To

The Hon.ble John Quincy

Adams

REPORT

OF THE

TRIAL BY IMPEACHMENT

OF

JAMES PRESCOTT, Esquire,

JUDGE OF THE PROBATE OF WILLS, &c. FOR THE COUNTY OF MIDDLESEX,

FOR MISCONDUCT AND MALADMINISTRATION IN OFFICE,

BEFORE

The Senate of Massachusetts,

IN THE YEAR 1821.

WITH AN

APPENDIX,

CONTAINING AN ACCOUNT OF FORMER IMPEACHMENTS IN THE SAME STATE.

BY OCTAVIUS PICKERING AND WILLIAM HOWARD GARDINER,

OF THE SUFFOLK BAR.

BOSTON:

PUBLISHED AT THE OFFICE OF THE DAILY ADVERTISER.

1821.

To The Hon.ble John Quincy Adams, from his Friend, & m.o respectful Obed.t Geo: Blake

ADVERTISEMENT.

THE original intention of the reporters of this trial was to furnish an account of it for the Boston Daily Advertiser, and the preliminary proceedings appeared in that paper accordingly; but after the trial was begun, it was found impracticable in this manner to give such an account of it as its importance and the ability of the counsel engaged in it seemed to demand, and the reporters relinquished their first design for the purpose of making a full report in a more permanent form. To some readers they may appear to have been unnecessarily minute; but as this is the first reported case of an impeachment in this Commonwealth, and will naturally be referred to as a precedent in future cases of the same kind, in this, and perhaps some of the neighbouring States, they thought it might prove useful to publish the forms and modes of proceeding more at large. In their endeavours to be accurate, they have been aided by the use of several sets of minutes, with which they were favored by gentlemen who had a part in the trial, and the main arguments of the counsel, with the exception of Mr. Hoar's, have been revised by the respective speakers. It is due to Mr. Hoar to state, that on account of his residing at a distance from Boston his argument has never been submitted to his inspection. The reporters are also under obligations to Mr. Hale, the editor of the Daily Advertiser, as well for the use of his minutes, as for his assistance in preparing some parts of the report. The arguments of the counsel will be found to contain much valuable information on the subjects of impeachment and courts of probate, and the appendix, if it does not supersede the necessity of sometimes recurring to the journals of the Legislature for the records of former impeachments, will at least serve as an index to them.

PROCEEDINGS

Of the Senate and House of Representatives of the Commonwealth of Massachusetts relative to the impeachment of

JAMES PRESCOTT, Esquire.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, JAN. 17, 1821.

On motion of Mr. Howland, of Newburyport,

Ordered, That Messrs. King, Phelps, Howard, Fay, and B. Lawrence, be a committee to consider what measures, if any, are necessary to enforce the provisions of the Fee Bill, relative to the Judges of Probate and Registers of Probate, in the Commonwealth, and to inquire if any of those officers have received larger sums for the performance of their respective official duties than are by law allowed, with power to send for persons and papers.

SATURDAY, JAN. 20.

The following petition was read.

To the Hon. Senate and House of Representatives in General Court assembled, Jan. 1821.

The undersigned, an inhabitant and freeholder of the county of Middlesex, begs leave to address your Honorable Bodies, as the Grand Inquest and Court of Impeachments of this Commonwealth, on a subject of very high concern and interest to himself, and to his fellow citizens of the county of Middlesex

The laws of the Commonwealth have pointed out with sufficient precision the fees and compensations which officers are to receive for services rendered in their official capacity, and have guarded against extortion by pecuniary penalties, as well as by rendering officers guilty of misconduct, or mal-administration, subject to impeachment and removal from office. It is matter of deep regret, that it should ever be found necessary to resort to these laws for redress or removal of grievances, as it is confidently believed, that the fees established by law are an honorable compensation for the services to which they are annexed, and that there are men, well qualified to fill all public offices, of too much honesty and integrity to receive any addition to the legal fees. But so numerous have been the instances of mal-administration in this particular, within the knowledge and experience of the undersigned, in the person who has long filled the office of Judge of Probate of Wills, &c. for the County of Middlesex, that he feels it to be his incumbent duty to himself, to his fellow-citizens, to those whom they may leave as widows, as heirs, and as creditors, to commence and pursue such measures as may effect his removal.

When it is considered how often in the course of human mortality all the estates and wealth in the County, pass through the hands of executors and administrators, how often it falls to the lot of men unaccustomed to the management of legal concerns, and exposed to impositions; how often to widows and orphans, the peculiar objects of tenderness, compassion and beneficence, it is evidently of the highest importance that he who fills the office of Judge of Probate, &c. should be, not only a person of amiable disposition, condescending manners, and unwearied patience, but also of the most punctilious exactness and inflexible integrity. To such a character, the undersigned affirms, and is ready to prove, the present incumbent of that office forms a complete contrast. The cases of his having received exorbitant fees for the ordinary business of executors, administrators and guardians are not a few solitary instances. It is matter of general practice. It is notorious, that the ordinary fees, paid for the settlement of estates in the Probate office in this county, are more than twice the sums allowed by law. This misconduct and mal-administration, too grievous in the opinion of the undersigned to be longer endured without complaint, he pledges himself to substantiate, whenever requested by the proper authority. Wherefore he prays that measures may be taken, either by impeachment, or address of both branches of the Legislature to the Executive Department, to remove the present incumbent of the office of Judge of Probate, &c. for the County of Middlesex, from his said office; and as in duty bound will ever pray.

