought the 200 shares of Big Four, you gave him $7,000, would it not? A. Yes, sir.

Q. Have you your check stubs covering the period of the 14th of July, 1910? A. I think I have.

Q. Will you see if you have the stub of any check drawn to Mr. Sulzer for $7,000? I think they are here, are they not? A. What date is that that you want, please?

Q. That is July 14, 1910, Mr. Fuller? A. I have the stub.

The President.— Is there any objection to reading the stub in lieu of the check?

Mr. Marshall.— No, your Honor, no objection.

Mr. Kresel.— This stub is No. 187,651, dated July 14, 1910, to the order of William Sulzer, debtor account, debit account, $7,000.

By Mr. Kresel:

Q. On the 19th of July, did you give Mr. Sulzer any further money? A. We did.

Q. How much? A. $500.

Q. Have you the check for that? A. I have. (Producing check.)

Mr. Kresel.— I offer that in evidence.

Mr. Herrick.— No objection.

(The check offered in evidence was received and marked Exhibit M-91.)

Mr. Kresel.—This check is No. 187,726, dated July 19, 1910, drawn on the Gallatin National Bank. "Pay to the order of William Sulzer, $500." Signed "Harris & Fuller." Endorsed "For deposit, William Sulzer," and deposited in the Carnegie Trust Company.

By Mr. Kresel:

Q. Now, on the 14th of July, 1910, Mr. Fuller, you had advanced for the account of Mr. Sulzer $21,012.50, not including interest, is that correct? A. That is right.

Q. And you had against that 400 shares of Big Four? A. Yes, sir.

Q. Which at the quoted market price on the 14th of July, 74½, was worth $29,800? A. Yes.

Q. So that his margin then was $8,800? A. Yes.

Q. Which was the required amount and more? A. Yes.

Q. That is correct? A. Yes.

Q. Now, by the 26th of July, 1910, the stock had dropped to 65, isn't that correct? A. I don't know.

The President.— You have got the quotation. Counsel said you might read it.

Q. It had dropped since June 27th, 1910, to July 26th, which was just about a month, 15 points?

Mr. Marshall.— No.

Mr. Kressel.— 15 points.

Mr. Marshall.— From what date?

Mr. Kresel.— From the 27th of June to the 26th of July.

Mr. Kresel.— You had paid out for the account by the 26th of July, $21,512.50, is that correct? A. I would have to figure it up to give it to you.

Q. There was 6 and 7, that is 13 —

Mr. Marshall.— Wouldn't we save time, your Honor, by having the account put in evidence and we could make our own computations without wasting time in computations here?

Mr. Kresel.— No, your Honor. The account if it were put in evidence —

The President.— If you would read from your quotation book just what you want, you need not ask him anything about the market value. They have agreed that that quotations book may be considered in evidence and that you may read it.

Mr. Kresel.— I have not asked him anything about the quotation value. I was just trying to get from him how the account stood at that time.

The President.— We do not want to take the time from him to make up an account.

The Witness.—At what date do you want it? I have it, with every change that was made in the account.

Q. Look at July 26th then? A. July 26th Governor Sulzer had on deposit with us 400 shares of CCC stock. His debit balance was $22,664. The market value was $28,800, that day, leaving an equity of $6,136.

Q. Now, on the 26th of September you made a payment of $1,000, did you? A. On the 26th of September we gave him a check for $1,000.

Q. Have you that check? A. I have.

Mr. Kresel.— I offer it in evidence.

(The check offered in evidence received and marked Exhibit M-92.)

Mr. Kresel.— The check is dated September 26, 1910, drawn on the Gallatin National Bank. "Pay to the order of William Sulzer, $1,000. Harris & Fuller." Endorsed for deposit, "William Sulzer," and deposited in the Carnegie Trust Company.

Q. Now, Mr. Fuller, on the 11th of November, 1910, you still had 400 shares of Big Four in the account, did you not? A. No.

Q. What did you have? A. 200 shares of Big Four and 200 shares of American Smelters.

Q. When did you get the Smelters? A. November 11, 1910.

Q. Well, I am talking of that same day, before you got the Smelters. Now, you had 400 shares of Big Four, before you got the Smelters, didn't you? A. Oh, yes.

Q. And the stock being worth, Big Four, at that time, 63, is it a fact that 400 shares of Big Four was then worth $25,200? A. Yes.

Q. Now, at that time, you had paid him $22,512.50, is that not the fact? A. Yes.

Q. So that your margin was only about $2,700? A. Yes.

Q. Thereupon you say that he brought in 200 shares of Smelters? A. Right.

Q. And Smelters on that day were selling higher than Big Four? A. 78.

Q. Now, when he brought in the 200 Smelters, did he take out 200 Big Four? A. He did.

Q. Have you the certificate numbers of the Smelters? A. I have.

Q. What are they? A. 56,308 and 9.

Q. And the certificate is made out to William Sulzer? A. I couldn't state positively; I think they were. The record will show.

Q. Now, have you, according to your —

The President.— Did you sell 200 Big Four then?

The Witness.— No, sir, we delivered it to him.

The President.— Delivered it to him? A. Yes, sir.

Q. What certificates did you deliver to him? A. 200 shares of CCC.

Q. Yes, but I mean what numbers of certificates? A. Certificates C24405 and 6.

Q. Those are the very certificates that he delivered to you? A. They are.

Q. Now, as of the end of the year 1910, have you made a computation as to how the account stood? A. I have not.

Q. You have not? A. No, sir.

Q. Now, see if my computation here is about correct. You had 200 shares of Big Four, is that correct?

The President.— He said that. He had 400, and he gave 200.

Mr. Kresel.— No, I am now speaking of a different date, if your Honor please. I am speaking of December 31st. Before that we were talking of November 11th.

The President.— Well, now, is there any change in the securities between — in the account between November of that date and December was the other?

Mr. Kresel.— December 31st.

The Witness.— According to my memorandum which I have had prepared for me, there was no change in the account between November 11, 1910, and April 26, 1911?

Q. So that it is a fact, then, that at the end of the year 1910, you held for the account 200 shares of Big Four and 200 shares of Smelters? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, at the current figures of those stocks, Big Four was selling at 65½ on the 31st of December, 1910; and Smelters was selling at 73¾, making the value of the stocks that you held $27,850. He paid you at that time $23,003.94, which included interest, which left him a margin of about $4,850? A. I should say that was about right.

Q. All right. Now, then, the next change, as you said, was April 26, 1911? A. Yes.

Q. And on that day you bought an additional 100 shares of Big Four for him, did you not? A. We did.

Q. At what figures? A. 57.

Q. And was that the current figure on that day? A. Yes.

Q. This was April, 1911? A. April 26, 1911.

Q. The stock had dropped from 80 to 57? A. Yes.

Q. Did you on that day get any additional margin? A. We did the next day.

Q. You did not on that day? A. No.

Q. Well, before you bought the additional 100 shares of Big Four for him, the account was pretty low, wasn't it? You had a margin of only about $2,900; the stock was selling at 57; 200 shares would be $11,400, and Smelter was selling at 73⅝, making a total value of that stock $26,125, and he owed you $23,240? A. On April 26, 1911, we had 300 shares of CCC, and 200 shares of Smelter. Our lien on those securities was $28,952. The market value, cash value was $31,900, leaving an equity or margin of $2,948. The next day, Governor Sulzer gave us 100 shares of CCC and their value, $5,700, would increase his margin or equity to $8,648.

Q. What was the number of the certificate of the 100 shares that he gave you on the 27th of June? A. C24406.

Q. That was the certificate that you had delivered to him in April? A. Yes, sir.

Q. I don't mean April. September, wasn't it?

Mr. Marshall.— November.

A. November.

Q. November, 1911? A. Yes, sir.

Q. On the 24th of June, 1911, what was the state of the account, Mr. Fuller? A. On the 24th of June, 1911, we —

Q. Just a minute. I withdraw that question. On the 24th of June, 1911, did Governor Sulzer bring in some more stock to you? A. He did.

Q. 100 shares of Southern Pacific? A. He did.

Q. What was the number of that certificate? A. C26554.

Q. Made out in his name? A. I think it was.

Q. And, upon delivering to you that 100 shares of Southern Pacific did you give him a check for $12,000? A. We did.

Q. Well, Southern Pacific on that day was selling at 120¼, wasn't it? A. 125.

Q. Selling at 125? A. That is what my record says. You can verify it.

Q. Talking of June 24, 1911, is that correct? A. June 26, 1911.

Q. You got the stock on June 24th, didn't you? A. Yes, but it was not entered until the 26th, because that was a Saturday I believe.

Q. When did you give him the check? The check will show if you have it there? A. That check was cashed and the cash given him.

Q. When? A. June 24, 1911.

Q. May I have the check, please? A. (Handing check to counsel.)

Q. I offer it in evidence.

(Check offered in evidence, admitted and marked Exhibit M-93.)

Q. Mr. Fuller, this check June 24, 1911, is drawn to the order of Harris & Fuller for $12,000, signed Harris & Fuller and indorsed Harris & Fuller, so that the $12,000 in cash was given to him on June 24, 1911? A. Yes.

By Mr. Marshall:

Q. Does that mean currency? A. Bills.

Q. What was the date? A. June 24, 1911.

By Mr. Kresel:

Q. On that day Southern Pacific was selling at 120¼? A. I can't say, I don't know.

Mr. Kresel.— It was conceded. May I show it to him?

The President.— Yes, you can show it to him.

A. On June 24th the price that you stated was the lowest price that it sold.

Q. What was the highest? A. The highest price was 123¾.

By Mr. Marshall:

Q. How was it the next day? A. It ranged from 124¼ to 126¾, and I figured it at 125.

By Mr. Kresel:

Q. On the 26th? A. Yes.

Mr. Marshall.— I would suggest when you read from the book hereafter you give the range of quotations, the highest and the lowest, so that he can strike an average instead of always taking the lowest.

Mr. Kresel.— I will do both.

Mr. Marshall.— All right.

Q. Now, the next change in the account was on July 10, 1911, was it not? A. The next change was on July 10, 1911.

Q. And on that day he brought in an additional 100 shares of Big Four, is that right? A. He did.

Q. What was the number of that certificate? A. C24405.

Q. On the 27th of November, 1911, did you give Mr. Sulzer another $1,000? A. We did.

Q. A check? A. Cash.

Q. Have you the check by which the money was drawn? A. I have (producing same.)

Mr. Kresel.— I offer it in evidence.

(The check offered in evidence was received and marked Exhibit M-94.)

Mr. Kresel.— It is drawn on the 27th of November, 1911, on the Gallatin National Bank, to the order of bearer $1,000, signed Harris & Fuller and indorsed L. R. Schenck.

Q. Who is L. R. Schenck? A. He is our cashier.

Q. One of your employees? A. Yes.

By the President:

Q. Then you drew the money on that? A. Yes.

Q. And gave it to him in currency? A. Yes, sir.

By Mr. Kresel:

Q. Now, on the 27th of November, 1911, is it a fact that Mr. Sulzer's margin in the account was about $9,300? A. On the 27th of November, 1911, we had 500 shares of CCC, 200 Smelters, 100 shares Southern Pacific, a debit balance of $48,233; market value of $57,700, an equity or margin of $9,467.

Q. Now, give the state of the account as of the end of the year 1911, December 30th. A. I cannot.

Q. You still had 500 shares of CCC and 200 Smelters and 100 Southern? A. We did.

Q. And according to the current prices they were worth $55,000? A. $57,000 on my record.

Q. $57,000, we will take it that way; then according to that you have a computation there? A. I was telling you the record I had here as of that date only.

Q. And as against that there was a debit balance of something like $48,600, is that correct? A. On the 27th of November —

Q. No, I am speaking of the end of December? A. I don't know.

Q. Now look at your account and see if $48,600 is not about the amount which was owing you on that account? A. December, 1910?

Q. December, 1911.

The President.— You mean the end of the month?

Mr. Kresel.— The end of the year.

The President.— The end of the year?

Q. Mr. Fuller? A. That ledger is not here.

Q. The Presiding Judge suggests that I ask you whether there was any change in the account between the 27th of November, 1911, and the end of 1911, except to add on interest? A. There was not.

Q. There was not? A. No, sir.

Q. Now, the next change in the account was February 29, 1912, was it not, or was it? A. No, sir.

Q. It was just an addition of interest? A. Yes, sir.

Q. Have you a computation there to show how the account stood on that day? A. What day, please?

Q. The end of February, 1912? A. No, sir.

Q. Well, you still have 500 CCC, haven't you? A. Yes.

Q. And the 200 Smelters? A. Yes.

Q. And the 100 Southern? A. Yes.

Q. Now, at the current rates that day, these stocks were worth $53,000? A. I don't know.

The President.— You can read it from your quotation book.

Mr. Kresel.— Very well.

The President.— Or if he has got it, will you let him state it, counselor.

Mr. Kresel.— Subject to correction if they want to correct it afterwards.

The President.— Yes; you have got it there on your own memorandum.

Q. And there was a debit balance on the account of $48,964, is that correct? A. I haven't the account computed of that date.

Q. Well, have you a transcript of the account? A. I think you have the only one that I —

Q. Well, look at this and see (counsel passes paper to witness). A. (After examining.) The debit balance was $48,964.57.

Q. And assuming that my quotations for the stock that you had at that time are correct, and that they were worth $52,000 —

Mr. Marshall.— $53,000.

Q. $53,000. Then the margin there was about $3,500, was it not? The end of February. A. Will you give me the figures again?

Q. $48,900.

The President.— That is the debit balance.

Mr. Kresel.— That is the debit balance.

Q. And $53,500?

The President.— The value of the stock.

Mr. Kresel.— The value of the stock.

The Witness.— $4,400. (After examining paper.) $4,600.

Q. Now, as of October 31, 1912, there was no change in the account between the 29th of February and the 31st of October, was there, except to add interest month by month? A. (Witness examines papers.) The next change in the account was November 18, 1912.

Q. Yes. And I am now asking you as of October 31, 1912, which is just the end of the preceding month? A. There was no change at that time.

Q. No change? A. No.

Q. Now, then, I want to get the state of the account as of the end of October, 1912. You still held 500 CCC?

The President.— You still held the same securities?

Q. You still held the same securities? A. Yes.

The President.— And you had neither bought any more stocks on his account nor given him any money? A. No, sir.

Q. So there was in fact no change in any respect except the running of interest? A. That is all.

By Mr. Kresel:

Q. Now, at the current prices on that day, those stocks were worth $53,362.50, and according to that account the debit balance was $50,612, leaving a margin of about $2,700, is that correct? A. That is right.

Q. It was pretty low? A. Yes.

Q. Now, did you write to Mr. Sulzer at that time asking for more margin? A. I don't know.

Q. Will you look please and see? A. (Witness examines book.)

Mr. Hinman.— Let me suggest, the Court stated that there was no change in the account except the addition of interest. I think there was a change also in the way of dividends during that long period there.

The President.— Just look and see.

The Witness.— That ledger has gone to New York.

By the President:

Q. Will the transcript of the account show? A. Mr. Kresel checked it off himself before he allowed me to send it.

Mr. Kresel.— There was no change. The last change, so far as interest is concerned, was January, 1911. We are talking of February, 1912.

Mr. Hinman.—Were not you inquiring as of October 31st?

Mr. Kresel.— 1912.

Mr. Hinman.— 1912. Isn't there a dividend on October 4th on the Southern Pacific?

Mr. Kresel.— There was in 1911. October 4, 1911.

Mr. Hinman.—You may be right.

Mr. Kresel.— That is according to the transcript that they gave us.

Mr. Hinman.— That is all right.

The Witness.— I do not seem to have any letter or copy, until December 11, 1912.

By Mr. Kresel:

Q. What is the date of the letter immediately preceding that date?

Mr. Marshall.— Letter to whom?

The President.— If you have the date in your memory, call his attention to it.

Mr. Kresel.— I have not, your Honor. I have never seen those letters.

The Witness.— If you want to see these notices I am referring to, you are welcome.

Mr. Kresel.— Not at all.

The Witness.— There is a letter here of July 15, 1912. The copy is imperfect and I doubt if I can read it.

By Mr. Kresel:

Q. Well, read it as far as you can. A. (Reading) "William Sulzer, 115 Broadway, New York City: Dear Sir: We have repeatedly requested you to deposit fund to protect your account, without response"— I should take it. "We, therefore, must insist that our demand be immediately complied with. Pending the receipt of the margin required, we will endeavor to place stop orders on your securities but, owing to the wide market in CCC and St. Louis, it will be almost impossible to market these stocks without considerable loss, in the event of which we will hold you responsible for any loss that might occur.

Kindly give this your immediate attention and avoid the loss of your securities.

Trusting that we will be favored by return mail with your check for $8,000, the amount necessary, we are

Yours truly, HARRIS & FULLER."

By Mr. Kresel:

Q. That is dated July 15, 1912, is that correct? A. July 15, 1912.

Q. Between that date and November 18, 1912, you received no money or securities from Mr. Sulzer, is that correct? A. That is right.

Q. Now then, can you find no letter that you wrote to Mr. Sulzer

with regard to this account on or about the 1st of November, 1912? A. The next letter that I find is December 11, 1912.

Q. Now, before December 11, 1912, Mr. Sulzer had made a payment into the account, had he not? A. He had, on November 18, 1912.

Q. And he paid how much? A. $10,000.

Q. And he paid that in currency, did he not? A. He did.

Q. To you personally? A. He did.

Q. State the conversation that you had with Mr. Sulzer at that time when he made the paper? A. Why, he handed me $10,000 and told me to credit his account; that he had told me that he would make a payment as soon as he could.

Q. When had he told you that? A. Well, he did not tell that to me. That was the conversation that took place. That is what he said he had said.

Q. You mean he came in and handed you $10,000 in cash and said to credit that to his account? A. I went to his office.

Q. Oh, you went to his office? A. I went to his office.

Q. At 115 Broadway? A. 115 Broadway.

Q. How did you come to go there? Was it at his request? A. It was.

Q. Had you, prior to going there, communicated with him about his paying something on account of this account? A. Only in these letters.

Judge Hiscock.— Will you ask him to state again what the condition of the account was on that day? There are so many I have forgotten; I didn't follow them.

Mr. Kresel.— Yes.

Q. On the 18th of November, 1912, will you state how the account stood? A. On the 18th of November, 1912, we had 500 shares of CCC. 200 shares of Smelter, 100 shares of Southern Pacific; the debit balance was $40,612; the market value was $52,600; the equity or margin was $11,988.

By the President:

Q. I thought the previous account was a debit balance of $48,000? A. $10,000.

Q. This is after the payment of the $10,000 on that day? A. Yes, sir.

The President.— I think that is what Judge Hiscock wants.

Judge Hiscock.— I wanted what the condition of the account was before.

The President.— That is what I thought.

By Judge Hiscock:

Q. All there is to it is that there was $10,000 worth, as you stated it? A. Yes, sir.

By Mr. Kresel:

Q. In other words, his margin then was only about how much? A. About $2,000.

By the President:

Q. On 800 shares? A. Yes, sir.

By Mr. Kresel:

Q. Now, we will run along, after the 18th of November, 1912; the next change in the account was the purchase of 100 shares of Big Four again? A. On December 5, 1912.

Q. And you bought it at 52? A. Yes.

Q. And the next change was that on the 16th of December, there was another payment of $6,000 in cash, in the account? A. Yes, sir.

Q. Was that made to you? A. No.

Q. To whom was it? A. I don't know.

Q. Now, on December 17, 1912, the day after he made that payment of $6,000, did he take out 10 shares of Big Four? A. Yes, sir.

Q. And what number of certificate did you deliver to him? A. C25681.

Q. Was that the number of the certificate that you had bought for him on December 5th? A. Yes.

Q. What was the state of the account then, on December 17, 1912, after he took out the 100 shares of Big Four? A. On December 17, 1912, he had 500 shares of CCC, 200 shares of Smelters, 100 shares of Southern Pacific; the debit balance was $40,167; the market value was $47,400; the equity or margin was $7,233.

By the President:

Q. Was that before he made the payment or after he made the payment, and took the 100 shares? A. After he made the payment and took the 100 shares.

By Mr. Kresel:

Q. Now, we come to the end of December, 1912. How did the account stand then? A. The end of December, the 30th of December, 1912, the account had 500 shares of CCC, 200 shares of Smelters, 100 shares Southern Pacific. The debit balance was $40,261; the market value was $48,900; the equity or margin was $8,639.

Q. Did you see Mr. Sulzer on the 30th of December, 1912? A. Not to my knowledge.

Q. Did you have any talk with him over the telephone or did you get any letter from him on that day? A. Not that I know of.

Q. Did you write any letter on that day or about that day? A. I will have to refer to the books. Not that I know of.

Q. Please do that? A. December 30th?

Q. December 30, 1912. A. The next letter that we wrote him was December 13, 1912.

Q. December 13th? A. Yes.

Q. Well, did you at about the end of the year, then? Let me see that letter of December 13th.

(Counsel and witness examine letter referred to.)

Q. You have a letter of December 11th, haven't you? A. I have.

Q. Will you read that, please? A. (Reading)

"*December 11, 1912*

"*Hon. William Sulzer, Washington, D. C.:*

"DEAR SIR.—As you no doubt are aware, a panicky condition has existed in the market the past few days. We would therefore appreciate a deposit from you. Thanking you in advance, we are,

"Very truly yours,

"HARRIS & FULLER."

Q. Now, did you get this reply (passing paper to witness). A. (After examining.) We did.

Q. Just read that, please. A. (Reading.) Written on the 12th day of December, 1912.

"*Messrs. Harris & Fuller, 45 Broadway, New York City:*

"GENTLEMEN.— Your letter to Congressman Sulzer just received. He will be glad to take the matter up with you when he comes to New York the first of the week. Believe me,

"Very sincerely yours,

"F. S."

Q. Cisna, isn't it? A. Cisna, Secretary.

Mr. Kresel.— Just have that marked, will you, so we will keep our records straight. Mark that.

(The letter offered for identification was received and marked Exhibit M-93 for identification.)

Q. Now, following the receipt of this letter and on the 16th of December, there was $6,000 paid into the account, isn't that right? A. There was.

Q. Yes. Now, have you found any — a copy of any letter which you wrote to Mr. Sulzer about the end of the year?

Mr. Marshall.— The $6,000 you have just referred to is the $6,000 of which the witness spoke a few moments ago?

Mr. Kresel.— Yes.

The Witness.—(After examining book.) The date please, Mr. Stenographer.

Q. The end of the year 1912? A. (After examining book.) The next letter appears as of June 9, 1913.

Q. Well, we will come to that later. Now —

The President.— Well, your answer —

The Witness.— That is correct.

The President.— Then your answer is you find no letter about the end of the year?

The Witness.— I do not.

Q. Do you find any letter that you received from Mr. Sulzer about the end of the year 1912? A. No.

Q. Have you produced all of the letters that you have and that you received from Mr. Sulzer? A. I have.

Q. And is that the only one that I just read before? A. Yes.

Q. Now, I want to show you this copy of the transcript, or transcript, because you have not your last ledger here, I understand? A. No.

Q. With our permission you took it back?

The President.— Your adversary, I think, consented that you might use the transcript instead of the original.

Mr. Marshall.— We have.

Q. Look at that paper, and state whether that is a transcript of what appears upon your last ledger? A. (After examining) Yes, sir.

Q. Now, I direct your attention to the following entry —

The President.— Now, you want that marked in evidence?

Mr. Kresel.— I just want the — not for the present.

Q. I direct your attention to the entry on the credit side of this account on December 30, 1912, reading as follows (reading). "December 30, 500 CCC; 200 Am. Smelters; 100 So. Pac. Delivered H. & F. Account Loan, $40,261.58," and I ask you whether you gave the directions to your bookkeeper to make that entry on your ledger? A. I did not.

Q. Who did? A. I don't know.

The President.— Well, what does it mean?

Mr. Kresel.— If your Honor will permit me, may I question him about that?

Q. H. & F. in that entry stands for Harris & Fuller, does it not? A. Yes.

Q. Now, I will ask you the question which the Court just asked. What does that entry mean? A. It was a cross entry of a loan made on that date.

Q. A loan made to whom? A. William Sulzer.

Q. By whom? A. Harris & Fuller.

Q. Was it made in cash? A. No.

Q. By check? A. It was a cross entry on my book.

Q. Now, just answer the question. Was it made by check?

The President.— Go easy with the witness; he is going to answer.

Q. Was it made by check? A. No.

Q. Did any money pass from Harris & Fuller to Sulzer? A. No.

Q. Did you speak to Sulzer on that day about making any loan to him? A. No.

Q. Did anybody in your firm? A. I don't know.

Q. What were the terms of the loan, how long was it to run? A. No date set.

Q. What interest was it to draw? A. I think 5 per cent.

Q. That was the rate of interest you had been charging him right along on this account? A. Yes.

Q. Did he give a note for this loan? A. No.

Q. Did he give any memorandum about it? A. No.

Q. Now, what was the purpose, if I may so call it — of making that entry in the account of William Sulzer on that day? A. The purpose was to keep those securities in our possession all the time.

Q. You had had them in your possession right along, had you not? A. Not necessarily.

Q. Well, didn't you have them in your possession right along? A. I mean by in our possession, in our box.

Q. Well, hadn't you had them in your box right along? A. No.

Q. Where had they been? A. They might have been in loans, collateral loans.

By the President:

Q. That is, the loans that you obtained from other parties? A. Yes, sir.

By Mr. Kresel:

Q. Well, now, you could have — you had it in your power right along, either to hold those securities in your box or to send them out as securities for loans? A. Yes.

Q. Was it necessary that this entry be made upon the books of your firm in order thereby you should be enabled to keep these securities in your box? A. A loan of that character made we would keep the securities in our box.

Q. A loan of what character? A. Of this loan.

Q. What is the character of this loan; how was it a loan?

By the President:

Q. Will you not explain exactly why it was and what it means; what was the reason for this change; apparently it was an ordinary account current before that? A. Yes, sir.

Q. Why did you change it, and did you have any conversation with Governor Sulzer about the change? A. I had no conversation with him whatever in regard to it.

Q. What was the object of that transaction; what would it mean in a stockbroker's office? A. It would mean that instead of taking those securities and putting them out in collateral loans we would keep them in our box and not use them.

By Mr. Kresel:

Q. What was the purpose of doing that?

By the President:

Q. Why did you want to make that change? That was no accommodation to you, was it? A. None whatever.

Q. On the contrary, it was limiting your power to use them? A. It was.

Q. How did you come to do it? A. Probably because my partners thought it was wise not to have securities going around the street in William Sulzer's name.

By Mr. Kresel:

Q. William Sulzer had been elected Governor by that time, had he not?

Mr. Marshall.— Yes, we concede that.

Q. Isn't that the fact? A. Yes.

Q. And he was just about to be inaugurated? A. Yes.

Q. The very next day? A. Yes.

Q. And is it your recollection, Mr. Fuller, that you had no talk with Mr. Sulzer about that time about making this change upon your books? A. I don't recollect any talk with him in regard to it, no.

Q. Who was the bookkeeper, if you can tell us, that made that entry? Of course you have not the book, but I thought you might be able to tell us? A. I cannot tell.

By the President:

Q. Was there more than one bookkeeper on the ledger? A. Yes, sir.

Q. How many? A. Three.

Q. Who were they? A. L. R. Schenck, Howard Gunn, I don't know the name of the other.

Q. In the ordinary course of business, witness, that would not be done by a bookkeeper of his own authority, it would be done by direction of one of the partners? A. Absolutely.

Q. And your partners are whom? A. Andrew G. Vogt and Clarence R. Nims.

Q. And are they both in the city of New York now, so far as you know? A. I think so.

Q. Now, Mr. Fuller, I want to exhaust your recollection about this transaction. Don't you remember having a talk with Mr. Sulzer, about the 30th of December, 1912, in which he told you,

in substance that, owing to the change in his situation by reason of his election, he should prefer that the accounts which he was carrying with your firm should be thus transferred into an alleged loan? A. I do not.

Q. Is your recollection so clear about the subject that you will swear that no such conversation took place? A. I will not.

Q. Now, you have a book, have you not, in your firm, and had at that time, wherein loans made by your firm were entered? A. Yes.

Q. Have you that book here? A. I have not.

Q. What is the name of that book? What is it called? A. Stock loan.

Q. Stock loan? A. Yes, sir.

Q. And in that book are made entries of loans which are made by Harris & Fuller from other people, and also loans made by Harris & Fuller to other people? A. No.

Q. What entries are made in there? A. Records of money borrowed only.

Q. By Harris & Fuller? A. By Harris & Fuller.

Q. In what book is the record kept of loans made by Harris & Fuller to other people? A. It would be on the blotter and in money loan account on the ledger.

Q. Very well. Now, please turn to money loan account, the ledger of December 30, 1912. Have you that here? A. The ledger is in New York.

Q. Have you the blotter of December 30, 1912? A. I think so.

Q. Please turn to that and see whether there is any record of this loan to William Sulzer? A. I do.

Q. You are pointing to an entry in this blotter, under date of Monday, December 30, 1912. It is the last entry on the page, is it not? A. On that page. It is carried forward to the next page, though.

Q. Is the entry to which you pointed the last entry on that page? A. It is the last entry on that page for that day. It is not the last entry made for that day on this book.

By the President:

Q. That is to say, there are some entries for that on the following page? A. There are eight pages of entries on that day, sir.

Q. And this is not the last of the whole eight pages? A. This is the last on the first page of that day.

By Mr. Kresel:

Q. And is there a line drawn under the entries preceding the entry now in question? A. No.

Q. Is there a line drawn there at all? A. There is.

Q. Through what? A. Through an entry that was made transferring forty shares of Brooklyn Rapid Transit from some name to the name of Harris & Fuller.

Q. In whose handwriting is the entry that you have pointed to as the entry with regard to the Sulzer account? A. L. R. Schenck.

Q. Is he your bookkeeper? A. He is our cashier and blotter man.

Q. Is he still in your employ? A. He is.

Mr. Kresel.— I offer, if your Honor please, the entry pointed to by the witness, in evidence.

Mr. Herrick.— Read it in evidence.

Mr. Kresel.— No, I want it marked in evidence, then we will read it.

The President.— Mark it in evidence.

(The entry offered in evidence received and marked Exhibit M-96.)

Mr. Kresel.— May I, if your Honor please, have this passed around to the Court (referring to Exhibit M-96)?

The President.— Yes; if you want to.

Mr. Herrick.— Cannot we have it read in evidence first?

The President.— Yes. It will be read first.

Mr. Kresel.— The entry reads as follows:

"Loan W. S. 500 CCC; 200 Smelter; 100 Southern Pacific, $40,261.58," "Money loaned."

Then the following numbers of certificates:
C-25806 —

The President.— Well, it is not necessary to read those.

Mr. Kresel.— That is not necessary?

The President.— No.

By Mr. Kresel:

Q. Before I pass this around, Mr. Fuller, I direct your attention to the letters W. S. after the word "loan" and ask you to state whether you know when those letters were written in there? A. I do not.

Q. Do you know, Mr. Fuller, when that entry was made? A. The day that it appears there, December 30, 1912.

Q. You know that, do you? A. Well, that is the way we do business.

By the President:

Q. That is what you mean; have you any personal knowledge or recollection? A. No, I have not.

Q. It is not in your handwriting? A. No, sir.

Q. As you stated, it was in Schenck's handwriting? A. Yes, sir.

(At this point the witness spoke privately with Mr. Kresel.)

Mr. Kresel.— The witness wants to know whether he can cover up the other names in the book?

The President.— Yes, he should. There need be no third party's names brought in here.

Q. I have no curiosity about them.

The President.— No, not you. Yes, you may cover them up, witness. That is fair.

Judge Bartlett.— Would it be proper if counsel would disclose why it is important for us to look at this, and why it does not suffice for us to merely hear it read?

Mr. Kresel.— If the Court please, it is claimed by the managers that this entry was not made on December 30, 1912; that it shows upon its face that it was not made at that time, and that part of it was not made at the same time that the other was made, and we shall ask your Honors to direct the witness to leave this book in Court so that we may give our experts access to this book, in order that they may more closely examine it.

The President.— Yes, but I think it is right the names of other parties should be protected.

Mr. Marshall.— May it please the Court: I desire at this time to object to this book on the ground that it appears clearly that this book was the book of Harris & Fuller. There is nothing to indicate that the respondent had any knowledge of this book or the entries, or the character of the entries, or when they were made, or how they were made. This is entirely a matter which is, so far as he is concerned, *res inter alios acto,* and they do not pretend to have ever had a conversation with the respondent or that his attention was ever called to this entry. Why then, shall the books or the entries upon books of a third party be considered as evidence in any way against the respondent?

The President.— You have let it all go in to this stage.

Mr. Marshall.— No, your Honor, may I make an explanation as to that. We have objected to nothing concerning the account, and the transaction as to which this witness had knowledge of the fact that stocks were put up as collateral, that certain loans were made, that certain stocks were purchased, but this is an entry in these books made on the 31st, or as of the 31st of December, 1912, and they are now claiming that there was something wrong or irregular about that entry. That is the subject that we are now addressing our attention to, not to the account itself.

The President.— You have allowed it to go in. It is in evidence now, and the Court can not do other than to let it stand. Of course, unless your client is connected with it in some way, there is no inference against your client from it, but I will not, at this stage, after it has gone in, try to prevent it.

Mr. Marshall.— I was otherwise engaged when it was offered and I move to strike it out.

The President.— I think I will let it stand.

Mr. Stanchfield.— Just a word in answer to the statement of counsel. You asked the witness why that change was made. He gave the reason that he presumed one of his partners did not want the name of William Sulzer floating around the street, or in substance that.

The President.— I have forgotten whether counsel suggested that. He said probably one of his partners dictated that change. But I will let it go in.

By the President:

Q. Have you covered that up? A. Yes, sir.

The President.— Then show it to the gentlemen of the Court.

Senator Foley.— While they are examining the record may I ask a question?

The President.— No, you had better wait, because the attention of our fellow members will be distracted from this book. If you will wait until the end, when it has been passed around and then put your question, I think it will be better.

The President.— Do not have any conversation with the counsel, gentlemen. You may have it among yourselves.

Now, Senator Foley, you may put your question to the witness, if you want to.

By Senator Foley:

Q. Mr. Fuller, I want to know if you had the total amount advanced by your firm on the collateral deposited with you to the respondent personally? You gave the figures separately. I want to know if you have the total there? A. I think that the transcript that Mr. Kresel has will show that.

Mr. Kresel.— What was that?

The Witness.— The total amount of the moneys paid to Governor Sulzer by my firm.

Mr. Kresel.— I will come to that, Senator Foley, in just a minute, if you will just let that stand.

By Mr. Kresel:

Q. Mr. Fuller, will you be good enough to remove that paper that you have pinned over the entries long enough for you to state whether the summation of the amounts on that page where the entry in question is written includes the $40,000 referring to that entry? A. Yes.

Q. Now, may I — will you cover the names and let me just look at the figures?

(Counsel and the witness here examine the book referred to.)