SAMPSON WOODS.

The foregoing petition was referred to a committee, consisting of Messrs. King, Phelps, Howard, Fay, Lawrence, Cobb, Paige, Rutter and B. Russell.

THURSDAY, FEB. 1.

The committee to whom was referred the Petition of Sampson Woods, respecting the misconduct and mal-administration of the Judge of Probate of the County of Middlesex, reported a statement of the facts proved before said committee, together with the following resolves, viz.

Resolved, That it is the duty of this House, as the grand inquest of the people of this Commonwealth to cause James Prescott Esq. Judge of Probate for the County of Middlesex, to be impeached of misconduct and maladministration in his said office, as disclosed in the evidence submitted to this House.

Resolved, That this House do proceed to impeach the said James Prescott Esq. of misconduct and maladministration in his said office, at the Bar of the Honorable Senate of this Commonwealth.

The report was read and made the order of the day for tomorrow at 10 o'clock.

IN SENATE.

FRIDAY, FEB. 2.

Messrs. King and Lincoln, a committee of the Hon. House, came up and stated that they were appointed to come to the bar of the Hon. Senate in the name of the House of Representatives, and all the people of the Commonwealth of Massachusetts, to impeach James Prescott Esq. Judge of Probate of the County of Middlesex, of misconduct and maladministration in his said office, and to acquaint the Hon. Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same. And the said committee did demand that the Hon. Senate should take order for the appearance of the said James Prescott, Esq. to answer the said impeachments.

It was ordered that the message be referred to Messrs. Varnum, Williams, and Lyman.

Mr. Varnum made the following report which was adopted, and the House of Representatives notified accordingly.

Whereas &c. [reciting the facts above stated.]

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

Resolved, That a message from the Senate now go to the House of Representatives to inform them of this resolution.

Ordered, That the Hon. Mr. Varnum, be charged with the aforesaid message—[Mr. V. reported that he had performed the duty assigned him.]

Messrs. Varnum, Williams and Lyman, were appointed to draft rules and regulations for the Senate, during the trial.

The Secretary was ordered to summon Judge Prescott to appear at the bar of the Senate on Tuesday the 6th day of Feb. at 11 o'clock A. M. to answer the charges which will be exhibited against him by the House of Representatives.

Mr. Williams was charged with a message to inform the House of Representatives of this order.

HOUSE OF REPRESENTATIVES.

FRIDAY, FEB. 2.

The report of the committee on the complaint against James Prescott, Esq. Judge of Probate for Middlesex County, was read and accepted, and the resolves reported by the committee were passed.

Whereupon, it was ordered that Messrs. King and L. Lincoln be a committee to go to the Hon. Senate, and at the Bar thereof in the name of the House of Representatives and of all the people of the Commonwealth of Massachusetts, to impeach James Prescott, Esquire, Judge of Probate for the County of Middlesex, of misconduct and maladministration in his said office, and to acquaint the Hon. Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

Ordered, That the committee do demand that the Hon. Senate take order for the appearance of the said James Prescott, Esq. to answer to the said impeachment.

Mr. King, of the committee appointed to proceed to the Hon. Senate, reported that the said committee had performed the service assigned to them, by impeaching James Prescott, Esq. Judge of Probate of the County of Middlesex, and by demanding of the Hon. Senate that they take order for the appearance of the said James Prescott to answer to the said impeachment.

Messrs. King, of Salem, L. Lincoln, of Worcester, Dutton, of Boston, Baylies, of Bridgewater, and Fay of Cambridge, were appointed a committee, to prepare and report articles of impeachment, with power to send for persons, papers and records.

A message was received from the Senate, informing the House that the Senate would take order for the impeachment of Judge Prescott.

Adjourned to 3 o'clock this afternoon.

AFTERNOON.

The Hon. Mr. Williams came down with a message from the Hon. Senate to inform the House that they had directed their clerk forthwith to issue a summons to James Prescott, Judge of Probate of wills, &c. for the County of Middlesex, to appear at the Bar of the Senate on Tuesday the sixth day of February, current, at 11 o'clock in the forenoon, to answer to such articles of impeachment for misconduct and maladministration in the said office as may then and there be exhibited against him by the House of Representatives, in behalf of all the people of this Commonwealth.

Ordered, That Messrs. L. Lincoln, Taft, Gray, Sibley, and Whitman, be a committee to wait upon his excellency the Governor, and inform him of the impeachment by this House of James Prescott, Judge of Probate for the County of Middlesex.

IN SENATE.

SATURDAY, FEB. 3.

The committee appointed to prepare and report proper rules of proceedings, to be observed by the Senate, in the case of James Prescott, Judge of Probate, &c. reported in part the following rules, which were adopted by the Senate, viz.

Ordered, That when the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct the impeachment against James Prescott, Judge of Probate, &c. and are directed to carry to the Senate such articles of impeachment, the Senate will, forthwith receive the managers for the purpose of

exhibiting the articles of such impeachment agreeably to such notice.