Q. Mr. Fuller, I ask you again to total up the figures in that column, and state whether it is not a fact that the total at the foot of the column does not include the $40,000 which you say was loaned? A. (After making calculation) The figures in that column do foot up the total amount of the figures at the bottom of the page.

By the President:

Q. Including that $40,000, whatever it was, forty odd thousand dollars? A. It does include the $40,261.58.

By Mr. Kresel:

Q. What do your figures, as you now calculate them, what are they? A. The amount brought forward is $180,383.13 from the page preceding. The amount at the bottom of the page totals $585,978.54.

Q. Is that what appears written there in ink? A. That is what appears there written in ink, yes, sir.

Q. And what do you make the figures, as you just totaled them up? A. $585,978.54.

Q. And how much is carried forward on the next page? A. $100, oh, on the next page, $585,978.54.

Q. Exactly the amount which appears there in ink? A. Yes, sir.

Q. Now, then, turning again to the account — you will have to use this because you have not got your ledger — after the 30th of December, 1912, what is the next entry in that account? A. January 1, 1912.

Q. I am speaking of entries after December, 1912.

The President.— That is, January of this year?

Mr. Kresel.— No. He has made a mistake, if your Honor please. He was looking at the wrong column.

The President.— Call his attention to the error, Mr. Kresel.

By Mr. Kresel:

Q. What is the answer, Mr. Fuller? A. June 16, 1913.

Q. Now, before we take up that entry, will you state whether between the 30th of December, 1912, and the 16th of June, 1913, you had any communication with Governor Sulzer? A. Not that I recall.

Q. Just look at your letter book. Didn't you write him on or about the 2d or 3d of June, 1913? A. No.

Q. Please look and make sure. A. You are speaking about me personally. I do not write the letters.

The President.— Look at your letter book and see if the firm did not.

Mr. Kresel.— I did not mean you personally; I meant your firm.

The Witness.— What was the date?

The President.— Do you know the date?

Mr. Kresel.— I do not. I know it was early in June. A. It was June 9, 1913.

Q. That is right. Please read into evidence that letter? A. (Reading) "We sent you a telegram last week stating that we would like to have an interview with you, but as yet have not received any reply. It is very imperative that we should get

in communication with you immediately and we would therefore thank you to advise us upon receipt of this letter where and when we can see you. Yours very truly, Harris & Fuller."

Q. Where is that addressed to? A. Executive Mansion, Albany, N. Y.

Q. Have you a copy of the telegram which is spoken of in that letter as having been sent to the Governor? A. I have not.

Q. The telegrams are not copied in that book? A. No, sir.

Q. This was the 9th of June, was it? A. The 9th of June.

Q. Now, see, whether between the 9th and 16th of June you wrote him any more letters? A. On the 11th of June.

Q. Please read that one. A. (Reading):

"*June 11, 1913*

"*Honorable William Sulzer, Albany, New York:*

"DEAR SIR.— We have been endeavoring for a number of days to get in touch with you in reference to the condition of your account, it being very bad and weak, without any success, and until this a. m., when we were advised that you would meet us on Saturday, June 14th, at the Waldorf, which arrangement is not at all satisfactory owing to the feverish and uncertain condition of the market. We must insist on immediate attention to this very important matter. Therefore, we request a deposit of $15,000 at once to bring your account up to the required margin. Failing to comply immediately with our demand, we ask you to take up or transfer your account forthwith, as we would rather have you do that than compel us to sell you out. Your indifference necessitates us to take this method of calling your attention to what we believe is of vital interest to yourself; therefore are of the opinion that after you realize the importance of promptness you will immediately comply and oblige us with the amount requested.

"Hoping to hear from you either by wire or telephone immediately upon receipt of this communication, we are,

"Yours truly,

"HARRIS & FULLER."

Q. Mr. Fuller, on what day between the 30th of December, 1912, and the 11th of June, 1913, was this loan changed back into an account so that it now required margin? A. It was not changed.

By the President:

Q. It remained then at the time of that correspondence in the same form that it was at the close of the preceding year? A. Yes, sir.

Q. That is, a loan? A. Yes, sir.

By Mr. Kresel:

Q. Now then, we will come to the 16th of June, 1913; what happened then? A. The 16th of June, 1913, the loan was reduced from $40,261.58 to $35,851.01.

Q. Is that all? A. That is all.

Q. Now, Mr. Fuller, in the first place what you did on the 16th of June, 1913, was to charge the account with interest on the debit balance of the 30th of December, 1912, from that date to the 16th of June, 1913; is that not correct? A. We returned the loan by a cross entry on our books charging the interest to date and crediting a check for $5,000 received from A. E. Spriggs and a dividend received on 200 shares of Smelters of $200.

Q. Won't you please follow me and let me see if we cannot get it the way I tried to get it? Is it not a fact that on the 16th of June, 1913, you charged this account with interest on the amount which was due on the 30th of December, 1912, from that date to the 16th of June, 1913? A. Interest was charged to date, yes.

Q. And that amounted to $939.43? A. I could not state there.

Q. Well, look at your account and state? A. Yes, sir.

Q. Now, on the same day you received a check of $5,000 did you not, from Mr. Sulzer, or Governor Sulzer? A. No, from Mr. Spriggs.

Q. No, it was a check of A. E. Spriggs, but didn't you receive it from Governor Sulzer? A. I think not.

Q. Do you know personally? (No response.)

By the President:

Q. Did you do it or did somebody else in the office get that check? A. Somebody else in the office got the check.

By Mr. Kresel:

Q. Wasn't it a check of A. E. Spriggs? A. Yes.

Q. And that is the only entry that appears on this transcript? A. Yes.

Q. It doesn't appear that Spriggs delivered it, does it? A. No.

Q. All right. Now, then, in addition to getting this check for $5,000, you also credited the account on that day with the receipt of a dividend on the American Smelters of $200, is that correct? A. Right.

Q. And you anticipated, did you not, the receipt of a dividend on 100 Southern Pacific of $150, because that you did not receive until July 1st, according to your account. (Counsel passes paper to witness).

The President.— As I understand it, dividends are declared to stockholders on a certain date, but may be payable at a later day?

Mr. Kresel.— Right.

By the President:

Q. Had you transferred those stocks to your name? A. I couldn't say, sir.

Q. Well, you got the dividend there? A. We credited this account on July 1st, we credited William Sulzer's account with 1½ per cent dividend on 100 shares of Southern Pacific.

Q. Well, then, you credited it with Smelters too, didn't you, the dividend? A. 1 per cent dividend on 200 shares of Smelters.

Q. You would not have done that — you would not have received it, would you, unless the stock was transferred to your name? A. Probably it was.

By Mr. Kresel:

Q. Now, Mr. Fuller, let us assume now that you received that dividend on the Smelters, not on July 1st, but on the 16th of

June, because you will see from the calculation, that you credited it as of that date. The fact is, then, that you have received on the 16th of June, $5,000 in a check and $350 in the way of dividends, making $5,350, isn't that correct? A. Yes.

Q. Now, deduct the $5,350 from the total debit balance on that day, and see whether the difference is not $53,851.01? A. It is.

Q. And that is exactly the amount of what I showed you in the loan, isn't it? A. That is the loan account that day.

Q. In other words, you made an entry in that account that on the 16th of June, 1913, you loaned Governor Sulzer $35,851.01, when as a matter of fact there wasn't a cent passed to him, isn't that right?

Mr. Marshall.— Wait a minute.

Mr. Kresel.— All right, I withdraw that.

The President.— You have got all that; he has told you how it was done; it was a mere book entry.

By Mr. Kresel:

Let me repeat just one question. What was true of the alleged loan transaction of December 30th, is true of the one of June 1, 1913, is it not?

Mr. Marshall.— I object to that as leading and improper.

The President.— It is only to shorten matters.

Mr. Marshall.—And summing up at the same time.

By the President:

Q. Well, you have stated there what you did. You calculated interest and added that to his debit; then you credited him with the $5,000 he paid you; with two dividends, one that you had actually received on Smelters, and one on the Southern Pacific that you had not received, found what was his balance due from him at that date, and treated that as a new loan of that date? A. That is it exactly.

Q. And so carried it on your book? A. Yes, sir.

By Mr. Kresel:

Q. And it was all simply a bookkeeping entry, wasn't it? A. That was a cross entry paying off one loan and making another.

Q. Now, the next entry in that account is as of July 9, 1913, is it not? A. Yes, sir.

Q. On that day, you sold for the account 100 Southern Pacific, is that correct? A. That is right.

Q. Now, after crediting the proceeds of that sale, how did the account stand, if you have it on your memoranda? A. (No response).

Q. Let me see if I cannot lead you there? May I do that?

The President.— Yes, you may lead him. You have the book.

Q. There was still a balance due then of $26,603.01 as against which you have 500 shares of CCC and 200 Smelters, which, at the current prices at that time, were worth $32,125, leaving a margin of about $55,000? A. That is right.

Mr. Marshall.— An equity.

Mr. Kresel.— Well, call it equity if you prefer.

Mr. Marshall.— Yes, that is what is was.

The President.— Yes. You want to put some more questions before the adjournment, or will you wait?

Mr. Kresel.— If your Honor will permit me to put two more questions?

The President.— Yes.

By Mr. Kresel:

Q. On July 15, 1913, and that is the last as we see of this account, there was a debit balance of $26,739.71, wasn't there? A. Yes, sir; that's right.

Q. And you still had against the account the 500 CCC, and the 200 Smelters? A. Yes, sir.

Q. They were worth at that time $31,825? A. $33,500.

Q. Very well. We will take your figures, $33,000 and what? A. $500.

Q. $33,500? A. Yes, sir.

Q. Leaving him a margin in that account on that day of over $7,000, wasn't it? A. $6,761.

Q. How much? A. $6,761.

Q. $6,761? A. Yes.

Mr. Kresel.— Now, if your Honor will suspend, I will finish with the witness at 2 o'clock.

The President.— Yes.

Whereupon, at 12.31 o'clock p. m., the Court adjourned until 2 o'clock p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2 o'clock p. m.

The roll call showing a quorum to be present, Court was duly opened.

Mr. Kresel.— Mr. Fuller.

MELVILLE B. FULLER recalled.

By Mr. Kresel:

Q. Mr. Fuller, this account that we have been analyzing was closed on the 15th of July, 1913, was it not? A. It was.

Q. On that day the debit balance was $26,739.71, is that correct? A. It was.

Q. And, according to the market price of the securities which you then had against this account, there was a margin over and above the indebtedness of about $6,800? A. That is right.

Q. Now, before the account was closed, did you have any communication with Governor Sulzer about closing it? A. We did.

Q. And was that in the form of correspondence? A. No.

Q. Did you see Governor Sulzer about it? A. No.

Q. Did he telephone to you? A. No.

Q. How did he communicate with your firm with regard to closing the account? A. Over the telephone.

Q. And what was said by Governor Sulzer? A. He referred us to Ex-governor Spriggs.

Q. This gentleman that you are speaking of as Ex-governor Spriggs, do you mean A. E. Spriggs who was at one time Governor of the state of Montana? A. Yes, sir.

Q. And did Ex-governor Spriggs have his office in the same suite where Governor Sulzer had his law office? A. Yes.

Q. What did Governor Sulzer say with regard to your seeing Governor or Ex-governor Spriggs? A. "Friend Nims, what Governor Spriggs said is agreeable to me. Yours, William Sulzer."

Q. Nims is one of your partners? A. He is.

Q. And was such on the 15th of July, 1913? A. He was.

Q. And is what you have just read a note sent by Governor Sulzer to Mr. Nims? A. It was.

Q. I notice on the back of this card which you have handed me, the date July 8, 1913. Is that the date on which this card was delivered? A. I presume it was.

Q. And did Ex-governor Spriggs present this card to Mr. Nims? A. Very likely.

Mr. Kresel.— I offer it in evidence.

The President.— Any objection?

Mr. Marshall.— No objection.

(The card offered in evidence received and marked Exhibit M-97.)

Mr. Kresel.— This is a card with the imprint "Mr. William Sulzer," and reads, "Friend Nims, what Governor Spriggs says is agreeable to me. Yours, William Sulzer."

Q. Mr. Fuller, are you sufficiently acquainted with the handwriting of Governor Sulzer, to be able to state whether the writing on the card is his handwriting? A. I am not.

Q. What was the message which Ex-governor Spriggs brought to your firm? A. He conferred with him in regard to having the Governor take up his account.

Q. Did your firm request that the account be taken up? A. We did.

Q. Was that request made by letter? A. I think not.

Q. How was it conveyed to the Governor? A. Through Spriggs, over the telephone, I think.

Q. And did your firm assign any reason why it was desired that the account be closed?

Mr. Herrick.— It is immaterial.

Mr. Kresel.— Do I understand that is objected to?

Mr. Herrick.— Yes.

The President.— Objection sustained.

Q. The week after this card was presented by Governor Spriggs the account was closed? A. It was.

The President.— Counsel, has the witness said how the account was closed?

Mr. Kresel.— I am just going to inquire.

Q. How was the account closed? A. It was delivered to Mr. Josephthal.

Q. You mean the securities were delivered to Mr. Josephthal? A. They were. He gave us a check.

The President.— For what was due you?

The Witness.— Yes, sir.

Mr. Marshall.— It was a transfer of the account?

The Witness.— Yes, sir.

Q. Who is Mr. Josephthal? A. Why he is a member of the firm of Josephthal, Louchheim & Company, members of the New York Stock Exchange.

Q. Do you know Mr. Josephthal's first name? A. Louis M. Josephthal.

Q. I notice in the transcript of your account the entry that on the 15th of July the securities in this account were delivered to Lieutenant Commander L. M. Josephthal? A. That is right.

Q. Lieutenant commander of what? A. I don't know.

Mr. Brackett.— Can we get a concession of counsel?

Mr. Marshall.— What do you want us to concede?

Mr. Brackett.— What he was lieutenant commander of.

Mr. Marshall.— We want to know what you say he is, and then we will concede it.

Mr. Brackett.— For one thing he is on the Governor's staff. We would like that concession.

Mr. Marshall.— There is no such position as lieutenant commander on the Governor's staff.

Mr. Brackett.— He was on the Governor's staff.

Mr. Marshall.— We concede it.

The President.— Now you have an admission from counsel that he was on the Governor's staff.

Q. When Lieutenant Commander Josephthal came to take away the securities did he present any authorization from the Governor? A. He had a card.

Q. A card? A. Yes, sir.

Q. Governor Sulzer's card? A. Yes, sir.

Q. Have you that? A. I have.

Mr. Kresel.— I offer that in evidence.

The President.—Any objection?

Mr. Marshall.— Let's see what it is first. No objection.

(This card offered in evidence is received and marked Exhibit M-98.)

Mr. Kresel.— This is again a card bearing the imprint of Mr. William Sulzer.

"DEAR MR. NIMS.— Please carry out the suggestion of the bearer, Commander Josephthal, and oblige me.

"Yours,

"WILLIAM SULZER.

"July 10th."

By Mr. Kresel:

Q. That was presented by Mr. Josephthal on July 10th? A. It was.

Q. 1913? A. Yes, sir.

Q. What was the suggestion of Commander Josephthal? A. The suggestion was that we transfer the account to him.

Q. And the actual transfer was not made until the 15th of July? A. The 15th of July.

Q. Why the delay? A. Because we refused to transfer the account without a proper order from the Governor.

Q. Did Lieutenant Commander Josephthal finally present an order which you considered proper? A. He did.

Q. Have you that? A. I have (producing paper).

Q. Was this paper which you have handed to me presented by Mr. Josephthal personally? A. It was.

Q. And did he present it to you personally? A. He did not.

Q. To whom did he present it? A. My partner.

Q. Which one? A. I couldn't say positively.

Q. When was the first time that you saw this paper? A. When I was before the managers' committee in your office.

Q. That was on September 12, 1913, wasn't it? A. I think you had it marked for identification.

Q. Well, it is marked as an exhibit in that proceeding, September 12, 1913. Does that refresh your recollection? A. I think so.

Mr. Herrick.—What proceeding do you refer to, Mr. Kresel?

Mr. Kresel.— I refer to an examination of this witness before the managers of the Assembly.

Mr. Herrick.— In your office? Private?

Mr. Kresel.— Yes. In the managers' office.

Mr. Herrick.—A private inquisition?

Mr. Kresel.—You can call it a private inquisition if you please.

The President.— One moment, gentlemen. Just avoid comment and keep right to work.

By Mr. Kresel:

Q. Of your own knowledge, therefore, Mr. Fuller, you are unable to state, are you not, whether this paper was in the condition that it is now when it was presented by Mr. Josephthal to your partner? A. Personally, I did not see it when he presented it.

Mr. Kresel.— That is what I mean. Now, I offer this paper in evidence.

Mr. Herrick.— Let me see it?

(The paper offered in evidence was received and marked Exhibit M-99.)

Mr. Kresel.— (Reading)

"*New York, N. Y., July 14, 1913*

"*Messrs. Harris & Fuller, New York City:*

"GENTLEMEN.— Please deliver to Lieutenant Commander L. M. Josephthal the securities now held as collateral in my loan upon the payment of the debit balance due thereon.

"Yours truly,

"WILLIAM SULZER."

Then under the signature of "William Sulzer" a line, and under that "For Mrs. Sulzer," and then another line.

Q. Mr. Fuller, on the 14th of July, 1913, did you know Mrs. Sulzer? A. No.

Q. Did Mrs. Sulzer at any time have anything to do with this account of William Sulzer about which you have been testifying?

Mr. Herrick.— One moment. That is objected to as a conclusion of the witness.

By the President:

Q. Did you have any transaction with her to your knowledge about this account? A. No.

By Mr. Kresel:

Q. Did your firm know Mrs. Sulzer in connection with this transaction at all?

Mr. Herrick.— Objected to.

The President.— Objection sustained.

Q. Did Mrs. Sulzer at any time call at your office?

Mr. Marshall.— Same objection.

The President.— He can answer that.

By the President:

Q. As far as you know did you ever see her there? A. No.

By Mr. Kresel:

Q. Did you or your firm ever have any communication with Mrs. Sulzer in regard to this account that we have been discussing?

Mr. Herrick.— Same objection.

The President.— He can answer as far as he knows. He cannot answer for the other members of his firm. Witness, answer as far as you are concerned. A. No.

Q. Is there any entry upon the books of Harris & Fuller in connection with this account wherein Mrs. Sulzer is mentioned? A. No.

Q. Did Mrs. Sulzer ever pay to your firm any money in connection with this account? A. No.

The President.— He already said that he never knew anything about her connection with the account so far as his knowledge is concerned. Of course that excludes payments and every other matter.

Q. Now, Mr. Fuller, this account ran for a period of a little over three years, did it not? A. Yes.

Q. Is it the fact that during the entire period of three years there were only three purchases made for that account? A. Yes.

Q. Is it the fact that during that entire period there was only one sale for that account? A. Yes.

Q. Now will you refer to the transcript of the account and see whether it is not the fact that during those three years the following payments were made by your firm to William Sulzer.

Mr. Herrick.— Is there any use of wasting time this way. We have been all over it; he has drawn it all, all the payments that were made.

The President.— Objection overruled.

Q. Is it the fact that the following payments were made to Mr. Sulzer: June 27, 1910, $6,000? A. Yes, sir.

Q. July 14, 1910, $7,000? A. Yes, sir.

Q. July 19, 1910, $500? A. Yes.

Q. September 2, 1910, $200? A. Yes.

Q. September 26, 1910, $1,000? A. Yes.

Q. June 26, 1911, $12,000? A. Yes.

Q. July 10, 1911, $5,500? A. Yes.

Q. November 27, 1911, $1,000? A. Yes.

Q. And those were all the payments made to him, were they not? A. Yes.

Q. Making a total of payments to him of $33,200. Now you might figure it.

The President.— Well, you state it, and the Court will assume it is true unless it is challenged. State the calculation.

Q. Now then, is it also the fact, Mr. Fuller, that Mr. Sulzer put into that account 500 shares of Big Four of which he withdrew 300, leaving 200 in the account? A. At the end of the account there were 500.

Q. I know you bought some for him. I am speaking of what he brought to you.

The President.— Really all this was duplicated, wasn't it? He took it away once and brought it back again?

Mr. Kresel.— That is right.

The Witness.— We received 500 shares of CCC from him.

Q. And you delivered to him 300 shares, didn't you? A. We delivered him 300 shares.

Q. So that of the Big Four stock that he brought in to you, as distinguished from what you purchased for him, there was left in the account 200 shares? A. Yes.

Q. Now, the first 100 shares that you did not turn back to him

was delivered to you on the 27th of June, 1910, wasn't it? A. That is right.

The President.— You have got that already. You can assume that in your questions without asking him to answer.

Mr. Kresel.— Very well.

Q. Now, is it a fact that the 200 shares of Big Four which you did not turn back to him, were valued at the time when they were delivered to you, at $13,700, the first one at 80 and the second at 57? A. The first one was valued at 80; the one valued at 57 was purchased.

Q. No. He delivered to you 100 shares on the same day when you purchased that 57, didn't he? A. That was received for nothing.

Q. I say the value at the time when you received it was 57? A. Yes.

Q. All right. Then, the value of the 200 shares which were not redelivered to him was a total of $13,700? A. Yes.

Q. Now, in addition to that he also put into the account 100 Southern Pacific on June 26, 1911, didn't he? A. Yes.

Q. Which at that time was worth $12,000? A. Yes.

Q. He also put in $10,000 in cash on November 18, 1912? A. Yes.

Q. $6,000 in cash on December 16, 1912? A. Yes.

The President.— You have got all that.

Mr. Kresel.— I want to sum it up.

The President.— Just give how much the payments were that he got.

Q. He gave to you altogether cash payments of $21,000, didn't he? A. $21,000.

Q. And on July 15, 1913, through Lieutenant Commander Josephthal he put into the account $26,739.71? A. Yes, sir.

Q. Now, totaling up the amounts of cash that he paid in, personally and through Josephthal, to the value of the 200 shares of Big Four that he did not take back, and the value of the 100 shares of Southern Pacific which he did not take back, I ask you

whether it is not a fact that the total amount that he put into the account was $73,439.71?

Mr. Herrick.— Don't answer for a moment. It is objected to. It assumes what Josephthal put in there —

The President.— This is merely asking for a summary.

Mr. Herrick.— No. It is a little more than that. It is an assumption that he put in what Josephthal paid.

The President.— Change it. Including what Josephthal paid, doesn't that sum up to what is this figure?

Mr. Kresel.— $75,431.71?

A. No.

The President.— Well, what does it?

By Mr. Kresel:

Q. The value of the 200 shares of Big Four was $13,700. We have agreed on that, haven't we?

Mr. Marshall.— As of what date?

Mr. Kresel.— We have agreed on that.

The Witness.— At a date, 57.

Q. As of the date when he put them in. That is the date I am taking? A. Yes, sir.

Q. The date when you put in the 100 Southern Pacific —

The President.— Don't you think you can get at it quicker if you ask him the difference between your figures and his?

Mr. Kresel.— I will accept your Honor's suggestion.

By the President:

Q. What do you make it up? A. We received $21,000 in cash from the Governor; that is in payments.

Q. Yes. A. And we received $26,739.71 from Mr. Josephthal.

Q. That is, $47,000? A. Which totals $47,739.71.

Q. Now, he asks what more you received in the stock, taking the stock at its market value at the time you received it? A. 200 shares CCC at 57.

By Mr. Kresel:

Q. Not at 57. One was at 80 and one was at 57, $13,700.

The President.— $13,000 and something.

The Witness.— $13,000.

By Mr. Kresel:

Q. $13,700, isn't it? A. Yes.

Q. And the $12,000 for the Southern Pacific? A. He took the money for the Southern Pacific.

Q. Yes, I know. We have given him credit on the other side for the $12,000. A. Oh, I didn't understand that. $73,439.71.

Q. Right. Now, he took out in cash $33,200, didn't he?

The President.— We have had that.

Mr. Kresel.— We have had that. I want to start with that point.

The President.— Start with it. Say he did and go on with your question.

By Mr. Kresel:

Q. And in addition to the cash, there was taken away the 500 shares of CCC, weren't there, at the end of the account? A. Yes.

Q. And about the date it was selling at 40, wasn't it? A. About.

Q. Which was worth $20,000? A. Yes.

Q. That is, between the 27th of June, 1910, and the 15th of July, 1913, Big Four had dropped from 80 to 40? A. Yes.

Q. And they also took away 200 Smelters? A. Yes, sir.

Q. Which at that time was selling at 59 1-8, making a value of $11,825? A. Yes, sir.

Q. So that the total of the stocks he took away was $31,825?

Mr. Marshall.— Who took them away?

Mr. Kresel.— Josephthal.

The President.— They would go to Josephthal.

By Mr. Kresel:

Q. Isn't that right? A. Figuring at the prices he bought them.

Q. Figuring at the prices that they were worth on the day he took them away? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Adding the value of the stocks taken away, $31,825, to the cash that he had taken out, $33,200, the total amount that he had taken out of the account was $65,025.

Mr. Herrick.— One moment. He didn't take stock out of the account.

Mr. Kresel.— Well, that was taken out by Josephthal.

The President.— It was taken out.

By Mr. Kresel:

Q. Assume that I have amended the question in that way, is that right? A. Yes, sir.

Q. So that he put into the account $73,439.71, and there was taken out of the account $65,025, making a loss of $8,414.71.

Mr. Herrick.— One moment. It has not been taken out. It is a new account opened.

The President.—What is the difference, if you subtract one from the other, it shows the loss.

Q. Is that right? A. Yes.

Q. Now, Mr. Fuller, when was the first time after the 15th of July, 1913, that you saw Governor Sulzer? A. I think it was the 30th of July.

Q. The 30th of July, did you say? A. 1913.

Q. Was that before you were first subpoenaed to appear before what was known as the Frawley committee? A. It was the day after.

Q. The day after? A. Yes, sir.

Q. And between the 15th and the 30th of July, had you had any communication with Governor Sulzer with reference to his account in your concern? A. I had not.

Q. Where did you see Governor Sulzer on the 30th of July? A. At the Executive Mansion, in Albany.

Q. Did he send for you? A. He did.

Q. Did he telegraph or write to you? A. No.

Q. Called you on the telephone? A. No; his office called me on the telephone.

Q. You were called from New York? A. Yes.

Q. And you went up there to see him? A. I did.

Q. Did you go there alone? A. No.

Q. You had a talk with the Governor then? A. I did.

Q. Was there anybody else present at this talk between yourself and the Governor? A. No.

Q. What was the conversation you had with him? A. I went into his library after dinner. I said to him, that I had been subpoenaed to appear before the Frawley committee with my books; that I felt any client doing business with me was entitled to all the protection that the law would give him; that I had consulted with my attorney, and if he advised me that I could legally refuse to answer these questions and produce my books, I would do so.

Q. Is that all? A. All the conversation that took place?

Q. Yes? A. No.

Q. Well, go on as far as your memory serves you? A. You want me to tell what the Governor said to me?

Q. Certainly; we want the entire conversation. A. The Governor said to me that Mr. Marshall was expected to meet me there. Mr. Marshall was not there. He stated that Mr. Marshall's opinion was that they could not force me to answer these questions, or produce my books, and that there was some question as to whether this committee had been legally organized, etc., and I told him that I should depend upon my attorney in regard to that. That was, I think, all that was said in regard to my testifying. Governor Sulzer went on, and he said to me: "Mr. Fuller, you know that these securities were Mrs. Sulzer's, don't you?" And I said, "No, I didn't." "Well," he said, "these securities be-

longed to Mrs. Sulzer when I brought them to you; she had a loan with the Carnegie Trust Company; they required me to give a note every three months, and it was very annoying, so I took the securities down to you and borrowed the money from you." I said to Governor Sulzer, "That may all be true. There is no evidence of anything of that kind on my books, and cannot be proven by me. If it is true, you will have no trouble in proving it, as the books of the Carnegie Trust Company must be a matter of record."

I think that was about all of the conversation that we had. Oh, he offered to furnish me with an attorney and I thanked him and told him no, that I would rather depend upon my own attorney. He said that any expense that I was put to he would pay.

Q. Did he suggest the name of an attorney to you? A. He did not. He asked the name of my attorney.

Q. I mean, did he suggest the name of the attorney he would supply you? A. No.

Q. And for what purpose was he to supply you an attorney? A. I did not ask him.

Q. And he didn't state? A. He did not.

Q. Did you see Mr. Marshall that evening? A. No.

Q. You have stated as far as you can recall the entire conversation? A. I have.

Q. Did the Governor say to you at all why he had sent for you? A. No.

Q. Didn't you inquire? A. I supposed he wanted to go over the account.

Q. Did you go over the account with him? A. No. I told him that those two items were there.

Q. What two items? A. The $10,000 cash and the $6,000 cash which was paid to me.

Q. What did he say about those two items? A. I don't think he made any comment. He said it was all right.

The President.— How did the subject of those two items come up?

Mr. Kresel.— That is right.

The Witness.— I told him that was probably what the Frawley committee were looking for.

Q. What did he say about those two items? A. He did not make any comment.

Q. Did I understand you to say that among other things those two items were all right? A. That is what I understood him to say. That is the best of my recollection.

Q. Was there anything else said about that account except to talk about these two items? A. Not that I recall at the moment.

Q. Did you have a transcript of the account with you? A. No.

Q. Was there anything said about the entry in the account of December 30, 1912, purporting to be a loan? A. No.

Q. That was not discussed? A. No.

Q. Now, as you came away from that talk with the Governor, had the Governor expressed a wish that you should refuse to testify before the Frawley committee?

Mr. Herrick.— Wait a minute. That is objectionable.

The President.— Did he say —

Q. In substance, whether he said that?

The President.—Ask him what he said on the subject if anything.

Q. What did he say on the subject if anything? A. He advised me of Mr. Marshall's opinion and my lawyer told me to ask him that question.

Q. Whether you should testify?

The President.— What do you mean?

The Witness.— Giving Mr. Marshall's opinion and cite the cases Mr. Marshall depended upon for his opinion.

Q. After the Governor told you it was Mr. Marshall's legal opinion that the Frawley committee was not legally organized or appointed and therefore you were not compelled to testify before it, did he ask you to follow Mr. Marshall's advice?

Mr. Herrick.— That assumes he told him he was not compelled to testify. He hasn't said anything of the kind.

The President.— You said in a general way that he gave you

Mr. Marshall's opinion. Did he state what Mr. Marshall's opinion was?

The Witness.— Yes, sir.

Q. Now tell the Court what he said was Mr. Marshall's opinion on the subject?

The Witness.— I think I have already stated that Mr. Marshall's opinion was that this committee was not legally organized and they had no right to inquire into the private affairs of my firm, or something of that kind.

Q. And therefore —

The President.— Now ask, did he advise you as to what course you should pursue?

The Witness.— No, sir.

Q. Did he suggest what course you were to pursue? A. In so far as he quoted Mr. Marshall's opinion.

Q. Did he in substance ask you to follow Mr. Marshall's advice? A. No.

Mr. Herrick.— Wait one moment.

The Witness.— I told him I should follow my own attorney's advice absolutely.

Q. I know what you told him. I am trying to find out what he told you. A. I am trying to tell you.

Q. Did he in substance ask you or suggest that he would like to have you follow Mr. Marshall's advice? A. He did not.

Q. Either in so many words or in substance? A. He did not.

Q. When you left the conference did you understand that Governor Sulzer was desirous that you should not testify before the Frawley committee?

Mr. Herrick.— One moment.

The President.— Objection sustained.

Q. Will you state, Mr. Fuller, what it was that Governor Sulzer offered to supply you a lawyer with — what for?

Mr. Herrick.— What is that question? Wait one moment. What is the question?

The President.— Ask him what he said on that subject if anything.

Q. Just tell us, if you please, as far as you can recall, what Governor Sulzer said about supplying you with a lawyer? A. He said he would be very glad to supply me with a lawyer if I wanted it. I thanked him and said I would depend on the advice of my own lawyer.

Q. Yes, but didn't you inquire of the Governor what he meant by offering to supply you with a lawyer? A. I did not.

Q. What was the lawyer to do for you? A. I don't know.

Mr. Herrick.— Wait one moment.

The President.— Objection sustained. What the respondent said, or the witness said to him is material; not what he thinks the lawyer was to be for.

Q. Now, did Governor Sulzer either in substance or so many words at this conversation say to you that it would be detrimental to his interests if you did testify to this account before the Frawley committee?

Mr. Herrick.— That is objectionable.

The President.— Yes. Did he say anything to you on the question of whether your testimony or your books would be personally injurious to him?

The Witness.— He did not.

Q. Either that or in substance? A. No.

Q. Was there anything said between you as to the probable effect of your testimony? A. No.

Q. Before going to see the Governor, you say that you had taken the advice of your own attorney? A. I had.

Q. Who, by the way, was Ex-judge Olcott? A. Yes, sir.

Q. Did you tell Governor Sulzer what advice your own attorney had given you? A. He had not expressed any opinion at that time.

Q. Up to that time? A. No, sir.

Q. Now, this was on the 13th of July, 1913? A. Yes, sir.

Q. When did you next see the Governor? A. I think it was on the 11th of September.

Q. Had you had any communication with the Governor between the 30th of July and the 11th of September? A. No, sir.

Q. Or had you received any letter or telegram from him with reference to this account? A. No.

Q. Or your testifying about it? A. No.

Q. You did testify before the Frawley committee? A. I did.

Q. Do you remember the date when you testified? A. It was the first week in August some time.

Q. It was the 8th of August, wasn't it? A. My recollection was it was on Wednesday, but I am not sure.

Mr. Fox.— If you have the record read it, Mr. Kresel.

Q. You appeared before the Frawley committee twice, didn't you? A. I did.

Q. Do you remember the day of your first appearance?

The President.— He said he thinks it was Wednesday, the first week of August. Have you that date?

Q. August 6th was your first appearance, as far as I can find out, and August 8th was your second appearance? A. Two or three days afterwards.

Q. When you appeared before the Frawley committee you were accompanied by Ex-judge Olcott, your attorney? A. The second time.

Q. The second time? A. Yes.

Q. And afterwards you were sworn and, before you testified, do you recall that Judge Olcott made a statement to the committee? A. I do.

Q. Among other things that Judge Olcott said at that time was a statement that you had had a conference with the Governor since your last appearance before the committee, and that the Governor had agreed that your lips should be unsealed, or words to that effect? A. Yes, sir.

Q. Now, had you had any other conference with the Governor

between the 30th of July and the 8th of August? A. I had a conference with an attorney, not the Governor.

Q. With an attorney? A. Yes.

Q. An attorney representing the Governor? A. Yes.

Q. But you had had no conference with him direct? A. No.

Q. Now, you saw the Governor, you said, on the 11th of September? A. I think that was the date.

Q. Wasn't that the date when you testified before the board of managers? A. I don't think so.

Q. Didn't you see the Governor at 115 Broadway, on the very day when you testified before the board of managers? A. I saw him at 115 Broadway, but I cannot swear that it was the same day that I testified before the board of managers.

Q. You saw him before you testified before the board of managers, didn't you? A. I could not swear as to that. My best recollection is that it was on the 11th.

Q. That you saw him? A. That I saw him.

Q. And of course you remember, don't you, that you testified before the board of managers on the 12th? A. I do not remember the date, no, sir.