When the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit such articles of impeachment, the President of the Senate shall direct proclamation to be made as follows, viz :—

Hear ye ! Hear ye ! Hear ye !

" All persons are commanded to keep silence on pain of imprisonment, while the Grand Inquest of this Commonwealth is exhibiting to the Senate articles of impeachment against James Prescott, judge of Probate of Wills, &c. for the county of Middlesex."

After which the articles shall be exhibited, and then the President of the Senate shall inform the managers, that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

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

HOUSE OF REPRESENTATIVES.

SATURDAY, FEB. 3.

Mr. King, chairman of the committee to prepare articles of impeachment against James Prescott, reported the same, which were read and ordered to lie on the table. The Clerk was directed to cause seven manuscript copies to be made for the use of the managers hereafter to be chosen by this House.

Mr. Lincoln, chairman of the committee appointed to inform his Excellency the Governor, of the impeachment of James Prescott, Judge, &c. reported that the committee had performed the duty assigned them.

IN SENATE.

MONDAY, FEB. 5.

Mr. Tudor, of Boston, came up with a message from the Hon. House to inform the Senate that managers have been appointed by the House of Representatives to conduct the impeachment against JAMES PRESCOTT Esq. Judge of Probate &c. for the County of Middlesex ; and have directed the said managers to carry to the Senate the articles agreed upon by the House, to be exhibited in maintenance of the impeachment against the said James Prescott.

Ordered, That the Senate will be ready forthwith to receive articles of impeachment against James Prescott, Judge of Probate &c. for the County of Middlesex, to be presented by the managers appointed by the House of Representatives.

The Hon. Mr. Williams was charged with a message to notify the Hon. House accordingly.

Agreeably to the aforesaid orders the managers on the part of the House of Representatives, viz : JOHN GLEN KING, LEVI LINCOLN, WILLIAM BAYLIES, WARREN DUTTON, SAMUEL P. P. FAY, LEMUEL SHAW, and SHERMAN LELAND, Esquires, were admitted ; and Mr. King the Chairman announced " that they were the managers instructed by the House of Representatives to exhibit certain articles of impeachment against James Prescott, Esq. Judge of Probate &c. for the County of Middlesex."

The managers were requested by the President to take seats assigned them within the bar, and the messenger was directed to make proclamation, which he did in the manner and form heretofore prescribed.

After which the managers rose, and Mr. King their Chairman read the articles as follows, viz :

ARTICLE I. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein, to wit : that the said James Prescott, Esq. Judge as aforesaid, on the fourteenth day of October, A. D. 1816, at his office in Groton, in said county, and not at any Probate Court held according to law, did decree and grant letters of administration, on the estate of Nathaniel Lakin, to one Abel Tarbell, Esq. and thereupon did issue a warrant of appraisement and order of notice; and the said Prescott did then and there, wilfully and corruptly, demand and receive, of said Tarbell, for the business aforesaid, as fees of office, other and greater fees than are by law allowed, to wit, the sum of five dollars and fifty-eight cents. And that said Prescott did, then and there, refuse to make and deliver to said Tarbell an account of the items for which said sum was paid, although by said Tarbell thereto requested. And that said Prescott afterwards, during and upon the settlement of said estate, did wilfully and corruptly, demand and receive, of and from said Tarbell, divers sums, as fees of office, other and greater than are by law allowed therefor, to wit : the sum of thirty-six dollars and nineteen cents.

ART. II. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein to wit:—

That the said James Prescott, Esq. Judge as aforesaid, on the twenty-ninth day of June, A. D. 1818, at his office in Groton, in said county, and not at any Probate Court held according to law, did decree and grant letters of guardianship, upon and over John F. Shepard, a spendthrift, and John Shepard and Francis Shepard, persons non compos mentis, to one Lemuel Parker, Esq. and did thereupon issue warrants to appraise the estate of the wards aforenamed ; and that the said Prescott did then and there, wilfully and corruptly, demand and receive of said Parker, as the fees of his said office, for said letters of guardianship and warrants of appraisement, other and greater fees than are by law allowed therefor, to wit; the sum of thirty two dollars and ten cents.

ART. III. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein to wit :

That said James Prescott, Esq. Judge as aforesaid, on the second day of Aug. A.D. 1819, at his said office, in Groton, aforesaid, and not at any Probate Court held according to law, did decree and grant Letters of Administration upon the estate of one Eri Rogers, to one Benjamin Dix, Esq. and thereupon did issue a warrant to appraise said estate ;

and the said Prescott did, then and there, wilfully and corruptly, demand and receive, of said Administrator, as and for the fees of his said office, in the business aforesaid, other and greater fees than are by law allowed therefor, to wit: the sum of five dollars and seventy cents. And that the said Prescott, on the nineteenth day of said August, at his said office, in Groton aforesaid, and not at any Probate Court held according to law, did receive the said administrator's return of the inventory of said Estate, and, then and there, did decree and grant a Commission of Insolvency, upon the estate aforesaid; and the said Prescott did, then and there, wilfully and corruptly receive from said Dix, other and greater fees than are by law allowed, for the business aforesaid, to wit: the sum of thirty nine dollars and two cents.