Q. Is it your best recollection now that you saw the Governor at his office, 115 Broadway, before you testified before the board of managers?

The President.— You have got the date somewhere. You can fix that yourself.

Mr. Kresel.— I want to fix it by the witness.

The President.— He says he can't recollect the date.

Mr. Kresel.— The day is not material, except in so far as whether it was before or after he testified; that is all I am trying to get.

The Witness.— I think it was before I testified before the managers' committee.

Q. Now, was there anybody else present at this conference between yourself and the Governor at his office? A. No.

Q. What was that conversation? A. He wanted a full tran-

script of his account to give to Judge Herrick, and asked me if I would come to Albany if he wanted me to explain the account to him.

Q. Is that all? A. That is all.

Q. Was there anything said between you as to whether you should or should not testify before the board of managers? A. I told him that I had received a subpoena to appear before the board of managers, and that it was a question in my mind if it was wise for me to refuse, I thought I should answer any questions that they asked me.

Q. And what did the Governor say? A. He did not say anything.

Q. Now, between the 15th of July and the 18th of September, 1913, have you received any letters from Governor Sulzer? A. No.

Q. Or any telegrams? A. No.

Q. Just one more question, Mr. Fuller: Did you appear before Governor Sulzer early this year, with reference to certain legislation which was pending in the Legislature affecting the New York Stock Exchange? A. I did.

Q. At that time Governor Sulzer's account was still in your office? A. It was.

Mr. Kresel.— That is all.

Cross-examination by Mr. Hinman:

Q. Reference has been made here to Judge Olcott; of what firm is he a member? A. Olcott, Bonynge, Gruber & McManus.

Q. What is the business or occupation of that firm? A. Attorneys at law.

Q. How long has that firm acted as attorneys for you and your firm? A. Ten years.

Q. When you were subpoenaed the first time before the Frawley committee, did you appear? A. I did.

Q. Were you represented there at that time by any attorney? A. I was not.

Q. Were you again subpoenaed before the Frawley committee? A. I was.

Q. And where was that hearing held? A. The same place in one of the public buildings in New York City.

Q. Who went there to that hearing with you? A. Judge Olcott.

Q. Did you hear what he said to the committee, when you were called as a witness? A. I did.

Q. On that occasion? A. I did.

Q. Who was present as attorney for or assuming to represent the Frawley committee on that occasion? A. Mr. Richards.

Q. What is Mr. Richards' first name?

Mr. Kresel.— We will concede it is Eugene Lamb Richards.

Q. Was Mr. Richards acting as counsel to that committee at that time, as you understand it? A. He was.

Q. Did you hear Judge Olcott state to the committee there at that time, did you hear what he said to the committee at that time with reference to your testimony? A. I did.

Q. Did Mr. Olcott there at that time make this statement after you had been called to the stand, and the oath administered — is this substantially his language: "I was not present at the hearing before. Before you proceed with his examination, through your own already expressed courtesy of the commission, and that of Mr. Richards, I want to say a word on the subject of his refusal to answer questions the other day, and the fact that he now presents himself ready to answer all questions which are asked him. His refusal the other day was based upon the custom, which is to them a law and a moral right of brokers, never to reveal any of their books so far as their customers' accounts are concerned. Since that, we have had a conference with Governor Sulzer and his representatives, and the Governor agrees that, without further contest, without any contest on his part, that Mr. Fuller's lips should be unsealed. Now, having that waiver from the customer, Mr. Fuller feels at liberty to answer your questions. I thank you for the privilege of this statement of his position in the matter."

Did you hear that? A. I did.

Q. What books, papers and documents, if any, did you have

before the Frawley committee that day? A. Everything that they asked for.

Q. Were those papers, books and documents examined by that committee and before that committee that day? A. Some of them.

Q. And did they examine such of those as they desired to? A. They did.

Q. Did you answer fully and frankly all questions put to you there that day? A. I did.

Q. And do you say that you were again before another board or body in connection with this matter? A. I am.

Q. When was that?

By Mr. Marshall:

Q. You were? A. I was.

By Mr. Hinman:

Q. When was that? A. Somewhere about —

Mr. Kresel.— The date was September 12th.

Q. On or about September 12th was it, 1913? A. I went to that office before that date.

Q. What was the occasion of your going to that office before that day? A. I returned to New York to find that a Mr. Kresel had called me on the telephone in regard to Governor Sulzer's matters.

Q. Do you know who Mr. Kresel was and is? Did you know at that time? A. I did not.

By the President:

Q. Do you mean the counsel who has been examining you? A. Yes, sir.

By Mr. Hinman:

Q. You did not know at that time? A. At that time I did not.

Q. Who he was? A. No, sir.

Q. Did you know at that time what connection, if any, he had with this matter? A. Not until after I entered his office.

Q. When the word was communicated to you that Mr. Kresel wanted to see you at his office, what did you do? Go to his office? A. I called him on the telephone.

Q. And, as a result of that conversation over the telephone, did you go to his office? A. He said he would come to my office or I might come down there. I asked him where his office was and he told me, I think, 37 Wall street: and as I was in the Exchange, it was just as easy for me to go there as it was to go to my own office, so I went to his office.

Q. Did you have a conversation with him there? A. I did.

Q. Regarding what? A. The transcript of my account of Governor Sulzer's.

Q. Did you answer the inquiries that he made of you that day? A. Some of them I did, as best I could.

Q. How long was that before you were examined before the board of managers, as you have testified? A. I think that was on Tuesday, the 9th, and I appeared before the committee of managers on Friday, the 12th.

Q. Were you subpoenaed to appear before the board of managers? A. I was.

Q. Where did you appear before the board of managers? A. 37 Wall street.

Q. In whose office was it? A. Mr. Kresel's.

Q. Who was present on that occasion? A. Why, Mr. Kresel was there, Mr. Levy was there, the other gentlemen I do not know.

Q. What Levy was that?

By the President:

Q. Is he the chairman of the committee? A. Yes, sir; assemblyman or senator.

By Mr. Hinman:

Q. Assemblyman Levy? A. Yes, sir.

Q. What, if any, books, papers or documents did you have with you that day? A. I took a transcript of the account, as they asked for it. The Frawley committee asked me for a transcript of the account from January 1, 1912, to date. The managers' committee asked me for a transcript of the account from

the opening of that account to date. I took that transcript with me.

Q. Did you exhibit it to the board of managers that day? A. I gave it to Mr. Kresel.

Q. And did he keep it? A. He did.

Q. Were you examined by question and answer at that time? A. I was.

Q. Under oath? A. I think Mr. Levy administered the oath.

Q. Who questioned you at that time? A. Mr. Kresel.

Q. Did you fully and frankly answer such questions as were put to you there that day? A. To the best of my ability.

Q. Did Judge Olcott give you any opinion, or express his opinion at any time as to whether or not you could be compelled, under the law, to give testimony before the Frawley committee regarding this account? A. He did.

Mr. Kresel.— I submit, if your Honor please, that is immaterial.

The President.— How is that material?

Mr. Hinman.— Only material on the proposition that —

The President.— Call your next.

Mr. Hinman.— Nothing further.

Examination by Mr. Kresel:

Q. Mr. Fuller, this account was also known on your books as No. 63, wasn't it? A. It was.

Q. When was it christened No. 63? A. I think always.

Q. It had that number all the time? A. Yes.

Q. Do you know J. B. Gray, of Fuller & Gray? A. Slightly — I do.

Q. Did you talk with him on the telephone last night? A. I did not.

Q. Did the account of Governor Sulzer, or William Sulzer, on your books during this entire period, appear under the name of William Sulzer? A. On every page of every ledger that it has ever been entered in, the name of William Sulzer appears.

Mr. Kresel.— That is all.

The Witness.—Am I excused now?

The President.— Does either side wish any further attendance of this witness?

Mr. Herrick.— We do not.

Mr. Kresel.— Not as far as we are concerned.

Senator Thompson.— I would like to ask the witness a question.

The President.— Just wait a moment until we see if counsel wish the witness to remain here afterwards.

Mr. Herrick.— We don't. He can take his books, too.

The Witness.— They want to keep some of my books. What are my privileges in regard to the matter?

The President.— I suppose they will keep the books. They will be kept in Court, if necessary. The Court will endeavor to see that your books are not kept an unnecessary length of time, and they will be taken care of.

The Witness.— What about this particular book they want to keep?

The President.— What is that?

The Witness.— That is my blotter.

Mr. Kresel.— I have no objection to your sealing any part of that except that one particular part.

The President.— We will take care of that.

The Witness.— Thank you.

The President.— Now see what Senator Thompson wants?

Senator Thompson.— Why do you sometimes keep accounts in your books by numbers instead of the names of the customers?

Mr. Hinman. —That is objected to on the ground it doesn't appear they do that.

The President.— He says that in this account there was both the number and the name.

Senator Thompson.— If there is objection, I don't care.

The President.— Was there a number and name both on this account?

The Witness.— There was.

The President.— Now answer the senator's question, why you keep accounts by numbers as well as names?

The Witness.— The original entry in my office is made on the blotter. That is posted into the ledger. The man that runs the ledger desk is fifteen feet away from the man that runs the blotter, and rather than call out the name across the office of a man or a client, we give it a number, so that posting the transaction for Sulzer, the man on the blotter would call out "Account 63." The ledger man would turn to 63 on the ledger, or William Sulzer's account, and enter there the entry that the blotter man calls off to him.

By Senator Thompson:

Q. So that you gave all accounts a number as well as the name? A. Not all, no. Then again, in transmitting an order, instead of giving the name, for our own convenience we often number the accounts.

Q. What is the reason some accounts have numbers and others do not? That is what I want to know? A. Well, I suppose we feel it is not wise to have people know that we are doing business for certain people, and therefore we number certain accounts.

The President.— You mean other people you are not so particular about?

The Witness.— Yes, sir.

By Senator Thompson:

Q. Do you have any accounts that are numbered but no name appears? A. No.

Q. You don't have any such accounts? A. No.

Q. Do you know what other brokers do? A. I heard one testify here yesterday, he had an account with no name on the ledger.

Q. Is that a custom among brokers in New York? A. It is not my custom.

Q. I am asking your knowledge? A. I do not know.

The President.—Are you familiar with the custom of brokers on the subject, or is there any general custom?

The Witness.— I think I am familiar with it.

The President.— Then answer.

The Witness.—What is the question, please?

The President.— Is it the custom to have accounts without any names, but only numbers?

The Witness.— No.

Senator Thompson.—What is that? I did not hear?

The Witness.— No, it is not the custom.

Senator Sage.— May I ask the witness if it isn't true that most speculator's accounts are numbered in broker's offices?

The Witness.—Yes.

Senator Sage.—And that as a rule inactive accounts or accounts in which few transactions are made and those practically only for investment, are not numbered?

The Witness.— No.

The President.—You mean —

The Witness.— No, they are not, an inactive account.

The President.—Anything else?

(No response.)

The President.— That is all, witness.

(Witness excused.)

Mr. Stanchfield.— I will call Mr. Pinkney.

Mr. Brackett.— Let the witness seal up that part of the book to his own satisfaction.

The President.— That will be attended to.

CORNELIUS S. PINKNEY, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Where do you live? A. New York City.

Q. What is your occupation? A. I am a lawyer.

Q. Where is your office located? A. In the Woolworth Building.

Q. The Woolworth Building? A. Yes; I was formerly at 115 Broadway.

Q. Where was your office in October and November, 1912? A. 115 Broadway.

Q. Was that the same building in which the respondent, Governor Sulzer, then had his offices? A. It was.

Q. Are you acquainted with Governor Sulzer? A. I am.

Q. How long have you known him? A. I have had a speaking acquaintance with him for several years. I do not know how long I have known him.

Q. On or about the 1st of November, while he was a candidate for Governor, in the fall of 1912, did you go to his office to see him? A. I did.

Q. Did you have an interview with him at that time? A. I did.

Q. Where was he? A. He was in his office, 115 Broadway.

Q. Was there anyone else in the room at the time save you two? A. There was not.

Q. What did you say to him at that time? A. I went up there. I had an engagement with him for about 12 o'clock in the day. He was very busy at the time. I could not see him. I went in later. I don't know just exactly what hour it was; and I talked to him about the conditions of the campaign, and I asked him whether he was in need of any money. He said that he had no objections to taking it, in fact he would like to have contribu-

tions as long as the persons who gave it to him felt as though they could afford it, and I sat down at the desk and started to write a check.

Q. Now, what was the number of the check upon which you first started to write? A. I could not tell you that.

Q. I hand you check 849 and ask you whether or not that will refresh your recollection so as to enable you to state the number of the check upon which you first started to write? A. It will, because the check which I first started to write was 850, because I had two checks in my hand; I tore them apart, and I see by looking at this check that I used the lower one first.

Q. So you started first then to write upon check No. 850? A. 850; I had two in my hand; I tore them apart.

Q. What did you start to write upon 850? A. I started to write "Pay to the order of William Sulzer."

Q. And while you were engaged in writing "William Sulzer" what if anything occurred? A. He told me not to make the check to the order of William Sulzer but to make it to the order of Louis A. Sarecky, spelling out such name.

Q. Spelling out the last name Sarecky? A. For me.

Q. Thereupon what did you do? A. I wrote the check as he asked me to.

Q. And is that the check you hold in your hand? A. That is the check I hold in my hand; I gave it to him personally.

Mr. Stanchfield.— I offer it in evidence.

The President.—Any objection?

Mr. Marshall.— No objection.

(Check offered in evidence received and marked Exhibit M-100.)

Mr. Stanchfield.— "No. 849," with the name "C. S. Pinkney" printed at the end. "New York, November 1st, 1912. Columbia Trust Company, New York, pay to the order of Louis A. Sarecky, $200, C. S. Pinkney."

Q. You say that you handed that to him personally? A. I did.

Q. Now, as you started to go out of the office, did candidate

Sulzer, as he was at that time, say anything to you? A. Yes, sir, he did.

Q. What did he say? A. He said that this was a personal matter between himself and myself, that he considered anything like this as a gift, I think was the word he used, and that he did not intend to make any record of any kind or account for the check. If I remember exactly his words were "I do not intend to account for this kind of gifts, they must be made to me personally; don't say anything about it; simply between you and myself."

Q. Is that all? A. That is all.

Mr. Stanchfield.— You may examine.

Cross-examination by Mr. Hinman:

Q. Do you recall what day in the week this was? A. No, sir, I cannot.

Q. Do you recall what day of the month it was? A. Yes, November 1st.

Q. Are you able to fix that date from anything except the date of the check? A. No, sir, not unless I look at my calendar in the office.

Q. Have you looked at your calendar in the office? A. I have not.

Q. In connection with this? A. I have not. I did not know I was going to testify until late yesterday afternoon and I have not been to my office since then except to get the check.

Q. When was the first time after November 1, 1912, that your attention was called to this transaction? A. Today; practically yesterday when I was served with the subpoena.

Q. From November 1st, from the moment that you left Mr. Sulzer's office on November 1, 1912, down until today have you mentioned the subject of that conversation to anyone? A. Yes, sir, I had.

Q. When first? A. Well, I had mentioned — I don't know just when I talked the first time.

Q. About when? A. I should judge about two weeks ago.

Q. From November 1st, the time you left Mr. Sulzer's office after writing this check, had you mentioned that conversation

to anyone prior to two weeks ago, or about two weeks ago? A. No, sir, I had not.

Q. To whom did you first mention that? A. I could not say; I don't think I ever mentioned it.

Q. What is your best recollection as to the name of the person to whom you first mentioned it? A. I do not think I ever mentioned the gist of the conversation until I was outside in the anteroom fifteen minutes ago.

Q. Let me get it again. Then from November 1, 1912, until yesterday you did not mention that conversation to anyone? A. No, sir, I did not; unless it was in my own family.

Q. You never had referred to it, did you, to anyone? A. Unless it was my own family, somebody like that.

By the President:

Q. Do you mean you did not say anything about any part of this conversation or the last part? A. Any part of it, your Honor.

Q. That you had gone there and asked him if he wanted the money? A. I may have spoken in a general conversation around the Manhattan Club. I think I came back and several weeks ago when the question was up who had contributed —

Q. You said that you had contributed? A. I simply said I had contributed but I had nothing to say about this conversation.

By Mr. Hinman:

Q. When was the first time and where was it that you first mentioned the fact, that you mentioned to anyone that you had contributed in this manner? A. I suppose —

Q. Not what you supposed, give us your recollection. A. Maybe as long —

Q. Not maybe, but give us your recollection. A. When the Frawley committee first started.

Q. When did the Frawley committee first start, as far as you know? A. I should say three months ago.

Q. How long was it after the Frawley committee started that you had this talk? A. Maybe a week — two weeks after.

Q. How long after you knew the Frawley committee started was it that you had this first talk? A. About two weeks after. I said that I had contributed to somebody, in the Manhattan Club; I could not tell you the names of anyone to whom I said it.

Q. Do you remember anyone who was present? The name of any person who was present in the Manhattan Club when you made that statement? A. Judge Conlon.

Q. Did you make it in his presence? A. Yes, sir.

Q. Judge Conlon heard you say it? A. I believe so. I don't know what he heard.

Q. Do you know he did? A. I couldn't say about that.

Q. Did Judge Conlon say anything to you in connection with it? A. No, sir.

Q. Who else was present besides Judge Conlon? A. I guess Judge Delehanty.

Q. Not guess. Your recollection? A. That is pretty hard to say, who was there.

Q. Then you simply told them you had made a contribution? A. Yes, sir.

Q. That was all that was said at that time on that subject? A. Yes, sir.

Q. When after that did you mention that subject to anyone, when next? A. I have not said anything about it.

Q. To anyone? A. No, sir.

Q. And the first time you had mentioned it to anyone, then, was about fifteen minutes ago. A. Yes, sir.

Q. Whom was it you mentioned it to then? A. Mr. Richards.

Q. One of the counsel for the board of managers? A. Yes, sir.

Q. How long have you known Mr. Richards? A. I don't know him. I just met him today.

Q. When were you subpoenaed as a witness? A. Yesterday.

Q. By whom? A. I don't know who served the summons.

Q. Where were you? A. I was in my office.

Q. Had you had any communication with anyone in reference to this, until the subpoena was served? A. I had not. I had been out of town.

Q. Since when? A. Two weeks, except I have been in for business. I have been living in New Jersey.

Q. So that when you came up here and up to about fifteen minutes ago, so far as you know, no one knew what you were going to testify to? A. Absolutely.

Q. On this day, when you were in Mr. Sulzer's office, which room were you in? A. I was in the far room. You go into the room, and, as you enter, the next room to the left.

Q. That is, you enter an anteroom and pass to the left? A. Pass to the left.

Q. Whom did you see in the anteroom? A. I saw Mr. Sarecky.

Q. How long have you known Mr. Sarecky? A. I don't know him.

Q. How do you know Sarecky? A. Because I had been introduced to him the day before.

Q. Where were you when you were introduced to Louis A. Sarecky the day before? A. I think in the lobby.

Q. Where was it? Not what you think. A. I couldn't say.

The Witness.— I don't know where it was.

The President.— In your recollection?

The Witness.— I think it may have been in my own office. My secretary made the engagement for me to come up there that day through Mr. Sarecky. I walked in the office and met Mr. Sarecky. I had seen him the day before I think in the lobby.

By Mr. Hinman:

Q. Where had you seen him the day before? A. Downstairs at the cigar store, as near as I can remember, but I am not sure that I was introduced to him at that time.

Q. You stated a moment ago, though, you were? A. I think so.

Q. By whom? A. I couldn't say.

Q. Who ushered you into the Governor's office? A. I should judge it was Mr. Sarecky. I talked to Mr. Sarecky first when I came in the first time. The Governor then was busy; he was engaged with three or four people, and I couldn't wait. I had to go

down to my own office, and when I came back, which was after lunch, Mr. Sarecky was then there, and he took me in there and I left the office alone, closing the door.

Q. You are sure about that? A. I am absolutely sure.

Q. So there was no one present and no one heard this conversation between you and the Governor? A. Absolutely.

Q. Whom else did you see in the office that day besides Mr. Sarecky? A. That is all I could remember.

Q. Out of which door did you pass when you left the office? A. Out of the front door.

Q. Directly into the hall? A. Yes, sir; the main entrance.

Q. Didn't go through this anteroom? A. No. An outer office. There is no anteroom there. It is just an outer office. You enter from the lobby into an office; you go to the left, and you are in Governor Sulzer's private chambers.

Q. Passing to the left? A. Passing to the left.

Q. When you left the office you left by the same way that you entered? A. I think so. I would not be sure. I was not there more than ten or fifteen minutes. I don't remember how I came out.

Q. What kind of a desk was it that you wrote this check at? A. A large desk he has there in the room.

Q. What kind of a desk? A. I couldn't tell you. I didn't notice it.

Q. Did you write the check standing or sitting? A. Sitting at his seat.

Q. Did you sit at the desk Governor Sulzer was using? A. Yes, sir.

Q. He got up and gave you his chair? A. He was walking up and down all the time I was in there.

Q. Do you know whether that check was given to Sarecky or not? A. I know it was not given to Sarecky. It was given the Governor personally.

Q. Do you know whether Sarecky was there? A. Not as long as I was in the room.

Q. Have you examined the check to see whose endorsement is on it? A. I have.

Q. Is the name of Sarecky on the check? A. There is. That is, his name is on the back of the check, but I don't know his signature.

Mr. Stanchfield.— Harvey C. Garber.

HARVEY C. GARBER, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Garber, your residence is where, Ohio? A. Columbus, Ohio.

Q. And your occupation? A. Vice president of the Rawlston Steel Car Company.

Q. You were at some time a member of Congress? A. I was a member of Congress four years.

Q. Do you know the respondent, William Sulzer? A. I do.

Q. Did you make a contribution to him during his candidacy for Governor? A. I did.

Q. In the fall of 1912? A. I did.

Q. How much? A. $100.

Q. Did you make it in cash or by check? A. Made it by check.

Q. Did you transmit it to him by mail or in hand, personally? A. By mail.

Q. Have you the check with you? A. I have.

Q. Will you produce it please?

(Witness produces a paper.)

Q. Is that the check? A. Yes, sir; and the stub with it.

Mr. Stanchfield.— I offer that in evidence.

Mr. Herrick.— Let me see it, please.

(The document was handed to Mr. Herrick.)

(The check referred to was offered in evidence, received and marked Exhibit M-101.)

Mr. Stanchfield.— (Reading.)

"*Columbus, Ohio, October 3, 1912*

"CITIZENS TRUST & SAVINGS BANK

"Pay to the order of William Sulzer one hundred dollars.

"HARVEY C. GARBER."

Q. Now, Congressman, that is indorsed "William Sulzer" and then under it "Louis A. Sarecky."

Mr. Hinman.— Indorsed with a stamp.

Mr. Stanchfield.— I think it is.

Mr. Hinman.—And the bank stamp there, if you will read that please.

Mr. Stanchfield.— Mutual Alliance Trust Company.

Mr. Hinman.— The date it was in the Mutual Alliance.

Mr. Stanchfield.— October 8, 1912, the check being dated October 3d.

Q. Congressman, did you send with the check a letter? A. I did.

Q. Did you keep a copy of the letter? A. I did not.

Mr. Stanchfield.— Will you gentlemen produce it?

Mr. Marshall.— We haven't it.

Q. Can you give us the substance of it? A. I can.

Q. Briefly state that, please. A. "I congratulate you upon your nomination. I herewith enclose check for $100. I hope you will be elected. Sincerely yours, Harvey C. Garber."

Q. Did you receive a response to that letter? A. I did.

Q. Did you keep the reply? A. I may have the reply, but —

Q. Have you it with you? A. I have not.

Q. Do you recollect the substance of it? A. I do.

Q. What was it? A. I thank you for all you have said and all you have done, something of that sort.

Q. See if I can refresh your recollection. I will read a letter.

I might say some read very, very many thanks for all you have said and done and some read many thanks. Your check being for $100, how did yours read? A. I think that the letter simply stated he thanked me for what I had said and what I had done.

Q. Did it make any allusion whatever to the fact that there was a contribution enclosed in it? A. It didn't, only to that extent.

Mr. Stanchfield.— That is all, Mr. Congressman, unless they desire to cross-examine you.

Mr. Hinman.— I assumed the Court will take the language of the letters from the record instead of Mr. Stanchfield's recollection.

Cross-examination by Mr. Hinman:

Q. Mr. Garber, how many times were you in Congress? A. I was in Congress two terms, five sessions. There was an extra session.

Q. During that time did you become acquainted with Mr. Sulzer? A. I became acquainted with him that time, but knew him before that time.

Q. How many years have you known him? A. I knew him probably a year or two before that, that was in 1902 when I was elected.

Q. What had been your relations with him from the time subsequent to your becoming acquainted with him? A. Well, simply friendly, as a member of Congress.

Q. Where were you when you learned that Mr. Sulzer had been nominated for Governor? A. At Columbus, Ohio.

Q. When and in what way did you learn that he had been nominated? A. Through the " Cincinnati Enquirer."

Q. What day did you learn that? A. I think on the 2d day of October.

Q. As a matter of fact he was nominated in the night of the 2d, or the early morning of the 3d of October? A. The check went immediately upon my reading it.

Q. Is it your recollection that you forwarded that check the very day you saw in the " Cincinnati Enquirer " that he had been

nominated for Governor of the State? A. Within perhaps ten minutes after I read it.

Mr. Hinman.— That is all.

Mr. Stanchfield.— That is all.

(Witness excused.)

Mr. Stanchfield.— For the purpose of the record I desire to call Judge Bell, if the Presiding Judge please, to ask him a question.

The President.— Call him.

JOSEPH H. BELL, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Judge Bell, where do you reside? A. In Yonkers, New York.

Q. And you occupy and have for quite some years a judicial place, do you not? A. For about eight years.

Q. You are city judge of Yonkers? A. Yes.

Q. A lawyer by profession? A. Yes.

Q. Engaged in the practice of your profession? A. Yes.

Q. Are you counsel for the brokerage firm of Fuller & Gray? A. Yes.

Q. What is the first name of Mr. Gray? A. John Boyd Gray is his name.

Q. Will you give me his various business addresses and where is his place of business where one would ordinarily expect to find him to serve a subpoena on him? A. He has the main office —

Mr. Herrick.— How is this material, if it please the Court?

Mr. Stanchfield.— If the Presiding Judge please, I want to explain and I ought to explain that John Boyd Gray is the one witness that can reveal the identity of the owner of account No. 500, and the board of managers have been trying for two weeks to subpoena him without avail, and what I want to find out from his counsel is what his addresses are.

Q. Will you give me his business addresses first? A. His main office, or the office of the firm of Fuller & Gray is No. 71 Broadway in the city of New York. He has a branch office or his firm has, in the city of Brooklyn, somewhere I think on Montague street. I am not sure of the number of that.

Q. Is that office carried on under the name of Fuller & Gray? A. Yes, sir. They have further a branch office at 501 Fifth avenue, almost on the corner of 42d street. They have also a branch office in the city of Yonkers.

Q. Has he any other business addresses of which you know? A. None of which I am aware.

Q. In this jurisdiction, in this State? A. None of which I am aware.

Q. Where is his residence? A. Mr. Gray usually or frequently stops with certain relatives of his, an uncle and aunt, I think.

Q. In Yonkers? A. No, in Brooklyn, the address of whom I do not know. He sometimes stays with friends of his on 52d street, New York, the number of the house of which I do not know.

Q. And you are unable, if I understand you then, to give us his residential address? A. I am, Mr. Stanchfield, unable to tell you exactly what his residence is. I do business with him, you understand, I do not live with him.

Q. You were apprised this morning or last night by counsel for the managers that we have been endeavoring for quite some time to subpoena Mr. Gray, were you not? A. Yes.

Q. And we asked you to communicate with Mr. Gray and ascertain whether he wouldn't come here or permit process to be served upon him, did we not? A. You did.

Q. Did you communicate with Mr. Gray by long distance telephone?

Mr. Hinman.— Objected to on the ground it is incompetent.

The Court.— Overruled.

The Witness.— I did.

Q. Did he tell you whether or no he would come here?

The Witness.— If the Court please, on behalf of my client I plead professional privilege and refuse to answer and submit myself to the instructions of this Court.

Mr. Stanchfield.— I haven't the slightest desire to invade the domain of personal privilege if the Presiding Judge thinks that the request of a man to submit himself to the service of process is a confidential communication.

The President.— He may have consulted him on the question of whether he should submit to the jurisdiction. I doubt whether he should be pressed on that. Do you know where he is, witness?

The Witness.—I do not.

Mr. Stanchfield.— I bow to your Honor's suggestion. I haven't the slightest desire to invade that domain. That is all, judge.

The Witness.— I would like to make myself plain in this respect, that so far as I as counsel am concerned or any information that I can give or any advice that I can give to aid this Court in arriving at a just conclusion in its great contention is at its disposal on either side and I believe both sides know it.

The President.—To get to the practical point, can you tell us how the managers can get this witness to attend here? That is the practical point.

The Witness.— I don't want, sir, to be critical of the managers, but I do know this, that Mr. Gray has been in his office at 501 Fifth avenue, where there are no means or methods of concealment, certainly, up to Saturday noon. I understand from statements that have been made to me that you could not find him there, but I know he has been there because he has called me from there and I know by the return messages I sent him that he was in that office. Anything I can do for the committee or the defense to produce Mr. Gray, and I understand they both want him —

The President.— Will you describe his personal appearance so a subpoena server may recognize the man? About how old is he?

Mr. Stanchfield.— I will suggest something practical. If you feel free to do it, will you go out and telephone him to submit himself to service of process? You say you want to help us. If you will do that, that will meet the case.

The Witness.—I will do that at this moment, if I am able to find him.

Mr. Stanchfield.— I will accept that solution of it. That is all.

(Witness excused.)

Mr. Todd.— Mr. Adams.

HENRY G. ADAMS, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. You are an employe of the State of New York? A. I am.

Q. In the Secretary of State's office? A. I am.

Q. You are a clerk there? A. Yes.

Q. How long have you been employed in the Secretary of State's office? A. A little over eleven years.

Q. Among other things have you charge of the statements of candidates for office which are filed in that office under the law? A. I have.

Q. Are you familiar with the form of the certificate and affidavit which is sent out by the Secretary for the purpose of candidates filing such certificates? A. I am.

Q. I show you the certificate filed by William Sulzer, which is managers' exhibit 33, and ask you to examine the form upon which that certificate is made out. Is that the regular form which is prescribed by the Secretary of State's office and which has been furnished to candidates?

Mr. Marshall.— We object to that your Honor. The form which is issued by the Secretary of State is of no consequence. The question is what the law requires.

Mr. Todd.— The law requires, if the Court please, that the Secretary of State shall prescribe the form and I am trying to show that this is the form prescribed by the Secretary of State.

The President.— Have you got the statute there?

Mr. Todd.— Yes, I can refer your Honor to section 544, I think, of the corrupt practices act.

The President.— Just read that part of it, please.

Mr. Todd.— I read section 549 of the corrupt practices act.

Mr. Brackett.— The election law.

Mr. Todd.— The election law, the Secretary of State — the law provides, "the Secretary of State shall provide blank forms suitable for the statements above required."

Mr. Marshall.— It merely says he shall provide forms, it does not say he shall prescribe the form. We assume this form may have been printed by the Secretary of State and was issued by him; that we will be perfectly willing to concede, but beyond that we object to the witness giving an opinion as to whether it was the form prescribed by the Secretary of State, or to attempt to give an interpretation of the statute.

Mr. Todd.— If Mr. Marshall does not like the word "prescribed" I will use the word in the statute.

By Mr. Todd:

Q. Is this the form provided by the Secretary of State? A. It is.

By the President:

Q. It is a printed form, isn't it? A. Yes, sir.

Q. You issued and sent it around to all the candidates? A. Yes, sir.

Q. Your office? A. Yes, sir.

By Mr. Todd:

Q. How long has this particular form, exactly like the form upon which Candidate Sulzer made his certificate of expenses, been in use in the Secretary of State's office?

Mr. Marshall.— That is objected to as entirely immaterial.

Mr. Todd.— We desire to show, if the Court please, that this

is the form prescribed by the Secretary of State, and the one which was used by candidates under this statute, and which had been used in this State for some time.

Mr. Parker.— It has been from the beginning.

Mr. Herrick.— From the beginning of what?

Mr. Parker.— From the enactment of that section of the corrupt practices act down to that.

The President.— Judge Parker, what is the object, for what purpose is it offered?

Mr. Parker.— It is offered for this purpose first, because it is provided by statute that a form, in accordance with that statute, shall be prepared by the Secretary of State, and it was done. If there is any opportunity for debate about the matter at all, and debate was suggested on the other side at the opening, then there has been placed upon it from the beginning a practical construction of the meaning of this provision of the statute.

The President.— I think so, but I think such practical construction must be that of which the Court can take notice rather than be the subject of contradictory evidence. Objection sustained.

Mr. Parker.— Then we understand that the Court will take judicial notice?

The President.— If it is the fact.

Mr. Parker.— It would have been rather convenient for us then to have it spread on the record.

The President.— We will do that at a later stage, Judge.

By Mr. Todd:

Q. Have you produced also from the files of the office of the Secretary of State, chapter 475 of the Laws of 1913? A. I have.

Mr. Todd.— I offer this act in evidence, together with the markings on the jacket. It is an act to amend the Penal Law in relation to false representations concerning securities.

Mr. Fox.— What is the relevancy?

Mr. Todd.— The relevancy of it is it is one of the acts which was introduced in pursuance of the message of Governor Sulzer to the Legislature, urging the passage of certain acts affecting the New York Stock Exchange.

The President.— It is hardly necessary to put in evidence a general statute. The Court must take judicial notice of its existence. It can do no harm. It is merely superfluous. You can have it marked, if you wish.

Mr. Todd.— It is our idea that it is necessary for us to show the history of the enactment of these acts in order to make our proof under that article.

The President.— You can call his attention to the circumstances.

Mr. Todd.— It is offered in evidence. Do I understand there is any objection?

Mr. Hinman.— Counsel are looking at it.

The President.— There cannot be any objection.

(Act offered in evidence, received and marked Exhibit M-102.)

Mr. Todd.— We offer in evidence the original bill enacted into chapter 476 of the Laws of the State of New York, with the jacket.

Mr. Hinman.— What is the title?

Mr. Todd.—And the endorsements thereon, showing the history of the act. The act is entitled: "An act to amend the Penal Laws in relation to reporting or publishing fictitious transactions in securities."

(The act offered in evidence was received and marked Exhibit M-103.)

Q. You also produce the original bill enacted into law, Chapter 500, of the Laws of 1913? A. I do.

Mr. Todd.— I introduce it in evidence, together with the

jacket and the indorsements thereon, showing the history of the enactment of this law.

Mr. Hinman.— Give the title.

Mr. Todd.— The title is "An act to amend the Penal Law in relations to transactions by brokers after insolvency, and in the hypothecation of customers' securities."

(The act offered in evidence was received and marked Exhibit M-104.)

Mr. Todd.— That is all, Mr. Adams.