ART. IV. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That the said Prescott, Judge as aforesaid, on the fifteenth day of August, A. D. 1818, at his said office in Groton aforesaid, and not at any Probate Court held according to law, did decree and grant Letters of Administration, upon the estate of one Simeon Brown, to Joseph Butterfield, and did thereupon issue an order of notice, and did then and there grant a warrant to appraise the estate of said Brown; and that said Prescott did then and there, wilfully and corruptly, demand and receive, of said Butterfield, for the business aforesaid, other and greater fees than are by law allowed therefor, to wit: the sum of six dollars.

ART. V. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That the said Prescott, Judge as aforesaid, at his said office in Groton, and not at any Probate Court held according to law, did decree and grant Letters of Administration upon the estate of one Shubael C. Allen, to the widow of said Shubael, and did thereupon issue an order of notice, and did then and there grant a warrant to appraise the said estate, and that said Prescott did, then and there, wilfully and corruptly, demand and receive of and from said Administratrix, other and greater fees than are by law allowed for said business, to wit: the sum of five dollars; and that the said Prescott did, thereafterwards, during and upon the settlement of said estate, wilfully and corruptly demand and receive of and from one Peter Stevens, the Agent and Attorney of said Administratrix, and in her behalf, other and greater fees than are by law allowed, to wit: the sum of thirty five dollars and sixty five cents in the whole.

ART. VI. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration, in his said office, herein, to wit:

That the said Prescott, then being Judge as aforesaid, on the twenty third day of May, A. D. 1805, upon the application and retainer of one Jonathan Loring, for and in behalf of one Mary Trowbridge, did engage himself as the attorney of said Mary, to procure by the process of law, in the Probate Court for said county, an assignment of the whole of a certain real estate, of which said Mary, and the sister of said Mary, were seized as coparceners, to be made to said Mary, and thereafterwards, being and continuing attorney to said Mary as aforesaid, and being and continuing Judge as aforesaid, on the said twenty third day of May 1805, did, in his said office of Judge of Probate, decree and grant a warrant to appraise, and, pursuant to law, to assign the whole of said estate to said Mary, if the same could not be conveniently divided. And the said Prescott, then continuing and being Judge as aforesaid, did thereafterwards unlawfully, wilfully, and corruptly, demand and receive, of and from the said Loring, the sum of fifty dollars for his advice and assistance in the business aforesaid.

ART. VII. That the said James Prescott, Esq. is guilty of misconduct and mal-administration in his said office, herein, to wit:

That said Prescott, being Judge as aforesaid, at a Probate Court at Concord, in said county of Middlesex, on the 7th day of June, A. D. 1815, did then and there advise one Samuel Whiting, Esq. in and about the settlement of his accounts as Guardian of certain Wards, and did then and there as the Attorney of said Whiting give him directions therein, and that the said Prescott did then and there for his services as attorney in the business aforesaid, unlawfully and corruptly, demand and receive of said Whiting the sum of fifteen dollars, and did then and there in his said office of Judge as aforesaid, charge and allow in the account of said Whiting with his said Wards, said sum of fifteen dollars for "advice and assistance about preparing this and other accounts and papers."

ART. VIII. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That at a Probate Court, holden by said Judge on the 11th day of November, in the year of our Lord one thousand eight hundred and eighteen, he directed, and advised with one Josiah Crosly, as the Attorney and Counsel of said Crosly, concerning the settlement of a certain account, then and there to be settled by said Crosly, before the said Judge, and then and there demanded and received, of and from the said Crosly, the sum of Two Dollars for his professional advice and assistance, as the Attorney and Counsel of said Crosly, and thereupon added the said sum to said Crosly's account, and in his office of Judge decreed the same to be allowed to him accordingly.

ART. IX. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That on the thirtieth day of December in the year of our Lord one thousand eight hundred and nineteen, the said James Prescott, being Judge as aforesaid, at Cambridge, in said county of Middlesex, upon the retainer of Josiah Crosly aforesaid, who was then and there administrator of the estate of one Jonas Kendall, deceased, advised with and directed the said Crosly concerning the settlement of said estate, and as Attorney and Counsel to said Crosly in the business aforesaid, demanded and received of and from said Crosly the sum of Two Dollars.

ART. X. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That the said Prescott, on the 1st day of January, in the year of our Lord one thousand eight hundred and twenty-one, at Groton, in said county of Middlesex, did advise with, and direct one Peter Stevens, as attorney and Counsel to said Stevens, upon the subject of an administration on the estate of the Father of said Peter, then late deceased, and did, then and there, demand and receive, of and from the said Stevens, for his professional advice and directions to the said Stevens, and as his Counsel and Attorney as aforesaid, the sum of Two Dollars.

ART. XI. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and mal-administration in his said office herein, to wit:

That the said Prescott, at a Probate Court, held at Woburn, in said county, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and eighteen, then being Judge as aforesaid, gave to Josiah Locke, as administrator of the

estate of Josiah Locke deceased, and to Benjamin Wyman, acting as attorney to said administrator, certain advice and instructions, relative to the second account of administration, which was then and there to be settled, by which the said administrator might correct a mistake which had occurred in a previous partial distribution of said estate; and the said Prescott did, then and there, wilfully and corruptly, demand and receive of and from said Locke, administrator as aforesaid, for his said advice and assistance to said Locke, and as his counsel and attorney as aforesaid, the sum of five dollars.