Here are a few dates I want to read into the record. In order that I may permit the Secretary of State to take back the original documents, I would like to read a few dates into the record, which we consider pertinent.

The President.— Read the entries on what we term the jacket.

Mr. Todd.— Chapter 475 of the Laws of 1913, was introduced by Mr. Stilwell in the Senate, on, the date is not given, but it was passed by the Senate on March 24, 1913; and it passed the Assembly on April 29, 1913, and it was approved by the Governor on May 9, 1913.

Chapter 476 of the Laws of 1913, was passed by the Senate on March 24, 1913; passed by the Assembly on April 29, 1913; and was approved by the Governor on May 9, 1913.

Chapter 500 of the Laws of 1913 was introduced by Mr. Stilwell in the Senate, and was passed by the Senate on April 1, 1913; passed by the Assembly on April 30, 1913, and was approved on May 14, 1913.

I ask the clerk of the Senate, or his deputy, to take the chair.

ERNEST A. FAY, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Todd:

Q. You have produced the journal of the Senate for the year 1913? A. A portion of it.

Q. Will you produce the message which was sent by Governor Sulzer to the Legislature on January 27, 1913? A. I haven't the journal.

Mr. Todd.— Is there any question about it, gentlemen?

Mr. Herrick.— No.

Mr. Marshall.— We consent that he may read from the printed copy, with the same force as though the original were produced.

Mr. Todd.— We offer in evidence the message.

(The message offered in evidence was received and marked Exhibit M-105.)

Senator McClelland.— Was this the emergency message?

Mr. Marshall.— No.

Mr. Todd.— I will not tire the Court with the reading of the full message, but simply the effect of it, to acquaint you with the object of the message.

It is dated January 27, 1913, and is addressed to the Legislature, and it is generally in reference to legislation regarding stock exchanges. Among other bills or legislation that is suggested by this message, I will read the following:

> "It has been charged that there has been a practice on the part of some brokers of selling for their own account the same stocks that they have been ordered to buy for their customers contemporaneously with the execution of the orders on behalf of their customers. Such transactions, of course, amount to a virtual bucketing by brokers of the orders of their customers. They come within the same principles that lead to the condemnation of bucket shops. They are obviously unjustifiable and should be stringently forbidden by a clear and explicit statute on the subject."

The next paragraph is headed, "Prohibiting brokers from doing business after their known insolvency," and the section on that subject concludes as follows:

"I, therefore, recommend an amendment to the law, with appropriate penalties for its violation, forbidding a broker to receive securities or cash from his customers, excepting in liquidation of, or as security for, an existing account, or to make fresh purchases or sales for his own account after he has become insolvent.

"The law should also contain a clear definition of insolvency within the meaning of the act, either analogous to the insolvency provisions of the national bankruptcy act, or otherwise, clearly defining such insolvency."

The next paragraph is headed, "More stringent penal provisions affecting bucket shops."

"Under the law of New York as it is at present, it is necessary to establish that both parties to an ostensible trade in securities intended that it should be settled by the mere payment of differences and not by the actual delivery of property. It follows from this state of the law that the keeper of a bucket shop may escape the penalties now imposed by the laws, merely by proving that his customer was an innocent victim, and a consenting party to the illegal transaction. I believe the Penal Code should be amended so that it shall be necessary only to show that the bucket shop keeper intended that there should be no actual delivery of property."

The next caption is "False statements," and the section, the last paragraph of the section under that caption reads as follows:

"I recommend amending the laws of this State so as to make it a criminal offense to issue any statement, or publish any advertisement as to the value of any stock, or any security, or as to the financial condition of any corporation or company issuing, or about to issue, stock or securities where any promise or prediction contained in such statement or advertisement is known to be false or to be not fairly justified by existing conditions."

Q. Have you produced the Senate bills which were introduced by Senator Stilwell, carrying out the suggestions from the

message of Governor Sulzer which I have just read? A. I have the printed copies.

Mr. Marshall.—They will show for themselves. Offer them in evidence. If you have them there, offer them.

Mr. Todd.— Very well. We offer in evidence Senate bill introductory number 597, entitled "An act to amend the Penal Law in relation to bucketshops." It was introduced by Mr. Stilwell on February 5, 1913. Will counsel consent that I also read the disposition that was made of each of those bills? I have obtained the information from the clerk.

Mr. Marshall.— If it will save time, that is all right. We will take your word for it.

Mr. Todd.— This bill was reported out of the committee on codes, and referred to the committee of the whole on March 13th; on March 27th, Assembly bill number 430 was substituted; Assembly bill went to third reading April 2d, and passed on April 7th, the Assembly bill being identical with this bill. This became a law known as chapter 236 of the Laws of 1913.

I offer that in evidence.

(The bill offered in evidence was received and marked Exhibit M-106.)

Mr. Todd.— I offer in evidence Senate bill number 604, introduced by Mr. Stilwell on February 5, 1913, and entitled "An act to amend the Penal Law in relation to trading by brokers against customers' orders." This bill died in the committee on codes of the Senate.

Mr. Brackett.— It never was reported out of the committee.

Mr. Marshall.— I think that would be a better way to describe it, as not having been reported by the committee.

Mr. Todd.— The suggestion is accepted. I withdraw the remark, "it died," and insert in place thereof that it was not reported out of the committee.

The President.— And that is accepted as a correct statement of its fate?

Mr. Marshall.— That is correct.

Mr. Todd.— I offer in evidence Senate bill number 641, introduced by Mr. Stilwell on February 5, 1913, entitled "An act to amend the Penal Law in relation to the manipulation of prices of securities, and conspiring movements to deceive the public."

This bill was reported by codes committee and reported to the committee of the whole on March 13; on March 27, Assembly bill number 429 was substituted; the Assembly bill was ordered to third reading, on April 2d, and passed on April 7th, and became chapter 253 of the Laws of 1913.

The President.— Is the Assembly bill the same?

Mr. Todd.— I assume it was, although it does not so state here.

Mr. Brackett.— Wherever it is substituted, if the Court please, it has to be identical.

The President.— That is what I imagined.

Mr. Brackett.— Always, with the exception simply of the title, that is in the Senate, and in the Assembly the text of the bill is identical.

The President.— Is there any objection to accepting that statement as correct?

Mr. Marshall.— No objection, your Honor.

(The bill offered in evidence was received and marked Exhibit M-108.)

Mr. Todd.— I offer in evidence Senate bill number 831, reprint number 1559, introduced by Mr. Stilwell on February 12, 1913, entitled "An act to amend the Penal Law in relation to delivery to customers of memoranda of transactions by brokers." This bill was amended and was then sent to the committee on codes and was not reported out of that committee.

(Admitted and marked Exhibit M-109.)

Mr. Todd.— I offer in evidence Senate bill number 832, which was introduced on February 12, 1913, by Mr. Stilwell, entitled "An act to amend the Penal Law in relation to discriminations

by exchanges or members thereof." This bill was sent to the committee on codes and was not reported out of that committee.

(Admitted and marked Exhibit M-110.)

Mr. Todd.— I offer in evidence Senate bill number 833, which was introduced in the Senate on February 12, 1913, by Mr. Stilwell entitled "An act to amend the banking law in relation to the organization and regulation of exchange corporations." This bill was committed to the committee on judiciary and was not reported out of that committee.

(Admitted and marked Exhibit M-111.)

Mr. Todd.— I offer in evidence Senate bill number 902, reprint number 1562, introduced on February 17, 1913, by Mr. Stilwell, entitled "An act to amend the general business law in relation to the listing of securities for sale on stock exchanges." This bill was committed to the committee on judiciary, was amended and was recommitted to the same committee on August 18th and was not reported out of that committee.

(Admitted and marked Exhibit M-112.)

Mr. Todd.— I offer in evidence Senate bill number 1188, reprint number 1884, introduced February 27, 1913, by Mr. Stilwell, entitled "An act to amend the Penal Law in relation to listing or trading in securities." This bill was committed to the committee on codes, amended on March 27th, and referred to the committee of the whole. It was not reported out of the committee of the whole.

(Admitted and marked Exhibit M-113.)

Mr. Todd.— I offer in evidence Senate bill number 199, introduced by Mr. Stilwell on January 15, 1913, entitled "An act to amend the Penal Law constituting chapter 40 of the Consolidated Laws in relation to speculative trading in securities or commodities on credit or margin." This bill was sent to the committee on codes and was not reported out of that committee.

(Admitted and marked Exhibit M-114.)

Mr. Todd.— I offer in evidence Senate bill number 200, introduced on January 15, 1913, by Mr. Stilwell, entitled "An act to

amend the Penal Law in reference to fictitious transactions over the stock exchange ticker." This bill was sent to the committee on codes and was not reported out of that committee.

(Admitted and marked Exhibit M-115.)

Mr. Todd.—I offer in evidence Senate bill number 638, introduced on February 5, 1913, by Mr. Stilwell, entitled "An act to amend the general business law in relation to interest permitted on advances on collateral security and repealing section 75 of the banking law relating thereto." This bill was sent to the committee on judiciary and was not reported out of that committee.

(Admitted and marked Exhibit M-116.)

Mr. Todd.—I offer in evidence Senate bill number 103, introduced on February 4, 1913, by Mr. Stilwell, entitled "An act to amend the tax law in relation to the amount of tax on transfers of stock." This act was intended to increase the tax upon transfers of stock from two cents on $100 to four cents on $100 par value of the stock. This bill was committed to the committee on taxation and retrenchment and was not reported out of that committee.

(Admitted and marked Exhibit M-117.)

Q. Will you produce special messages which were sent to the Legislature by the Governor in reference to this legislation? A. On any particular date?

Q. I want all of the special messages affecting this stock exchange legislation? A. They are all in here.

The President.—All these refer to stock exchanges or to stock transactions?

Mr. Todd.—Yes, sir, in reference to stock transfers or regulating the business of dealing in stocks.

Mr. Marshall.—If you have complete printed copies of those messages, all right.

Mr. Todd.—Those of which we have no printed copy are short and I will read them right in.

The President.—Very good.

Mr. Todd.— I read the message from the Governor dated Albany, May 2d, 1913:

"To the Legislature:

"On January 27, 1913, I sent a special message to your honorable bodies concerning stock exchanges, and at this time I wish again to call your attention to all that I then stated and to repeat the suggestions contained therein. Thereafter with my approval several bills were prepared and introduced at both branches of your honorable body, and to such of those measures that have not yet passed the Legislature I most respectfully and most earnestly ask your favorable consideration. Concerning these measures I have sent to the Legislature the emergency messages to speed their enactment, and I am convinced that their passage at this session of the Legislature is greatly to the interest of the public welfare. I indulge the hope that the receipt of these emergency messages would have resulted in the speedy passage of those measures. I now want to impress upon you as emphatically and as earnestly as words can convey that I believe it to be the desire of our citizens that these pending stock exchange measures receive favorable consideration by the Legislature at this session.

(Signed) "William Sulzer."

The message of the Governor read in the Senate on April 30, 1913:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore in accordance with the provision of section 15 of article 3 of the Constitution and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Senate bill introductory number 1041, printed number 1884, entitled: 'An act to amend the Penal Law in relation to listing or trading in securities.' Given under my hand and privy seal of the State at the Capitol at the city of Albany this 30th day of April in the year of our Lord one thousand nine hundred and thirteen.

(Signed) "William Sulzer."

I read another message of the Governor dated April 30, 1913, read in the Senate on that day as follows:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore in accordance with the provisions of section 15 of article 3 of the Constitution and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Senate bill introductory number 811, printed number 1562, entitled: 'An act to amend the general business law in relation to the listing of securities for sale on stock exchanges.' Given under my hand and privy seal of the State at the Capitol in the city of Albany, this 30th day of April in the year of our Lord one thousand nine hundred and thirteen.

(Signed) "William Sulzer."

I read another message which was read in the Senate on April 30, 1913, as follows:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore in accordance with the provisions of section 15 of article 3 of the Constitution, and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill introductory number 1113, printed number 1192, entitled 'An act to amend the general business law in relation to the listing of securities for sale on stock exchanges.' Given under my hand and privy seal of the State at the Capitol in the city of Albany this 30th day of April, in the year of our Lord one thousand nine hundred and thirteen."

(Signed) "William Sulzer."

I read another message which was read in the Senate on April 13, 1913, as follows:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore, in accordance with the provisions of section 15 of article 3 of the Constitution, and by virtue of

the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill introductory number 1010, printed number 1068, entitled: 'An act to amend the banking law in relation to the organization and regulation of exchange corporations.' Given under my hand and privy seal of the State at the Capitol in the city of Albany this 30th day of April, in the year of our Lord, one thousand nine hundred and thirteen.

(Signed) "William Sulzer."

I read another message that was read in the Senate on April 30, 1913, as follows:

"To the Legislature:

"It appearing to my satisfaction that public necessity requires it, therefore, in accordance with the provisions of section 15, article 3 of the Constitution, and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill, introductory number 823, printed number 865, 'An act to amend the Penal Law in relation to the reporting or publishing of fictitious transactions in securities.' Given under my hand and the privy seal of the State at the Capitol, city of Albany, this 30th day of April in the year of our Lord, one thousand nine hundred and thirteen."

I read another message read in the Senate on April 30, 1913:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore, in accordance with the provisions of section 15 of article 3 of the Constitution and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill, introductory number 818, printed number 860, entitled 'An act in relation to false representations concerning securities.' Given under my hand and the privy seal of the State at the Capitol, in the city of Albany, this 30th day of April, in the year of our Lord, one thousand nine hundred and thirteen."

I read another message, which was read in the Senate on April 30, 1913, as follows:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore, in accordance with the provisions of section 15 of article 3 of the Constitution, and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill, introductory number 824, Senate reprint number 420, 'An act to amend the Penal Law, in relation to trading by brokers against customers' orders.' Given under my hand and the privy seal of the State at the Capitol, in the city of Albany, this 30th day of April, in the year of our Lord, one thousand nine hundred and thirteen."

I read another message read in the Senate on April 30, 1913, as follows:

"To the Legislature:

"It appearing to my satisfaction that the public interest requires it, therefore in accordance with the provisions of section 13, article 3, of the Constitution and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Assembly bill introduction number 817, printed number 859, 'An act to amend the Penal Law in relation to transactions by brokers after insolvency, and in the hypothecation of customers' securities.' Given under my hand and the privy seal of the State at the Capitol in the city of Albany, this 30th day of April, in the year of our Lord, one thousand nine hundred and thirteen."

I read another message which was read in the Senate on April 30, 1913 — with the permission of the Court I will simply read the description of the bill in these different messages, the formal parts of each of these messages being the same, except the enacting clause of the bill.

Mr. Marshall.— We consent that that be done.

Mr. Todd.— My attention was called to the fact that I misstated the term. I should have said the title of the bill and not the enacting clause. I will read the title of the bill.

The message which was read on April 30, 1913, in the Senate, the formal parts being the same as the previous message, is in relation to the bill entitled "An act to amend the Penal Law in relation to delivery to customers of memoranda of transactions by brokers."

Another message, on April 30, 1913, read in the Senate, the formal parts being the same as the other messages and being in reference to an act entitled "An act to amend the Penal Law in relation to discrimination by exchanges or the members thereof."

I read another message which was read in the Senate on May 1, 1913, the formal parts being the same as those previously read, and this message urging the immediate passage of Senate bill introduction number 1464, printed number 2244, entitled "An act to amend chapter 62 of the Laws of 1909, entitled 'An act in relation to taxation, constituting chapter 60 of the Consolidated Laws,' in relation to the tax imposed on transfers of stock, as amended."

That is all, Mr. Clerk.

Mr. Marshall.— No cross-examination.

Mr. Todd.— Just a moment.

Mr. Stanchfield.— If the Presiding Judge please, we now propose to introduce evidence under articles 3 and 4 in the articles of impeachment.

Mr. Clerk, will you turn to the so-called concurrent Frawley resolutions?

The Witness.— I have them here.

Mr. Stanchfield.— We introduce them in evidence. There are two of them. Let me give their respective dates. On May 2, 1913, Mr. Frawley offered the first resolution.

We offer that in evidence.

Mr. Brackett.— Read it right into the record, Mr. Stanchfield.

Mr. Stanchfield.— The pith to this resolution is as follows:

"Resolved that said committee is authorized to sit after the adjournment of the Legislature, in and outside the city of Albany, and is hereby authorized and empowered to subpoena and force the attendance of witnesses including public officers and public employees, and to require the production of books and papers, including any public record or document pertaining to the administration of any State institution or of any State department concerned in the management, regulation, visitation or supervision of the same, to administer oaths, to employ a secretary, counsel, and stenographer, and expert accountant and such other employees as may be necessary for the purpose of the investigation and the actual and necessary expenses of the committee in carrying out the provisions of this resolution, shall be paid from the funds appropriated for the contingent expenses of the Legislature by the treasurer on the warrant of the controller upon the certificate of the chairman of the committee."

I assume there will be no objection to having the stenographer incorporate in the record, Mr. Marshall, the entire resolution.

Mr. Marshall.— We consent to that.

Mr. Brackett.— For convenience; that is all.

The resolution reads as follows:

"By Mr. Frawley: Resolved (if the Assembly concur), that a joint committee of the Assembly and the Senate be appointed, of which the chairman of the Senate finance committee shall be the chairman, consisting of three members of the Senate other than said chairman, to be appointed by the President of the Senate, and three members of the Assembly, to examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, which are supported either wholly or in part by State moneys, or which report officially to the State,

into the functions of any or all State departments concerned in the management, supervision or regulation of any of such departments, the methods of making purchases, fixing salaries, awarding contracts for supplies, buildings, repairs and improvements, the sale of manufactured articles, and the conduct generally of the business of all such institutions and departments, for the purpose of reporting to the next session of the Legislature such laws relating thereto as the committee may deem proper.