ART. XII. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and mal-administration in his said office, herein, to wit:

That at a Probate Court holden by the said Prescott, on the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and fifteen at Framingham, in said county of Middlesex, one Alpheus Ware, who before had been, and then was guardian of one Jotham Breck, a person *non compos mentis*, was about presenting his account of his guardianship of his said ward for allowance, and thereupon a controversy arose between the said Ware and one Nathan Grout, who, as one of the Overseers of the Poor of the town, in which the said Brock had his settlement, attended the said Court to examine said accounts, respecting some property belonging to the ward of said Ware, and thereupon the said Prescott, overhearing the conversation between the said Ware and the said Grout respecting the said ward's estate, proposed to advise and instruct them therein; and thereupon the said Prescott, being then and there Judge as aforesaid, did advise with and direct the said Ware and the said Grout concerning the settlement of the account aforesaid, and the interest and estate of the said ward, and the guardianship of the aforesaid Ware; and the said account thereafter on the day aforesaid, was sworn to by the said Ware, and was examined, and with the consent of said Grout, was allowed by the said Judge; and the said Prescott then and there first demanded of said Grout, as fees for advice and counsel as aforesaid, the sum of five dollars—and upon the refusal of said Grout to pay the same, the said Prescott demanded the same of the said Ware—and the said Ware objecting to the payment thereof, the said Prescott then and there proposed to said Ware, that if he would pay the said sum of five dollars, he would in his said office of Judge, insert and allow the same to the said Ware in his said account of guardianship, then before sworn to, and with the consent of said Grout, allowed by the said Judge. And the said Ware then and there still objecting thereto, because the said account, allowed, had been consented to by the aforesaid Grout, acting as Overseer of the Poor as aforesaid; the said Prescott insisted upon the payment thereof, and to overcome the objection of the said Ware thereto, stated to the said Ware that "the Overseers need know nothing about it!" And the said Ware then and there, upon the urgent and repeated demands of the said Prescott and upon his proposition to insert the same charge in the guardianship account aforesaid, and to allow the same without the knowledge of the said Grout, did pay to the said Prescott, the said sum of five dollars And thereupon the said Prescott did insert by interlineation, a charge of five dollars, for the money so paid to him as aforesaid, in the guardianship account of said Ware, and did pass and allow the same accordingly.

ART. XIII. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and maladministration in his said office, herein, to wit;

That holding and exercising the office of Judge of Probate, as aforesaid, he became, and was, the attorney and counsel of one Susan Clapp, administratrix of the estate of one Jeremiah Clapp, deceased, about and concerning the settlement of said estate: and on the second day of November, in the year of our Lord one thousand eight hundred and nineteen, the said Prescott did, as attorney and counsel of the said administratrix, advise with and direct her respecting her administration of the estate aforesaid: and then and there, did demand and receive, for his fees as counsel and attorney of said administratrix as aforesaid, the sum of three dollars.

ART. XIV. That the said James Prescott, Judge as aforesaid, has been guilty of misconduct and maladministration in his said office, herein, to wit:

That being Judge as aforesaid, he became, and was, the counsel of one John Walker, administrator on the estate of one John Walker, deceased, and on the first day of April, in the year of our Lord one thousand eight hundred and fifteen, did advise with and direct the said administrator respecting his administration on said estate, and did demand and receive as fees therefor, of and from said administrator, the sum of five dollars, and the said Prescott, being Judge as aforesaid, on the first day of June, in the year of our Lord one thousand eight hundred and sixteen, did further advise with and direct said administrator, and as his counsel and attorney of and concerning his administration on said estate, and did demand and receive, as fees therefor, of and from said administrator, other and further sums of money, amounting in the whole to the sum of fifteen dollars, and the said Prescott, being and continuing Judge as aforesaid, on divers days and times, between the said first day of June aforesaid, and the seventeenth day of May next after, did, as counsel and attorney of said administrator, advise with and instruct him in the further administration of said estate, and for his fees, for his advice and instruction and counsel as aforesaid, the said Prescott did demand and receive, of and from said administrator, other large sums of money, to wit, in the whole, the sum of one hundred and twenty dollars; and the said Prescott there after in his office of Judge of Probate, did allow all the aforesaid sums to the said John Walker, in the settlement of his administration of the estate aforesaid.

ART. XV. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office herein, to wit:—

That in December, in the year of our Lord one thousand eight hundred and fourteen, at a Court of Probate holden by the said Prescott at Cambridge, one Amos Wood being there for the purpose of aiding his sister, who had been appointed Executrix of the last will of her husband, Jonas Adams of Lincoln, the said Prescott permitted himself to be retained, and did act as Attorney of the said Executrix, in advising with and directing her in relation to her liability as Executrix for the support of a person, who was supposed to be chargeable upon the Estate, and did then and there, demand and receive, of and from the said Wood the sum of five dollars, for the advice so given; and that afterwards, to wit, in May, in the year of our Lord, one thousand eight hundred and fifteen, the said Wood being in the office of the said Prescott, in Groton, the said Prescott further directed and advised, as attorney, in the matter aforesaid, and thereupon demanded and received of the said Wood the further sum of ten dollars; and afterwards, to wit, in the year of our Lord one thousand eight hundred and sixteen, the said Executrix presented her account for allowance to said Judge, wherein was charged the said sum of fifteen dollars, paid as aforesaid, which said account was then and there approved and allowed by the said Judge.

And the said House of Representatives, saving to themselves by protestation the liberty of exhibiting at any time hereafter any other articles of ac-

cusation or impeachment against the said James Prescott, Esq. Judge as aforesaid, and also of replying to the answers which he may make to the impeachment aforesaid, and of offering proof of the premises and of every part thereof, and of any other accusation or impeachment which may be exhibited by them, as the case may require; do demand, that the said James Prescott, Judge as aforesaid, be put to answer all and every of the premises, and that such proceedings, examination, trial and judgment, may be thereupon had and given, as are conformable to the Constitution and laws of this Commonwealth; and the said House of Representatives are ready to offer proof of the premises at such time as the Senate of the Commonwealth of Massachusetts may order and appoint.

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

The managers delivered the articles of impeachment at the table and withdrew.

The committee appointed to prepare and report proper rules of proceedings to be observed by the Senate, in the trial and impeachment of Judge Prescott, reported the following rules in addition to those heretofore adopted, which were read and adopted, viz.

Ordered, Fourth, That the President of the Senate be authorized to direct the employment of the sheriff of Suffolk or any person or persons, during the trial of the impeachment of James Prescott, Judge of Probate of Wills, &c. to discharge such duties as may be prescribed.

5. At the time appointed for the return of the summons against the said James Prescott the legislative business of the Senate shall be suspended, and the clerk of the Senate shall administer an oath to the returning officer in the form following, viz:—"You A. B. do solemnly swear that the return made and subscribed by you, upon the process issued on the day of by the Senate of this Commonwealth against James Prescott, is truly made, and that you have performed the service as therein described. So help you God."—Which oath shall be entered upon the records.

6. The person impeached shall then be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly, if by himself, or if by agent or attorney. If he does not appear either personally or by agent or attorney, the same shall be recorded, and such further process shall be thereupon issued for his appearance, and such further proceedings had as the Senate shall direct.

7. At the time appointed for the trial of the impeachment the Legislative business of the Senate shall be suspended, and the clerk shall administer to the President the oath prescribed to be taken in such cases, by the constitution of this Commonwealth. The President shall then administer the same oath to each Senator present.

8. A message shall be sent to the House of Representatives to inform them that the Senate is ready to proceed upon the trial of the impeachment of the said James Prescott in the Senate chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

9. Counsel for the party impeached shall be admitted to appear and be heard upon the trial.

10. All motions made by the parties or their counsel, shall be addressed to the President of the Senate; and if he shall request it, shall be committed to writing and read at his table, and all decisions upon such motions shall be had, after hearing the parties, by ayes and noes, without debate, which shall be entered upon the records.

11. Witnesses shall be sworn in the following form, to wit, "you solemnly swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the Commonwealth of Massachusetts and James Prescott, shall be the truth, the whole truth, and nothing but the truth,—So help you God," (or "this you do under the pains and penalties of perjury," as the case may be) which oath shall be administered by the Clerk.

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

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

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

15. Subpœnas for witnesses shall be issued by the Clerk of the Senate, upon the application of the managers of the impeachment, or of the party impeached, or his counsel, in the following form, to wit:

To Greeting.

You and each of you, are hereby commanded to appear before the Senate of the Commonwealth of Massachusetts at their Chamber in Boston;—then and there to testify to your knowledge in the cause which is before the Senate in which the House of Representatives have impeached

Fail not.

Witness

President of the Senate of the Commonwealth of Massachusetts, at Boston, this day of , in the year of our Lord , and of the independence of the U. S. of America the .

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

16. The form of direction to the Sheriff for the service of the subpœna, shall be as follows:

The Senate of the Commonwealth of Massachusetts

(L.S.) To the Sheriff of the County of or either of his deputies.

You are hereby commanded to serve and return the within subpœna, according to law. Dated at Boston this day of in the year of our Lord, , *Clerk of the Senate.*

17. The form of any summons which may be issued, directed to the person impeached, shall be as follows, to wit:

Commonwealth of Massachusetts, ss.

The Senate of the Commonwealth of Massachusetts

To Greeting

Whereas, the House of Representatives of this Commonwealth did, on the day of exhibit to the Senate, articles of impeachment against you the said in the words following, viz, and did demand that you the said should be put to answer the accusations as set forth in said articles; and that such proceedings, examinations, trials and judgments, might be thereupon had, as are agreeable to law and justice

You the said are therefore summoned, to be, and appear before the Senate of this Commonwealth at their Chamber in Boston, on the day of , then and there to answer to the said articles of impeachment, and then and there to abide by, obey and perform such orders and judgments as the Senate of this Commonwealth shall make in the premises according to the Constitution and laws of this Commonwealth.

Hereof you are not to fail—Witness

President of the Senate thereof, at Boston, this day of in the year of our Lord

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

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

Commonwealth of Massachusetts, ss.

The Senate of the Commonwealth of Massachusetts

To Greeting.