"Resolved, That said committee is authorized to sit after the adjournment of the Legislature in and outside the city of Albany; and is hereby authorized and empowered to subpoena and enforce the attendance of witnesses, including public officers and public employees, and to require the production of books and papers, including any public record or document pertaining to the administration of any State institution or of any State department concerned in the management, regulation, visitation or supervision of the same, to administer oaths, to employ a secretary, counsel and stenographer, an expert accountant and such other employees as may be necessary for the purpose of the investigation and the actual and necessary expenses of the committee in carrying out the provisions of this resolution, shall be paid from the funds appropriated for the contingent expenses of the Legislature by the treasurer on the warrant of the controller upon the certificate of the chairman of the committee."

"Adopted.

"In Assembly. To Ways and Means Com.

"May 3. Reported and adopted."

Mr. Stanchfield.—The supplementary resolution which we now proffer in evidence is as follows:

"Whereas, It has been alleged, in the press of the State, that unlawful or improper — "

Mr. Marshall.— Have you got the date?

Mr. Brackett.—That will be given by the clerk.

Mr. Stanchfield.— June 25, 1913.

Mr. Marshall.—At the extraordinary session.

Mr. Stanchfield.—(Reading):

Mr. Thompson offered the following:

"Whereas, It has been alleged in the press of the State that unlawful or improper methods have been used or pursued by private persons or public officers and wrongful or unlawful acts done to influence the votes of legislators on election or primary legislation, and

"Whereas, There has been submitted to the present extraordinary session of the Legislature of the State of New York a proposed act providing among other things for the punishment of any person who while a candidate for elective office to be voted for by the electors of the whole State shall fail to make true returns of moneys or things of value, directly or indirectly received or expended in aid of such candidacy, or who shall receive or expend more than a certain sum stated in said act, now, therefore be it

"Resolved, If the Assembly concur, that for the information of the Legislature, the whole subject of any unlawful or improper methods or wrongful or unlawful acts aforesaid, and of receipts and expenditures of candidates for an elective office to be filled by the votes of the electors of the whole State, be referred to a certain joint legislative committee of the Senate and Assembly, to examine into the methods of financial administration and conduct of all institutions, societies or associations of the State, etc., heretofore appointed under joint resolution, dated the 2d day of May, 1913, to ascertain and report to the Legislature at this extraordinary session or, if not ready, as soon thereafter as possible, whether any unlawful or improper methods have been employed, used or pursued or wrongful or unlawful acts done by any private person or public officer to influence the votes of legislators on election or primary legislation at the last regular or present extraordinary session of the Legislature; and further to investigate into, ascertain and report upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and

upon all statements filed by or on behalf of any such candidate for moneys or things of value received or paid out in aid of his election, and their compliance with the present requirements of law relating thereto.

"Said committee to have the power to subpoena witnesses on these subjects, the same as provided in the resolution of May 2d above referred to."

Mr. Marshall.— Let it appear in the minutes that this was adopted at the extraordinary session, the date of its passage being given in the minutes.

Mr. Stanchfield.— Surely.

May we have the concession from the counsel for the respondent that similar resolutions were introduced, passed and adopted by the Assembly in due form?

Mr. Hinman.— Same?

Mr. Stanchfield.— I said similar, the same resolution.

Mr. Herrick.— If you say they were, we will.

Mr. Stanchfield.— That is my information. I am not making assertions about it, and they will be incorporated in the minutes.

The President.—And that was passed at the same session as this?

Mr. Stanchfield.— Yes, sir, in the Assembly.

Mr. Marshall.— We consent to that fact, and if it is found to be a fact, reference may be inserted in the minutes referring to the Assembly resolution.

The President.— If you find you are in error, the Court will give you leave to withdraw your concession.

Mr. Marshall.— That is not necessary, because the resolution, if it is the same as the Senate resolution, need not be inserted.

Mr. Brackett.— It is the same resolution, concurrent resolution.

The President.— Your opponents are willing to admit that, only reserving the privilege of withdrawing them if they find there is an error.

Mr. Marshall.— There is no other. This was passed by both houses.

The President.— He suggests that this be not printed twice. I think we have got at this.

Mr. Brackett.— There is but one print. That is what I wanted to say.

Mr. Stanchfield.— Read into the record, so we may have it at this time, the personnel of that committee.

The Witness.— James Frawley, chairman; Felix J. Sanner, Samuel J. Ramsperger, Elon R. Brown, La Verne P. Butts, Wilson R. Yard and Myron Smith.

The President.— Are those the senators, or both senators and assemblymen?

The Witness.— That is the joint committee, both.

Mr. Stanchfield.— Would you desire, sir, to have them separate?

The President.— No, it is only to have him name the assemblymen.

Mr. Stanchfield.— Would the Presiding Judge, owing to the immediacy of a witness who is here, and desires to leave, permit me to interrupt this proof and call him?

The President.— Certainly.

Mr. Stanchfield.— That is all, Mr. Clerk.

(Witness excused.)

FRANK M. PATTERSON, a witness called in behalf of the managers, having been first duly sworn in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Kresel:

Q. Are you an attorney and counsellor at law? A. I am.

Q. And you are practicing your profession and have an office in the city of New York? A. I am.

Q. How long have you known Governor Sulzer? A. A great many years.

Q. You are a personal friend of his? A. Yes.

Q. And were so at the time he was a candidate for Governor? A. Yes, sir.

Q. Before the 10th of October, 1912, did you have a talk with Mr. Sulzer, who was then a candidate? A. I did.

Q. Where did you have the talk with him? A. I think my first talk was on the street in front of the building in which my office is or was at that time, the Lords Court building, on Exchange place.

Q. Will you state, please, what that conversation was? A. Well, I had not personally seen Mr. Sulzer at the convention, although I had been there.

Q. You mean at the Democratic state convention, at which he was nominated? A. At Rochester, and this was shortly after that convention —

Mr. Marshall.— Syracuse.

The Witness.— At Syracuse, and we stopped and talked. I congratulated him on his nomination, and told him that in spite of the fact that I was very much interested in the renomination of Governor Dix, that now that he was the party candidate, that he would have my loyal support. That was the substance of the conversation, and I think in the course of it I told the Governor that in order to convince him that my support would be loyal, and that I was very much interested in his campaign, that I would give a personal contribution in addition to those which I gave to the regular committees, as was my custom.

Q. Did you tell him at that time about how much you would give him? A. I forget whether I told him then that it was $500. I do not remember that, but I know the contribution was $500. He did not suggest the amount or say anything about it, except that he thanked me for my assurances.

Q. Did you then tell him when you would give him the check or money? A. No. I think at the time I told him at my convenience, that I was very busy, and that I probably would see him in the course of the week and give him this contribution.

Q. On the 10th of October, 1912, did you go to Mr. Sulzer's office? A. I did.

Q. And did you there give him anything? A. I did.

Q. What did you give him? A. I gave him the sum of $500 in cash.

Q. What did you say to him? A. Well, I can't remember exactly the conversation, except that we discussed the campaign. I told him that I was very much interested in the national campaign, in the election of Mr. Wilson as President. I thought he had a very good chance of being elected, provided all the different State organizations got in and gave him their loyal support, and that an extra good campaign by Mr. Sulzer, in addition to electing him Governor, would go a great way toward assuring the election of the President, and I think at that time I handed him this money.

Q. $500 in cash? A. $500 in cash.

Q. Had you drawn that from your bank on that day? A. Yes, it was on the day that I drew the money that I gave it to him.

Q. And is this check I now hand you the check by which you drew the money? A. That is the check.

Mr. Kresel.—I offer that in evidence.

(The check offered in evidence was received in evidence and marked Exhibit M-118.)

Q. The check is dated October 10, 1912, and is drawn on the Mutual Alliance Trust Company.

"Pay to the order of Cash $500.

"FRANK M. PATTERSON."

Q. Mr. Patterson, who suggested that this contribution be made in cash? A. That I cannot at the present time remember. I have been trying to charge my memory on the way up, but that particular feature of the transaction is for the moment lost. I have reason to believe, however, that it was my own suggestion, whether for convenience or not at that time I do not remember, but I do not remember Mr. Sulzer suggesting it. Therefore, I assume that it was of my own motion.

Q. Aside from Mr. Sulzer's thanking you in person, did you receive any acknowledgment of this contribution? A. None whatever, because I gave it to him personally at his office.

Mr. Kresel.— That is all.

Mr. Herrick.— Is that all?

Mr. Kresel.— Certainly.

The President.—Any cross-examination?

Mr. Herrick.— Yes.

Cross-examination by Mr. Herrick:

Q. You say you have known Mr. Sulzer for a good many years, Mr. Patterson? A. Yes, sir.

Q. Personally and by reputation? A. Yes, sir.

Q. You were conversant with his reputed financial condition? A. Yes.

Q. When you gave him this money, did you place any limits or restrictions upon its use? A. None whatever.

Q. You differentiated apparently in your testimony between the contributions that you made to political committees and this contribution to Mr. Sulzer? A. Yes, sir.

Q. The one you regarded as a personal contribution? A. Yes, sir.

Q. And the other as a political contribution? A. Exactly.

Q. One, helping along a cause and a principle? A. Exactly.

Q. And the other to help along the person, the individual. A. Well yes; to help him personally, to do what he pleased with it.

Q. To do what he pleased with it? A. Yes, sir.

By Mr. Kresel:

Q. Would you have made this contribution to Mr. Sulzer if he had not been the candidate of the Democratic party for Governor?

Mr. Herrick.— I object.

A. I don't know what I would have done.

Mr. Kresel.— I asked you that question. A. My mind has never operated on it. I would not want to say.

The President.— You could answer this, Mr. Witness: Was the way you came to give him that money because he was the candidate for Governor? A. I rather think that was so, that I

would not have had occasion to give him the money other than the fact that he was a candidate for Governor.

The President.— You never offered him any miney before?

The Witness.—Never.

Mr. Kresel.— That is all.

By Mr. Herrick.

Q. Would you have given him this contribution except from what you understood his financial needs, his financial condition? A. I think that influenced me a great deal in the offer, the fact that I understood he was not a man of great means but had nothing but his salary in Congress, and it occurred to me that he would have expenses in the course of being a candidate for Governor that might necessitate the use of money that he did not have. I think that influenced me to some large degree.

Q. There are other personal friends of yours that have been candidates for Governor? A. Yes, sir.

Q. Who are not reputed to be in such desperate financial condition as Sulzer?

Mr. Kresel.— I object to that.

The President.— Are you going to follow that up?

Mr. Herrick.— I simply want to know whether he contributed to them, that is all.

Mr. Kresel.— I object to that.

The President.— Objection sustained.

Mr. Kresel.— That is all, Mr. Patterson. Thank you.

Mr. Stanchfield.— Will the representative of the Civil Service Commission take the stand?

JOHN C. BIRDSEYE, a witness called in behalf of the managers, having been first duly sworn, in accordance with the foregoing oath, testified as follows:

Direct examination by Mr. Stanchfield:

Q. Mr. Birdseye, what is your position? A. Secretary of the Civil Service Commission of the State of New York.

Q. On or about the 21st of July, 1913, did you receive a communication from Mr. Platt, the Secretary of the Governor? A. Yes, sir, I received it on behalf of the Civil Service Commission.

Mr. Stanchfield.— I offer that in evidence.

Mr. Herrick.— May we see it?

Mr. Stanchfield.— Yes, I have the original. I am going to mark a copy, as part of their files.

Mr. Fox.— Is it the appointment of Sarecky?

Mr. Stanchfield.— Yes. His resignation. I will read the whole thing, if you want.

Mr. Herrick.— What is it?

Mr. Stanchfield.— A series of communications back and forth.

Mr. Herrick.— We object to their materiality.

The President.— What is it?

Mr. Stanchfield.— Does the Presiding Judge desire me to explain the position of the board of managers with respect to this testimony?

The President.— Yes.

Mr. Stanchfield.— Article 3 of the charges provides "that the respondent, William Sulzer, then being the Governor of the State of New York, unmindful of the duties of his office, and in violation of his oath of office, was guilty of mal and corrupt conduct in his office as such Governor of the State, and was guilty of bribing witnesses, and of a violation of section 2440 of the Penal Law of said State, in that, while a certain committee of the Legislature of the State of New York named by a concurrent resolution of said Legislature to investigate into, ascertain, and report at an extraordinary session of the Legislature then in session, upon all expenditures made by any candidate voted for at the last preceding election by the electors of the whole State, and upon all statements filed by and on behalf of any such candidate

for moneys or things of value received or paid out in aid of his election, and their compliance with the present requirements of law relative thereto — while such committee was conducting such investigation, and had full authority in the premises he, the said William Sulzer, in the months of July and August, 1913, fraudulently induced one Louis A. Sarecky, one Frederick L. Colwell, and one Melville B. Fuller, each, to withhold true testimony from said committee, which testimony it was the duty of said several persons named to give to said committee when called before it, and which, under said inducements of said William Sulzer, they and each of them refused to do.

" That, in so inducing such witnesses to withhold such true testimony from said committee, the said William Sulzer acted wrongfully and wilfully and corruptly, and was guilty of a violation of the statutes of the State and of a felony, to the great scandal and reproach of the said Governor of the State of New York."

The President.— Were any of those persons connected with the Civil Service?

Mr. Stanchfield.— I will get at that in a moment.

No. 4 is to the same general effect, except the accusation there is that he was guilty of suppressing evidence of a violation of section 814.

The facts the managers propose to prove are these: In the State Hospital Commission, at or about this time, were employed three physicians, whose function was to look after the deportation of the alien insane. About this time the Civil Service Commission was apprised by the Governor of the State that the said Louis A. Sarecky, named in the charge, had resigned his position in connection with the Governor as private stenographer. Thereupon followed a series of letters back and forth between the State Hospital Commission and the Civil Service Commission, in which the Civil Service Commission was asked to let down the bars and exempt from examination, competitive or otherwise, Louis A. Sarecky, upon the ground of his extraordinary fitness for the place of deportation agent, occupied before by a man of medicine. This man of medicine was transferred to another department, and

the extraordinary qualifications lodged in Mr. Louis A. Sarecky, according to this correspondence, were to the general effect that he was a master of five different languages and of the jargon of all nationalities.

The Civil Service Commission, as this correspondence shows, did exempt him from examination, they did set aside the rule, and the setting aside of that rule was approved by the respondent, as Governor of the State, and Mr. Sarecky who had been receiving a salary of between $1,500 and $2,500 a year thereby became propelled into a position that paid him $4,000 a year.

Sarecky about this time was a witness before the Frawley committee and he refused to testify and give evidence. We charge here that upon those facts, within the four corners of these charges, the respondent was guilty of the offenses the board of managers lay at his door. I am not going into the details of that testimony, if the Presiding Judge please. I have stated in a substantial way just what this proof will show.

The President.— Wouldn't it be better to wait until you have got the conduct of Sarecky in evidence?

Mr. Stanchfield.— I am willing to adopt any method.

The President.— It seems to me that is better, because it is difficult for the Court to tell now whether this evidence will or will not be competent.

Mr. Stanchfield.— Now, I propose to read here, if the Presiding Judge please, from the proceedings that took place before the joint legislative investigating committee when Mr. Sarecky was before it as a witness.

Mr. Herrick.—That we object to as incompetent.

Mr. Stanchfield.— Let me inquire, is the objection made upon the ground that this is not the best evidence?

Mr. Herrick.—The objection is made upon the ground it is not the best evidence and our information is that this record of the evidence is not correct. Now, whether that particular one is or not, I do not know.

Mr. Stanchfield.—That does not go to anything except the form in which the offer is made. That simply necessitates the calling of the stenographer in order to demonstrate whether or no this be accurate. I would say in the interest of the saving of time that we will go through it later and if there are any errors in this evidence I shall be only too glad to correct them.

Mr. Herrick.—The respondent is not bound by what took place before that committee.

The President.—No, but how can they establish this charge, assuming they can establish it, except by proving that Sarecky did not appear, and then connecting that to show that the respondent advised him not to appear?

Mr. Herrick.— Exactly, but what we submit is they cannot prove it by the minutes of the proceedings in which they claim he refused. That is their theory of the evidence.

The President.— Your opponent concedes that. That is only as to the method or the character of the evidence.

Mr. Herrick.— We want other evidence than that.

The President.— Then you will have to obtain other evidence.

Mr. Stanchfield.— May I inquire of the official stenographer whether he took the minutes of the Frawley investigating committee?

(One of the stenographers stated that he had taken part of the minutes and was directed to bring his notes to the court room tomorrow morning at 10 o'clock.)

Mr. Stanchfield.— It is now five minutes of 5, your Honor.

Mr. Kresel.— I think I can fill up five minutes, if the Court please. I want to know whether it will be conceded by the counsel for the respondent that Exhibits 97 and 98, which are the cards produced by Mr. Fuller, are in the handwriting of Mr. Sulzer.

Mr. Marshall.— There is no question about the cards.

Mr. Fox.— They are in evidence.

Mr. Marshall.— We make no objection to the cards or to their probative force. We say we do not raise any question as to the probative force of the evidence.

The President.— Do you concede that at least presumptively they are in his handwriting?

Mr. Marshall.— I do not know anything about that. We make no statement as to the handwriting, but we state that he authorized them or that he is bound by those cards.

The President.— Is that enough for you?

Mr. Kresel.— No, your Honor, but if they won't concede it I cannot make them do it.

The President.— Then you will have to get the witness. You can do that.

Whereupon at 5 p. m. the Court adjourned to meet again on Wednesday, October 1, 1913, at 10 o'clock a. m.