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

Witness President of the Senate thereof, at Boston, this day of in the year of our Lord,

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

HOUSE OF REPRESENTATIVES.

MONDAY, FEB. 5.

The articles of impeachment against James Prescott Judge of Probate for Middlesex County were read from the chair and were accepted. The House then proceeded to elect by ballot, managers to prosecute the impeachment. The following gentlemen were elected viz. JOHN G. KING, LEVI LINCOLN, WILLIAM BAYLIES, WARREN DUTTON, SAMUEL P. P. FAY, LEMUEL SHAW, and SHERMAN LELAND, Esquires.

Ordered, that the articles agreed to by this House to be exhibited in the name of themselves and of all the people of this Commonwealth, against James Prescott Judge of Probate &c. be carried to the Senate, by the managers appointed to conduct the impeachment.

Mr. Tudor was charged with a message to the Hon. Senate to inform them that the House had appointed managers to conduct the impeachment.

The Hon. Mr. Williams came down with a message to inform theHouse that the Senate were ready to receive the managers appointed to conduct the impeachment.

IN SENATE.

TUESDAY, FEB. 6.

On motion of Mr. Varnum, a message was sent to inform the House that the Senate was about to organize itself as a Court for the trial of the impeachment against Judge Prescott.

COURT OF IMPEACHMENT,

Senate Chamber, Feb. 6, 1821.

Commonwealth vs. *James Prescott, Esq. Judge of Probate, &c. for the County of Middlesex.*

This being the day assigned for the return of the summons and for the trial of James Prescott, Esq. Judge of Probate, &c. for the County of Middlesex, on an impeachment presented against him, by the Representatives of the people of Massachusetts for misconduct and maladministration in office—the Clerk of the Senate administered the following oath of office to the Hon. John Phillips, President, viz :

"You do solemnly swear that in the trial of James Prescott, Esq. Judge of Probate, &c. for the County of Middlesex, for misconduct and maladministration in office, expressed in articles of impeachment presented against him by the Hon. House of Representatives, you will truly and impartially try and determine the charge in question, according to evidence—So help you God." And the same oath was administered to the several members hereafter named, viz : Hon. J. B. Varnum, William Gray, Israel Bartlett, Jona. Hunewell, John M. Williams, Leonard M. Parker, Aaron Tufts, Phineas Allen, Samuel Eastman, William Whittemore, Mark Doolittle, Hobart Clark, John Thomas, Peter C. Brooks, John Wells, Dudley L. Pickman, Step hen P. Gardner, Jona. H. Lyman, Jona. Dwight, Jr. Thomas Longley, Benj. Reynolds, Lewis Bigelow, William Sullivan, Robert Rantoul, Ebenezer Mosely, John Ruggles Jr. and William Bourne, Esquires.

An oath was administered by the President to Samuel F. McCleary, Esq. for the faithful discharge of the office of Clerk of the Court to which he was appointed.

The messenger, as crier of the Court, opened the Court by the direction of the President.

The writ of summons to the said James Prescott was read, together with the precept of the Messenger and his return thereof that he had left a true copy of the writ at the Respondent's residence in Groton—and the following oath was administered to him by the Clerk of the Court :

"You, Jacob Kuhn, Messenger to the General Court, do solemnly swear, that the return made and subscribed by you upon the process issued on the second day of February current, by the Senate of this Commonwealth against James Prescott, Esq. Judge of Probate, &c. for the county of Middlesex, is truly made, and that you have performed said services as therein described.—So help you God."

JAMES PRESCOTT, Esq. was then called, who appeared with Samuel Hoar, Jr. Esq. as his counsel.

The Speaker of the House of Representatives, followed by six of the managers, (Mr. Lincoln being absent) and the other members, entered the Senate Chamber and took the seats assigned them—the managers within the circle of Senators, and the other members without the circle, at the right of the President. The Lieut. Governor and some of the Council likewise came in and took seats.

The Respondent stood at the bar in front of the President. The Clerk, by direction of the President, read the articles of impeachment ; and the Respondent being asked whether he was guilty thereof or not guilty, declared that he was not guilty.

The President asked the Respondent if he had any motion to submit as to the course, or time of his trial.

The Respondent answered that his Counsel would address the Court.

Mr. Hoar, (who was seated in the circle, nearly fronting the President,) then rose, and observed,

that the articles of impeachment, which had been exhibited, embraced a period of about 16 years—that they were 15 in number—and that these were so many distinct and independent charges, requiring as many distinct and independent answers.

That the Respondent had no notice of the proceedings against him before Saturday last; and that it might require some time for him both to prepare his evidence and to investigate the law.

It was impossible that after so long an interval he should be able to recollect at once all the facts which had been referred to in the charges exhibited against him. He must have time to inquire into their truth—to recal other facts connected with these which might serve to explain them—and to know whether they amount to an offence against the laws of his country. It was apprehended that it would be impossible for him during the present session of the Legislature to employ and instruct Counsel sufficiently in his defence, unless the session should be protracted to an unusual length. He hoped therefore that an early day would be assigned at the next session, for the respondent to make answer, and procure his testimony as to the facts.

The President directed that the motion should be reduced to writing.

It was then read by the Clerk as follows, viz:—"And now the said Prescott moves the said Court, that the second Wednesday of the first Session of the next General Court be assigned as the day for him the said Prescott to appear, and give his answers to said articles of impeachment, and submit to a trial on the same."

The motion being read, Mr. King, as Chairman of the Managers, said, that the object of the House of Representatives in preferring this Impeachment was the attainment of justice, to the gentleman at the bar, as well as to the Commonwealth. It was not the wish of the Managers to press forward the trial to the inconvenience of the accused, and they were desirous that all reasonable time should be allowed him for his defence. The House of Representatives did not think it proper to interpose an opinion as to the length of time requested in the motion submitted to the Court; they considered it a question exclusively within the jurisdiction of the Court, and would cheerfully acquiesce in their decision.

The President informed the Respondent, that the Court would take time to consider his motion, and would be in session tomorrow morning at 11 o'clock; upon which the Respondent, the Managers, and the Members of the Hon. House, withdrew.

It was then moved that the chambers and galleries be cleared of spectators.

Mr. Dwight thought that the proceedings being properly of a public character, spectators should be allowed to remain throughout the whole.

Mr. Sullivan said, that there was a distinction to be observed;—that when the accused was present, and the trial was actually going on, the Court should be open; but that it should be otherwise when the Court were deliberating on the course they should pursue;—and he cited the precedent of Judge Chase's trial.

Upon a vote being taken, the House was ordered to be cleared.

After sitting about an hour with closed doors, the House was again opened to spectators.

Mr. Sullivan moved that the Senate pass an order to prohibit the publication of the articles of impeachment at present. Mr. S. supported his motion by remarking upon the impropriety of submitting the specific articles to public discussion before the Court were ready to investigate them, and urged the practice of other courts in similar cases.

The President said the Clerk was not authorized to furnish a copy of the articles. It seemed also to be the general sense of the Court that they ought not to be published, although no express order was passed on the subject.

The Court was then adjourned to tomorrow morning at half past 10 o'clock.

HOUSE OF REPRESENTATIVES.

TUESDAY, FEB. 6.

Mr. King from the managers of the impeachment, reported that they had carried to the Senate the articles &c.

The Hon. Mr. Varnum came down with a message to inform the House that the Senate were about to organise themselves into a Court of Impeachment, for the trial of James Prescott Judge of Probate &c.—that seats have been assigned for the managers, in the area opposite to the Chair of the President, and that chairs have been appropriated for the members of the House upon the right of the President.

Ordered, that the House will this day attend the Hon. Senate upon the trial of James Prescott, Judge of Probate, for misconduct and maladministration in his office. And the House proceeded in a body to the Hon. Senate, after which they returned to their own room.

IN SENATE.

WEDNESDAY, FEB. 7.

The Senate sat with closed doors till 11 o'clock. At half-past 11 Mr. Lyman was charged with a message to inform the Hon. House of Representatives that the Senate was about to resolve itself into a Court of Impeachment for the consideration of the articles exhibited against Judge Prescott.

In a few minutes Mr. Tudor came up with a message from the House, and informed the President that the House had received notice of the intention of the Senate, and would prepare to act accordingly.

COURT OF IMPEACHMENT.

Commonwealth vs. James Prescott, Esq. Judge of Probate, &c. for the County of Middlesex.

Soon after, the Speaker, the six Managers who attended yesterday, the other members of the House, the Respondent, and his Counsel, came in and took their respective seats.

The Crier opened the Court by Proclamation, and the Respondent was called.

The President read the Respondent's motion of yesterday, praying for a continuance to the first session of the next General Court.

The President put the question on granting the Respondent's prayer, and it was decided by yeas and nays as follows, viz:

YEAS.—Messrs. Doolittle, Bigelow, Dwight, Lyman, Williams, Gardner and Gray—7.

NAYS.—Messrs. Bourne, Thomas, Ruggles, Whittemore, Sullivan, Allen, Reynolds, Longley, Tufts, Parker, Hunewell, Pickman, Bartlett, Welles, Brooks and Varnum—16

So the Respondent's prayer was refused.

An order for the assignment of a day was read by Mr. SULLIVAN, who moved that the blank therein should be filled with the first Wednesday of May next.

Mr. PICKMAN moved to amend by striking out the first Wednesday of May, and substituting Tuesday the 20th inst. at 10 o'clock, A. M. as the

time to hear the Respondent's answer, and of Wednesday the 21st at 10 o'clock, A. M. as the time of proceeding to trial

Mr. WILLIAMS called for a division of the question.

Mr. HOAR (Counsel for Respondent) did not know whether it would be proper for him to speak on this question. He professed himself entirely unacquainted with the rules of that Hon. Court, and rose merely to ask, whether he could with propriety be heard on the motion before the Court.

Mr. PICKMAN inquired, as to a point of order, in general terms, whether Counsel should be allowed to address the Court on a motion from one of its members.

The PRESIDENT decided, that in a matter of so much consequence to the Respondent it must be in order for him to be heard, and directed his Counsel to proceed.

Mr. HOAR then said that, on examining the articles of impeachment last evening, the Respondent had found that in relation to the facts stated in one of them, it would be necessary for him to send into a neighbouring state for the purpose of obtaining evidence. It was uncertain whether the witnesses to be examined would easily be found, and if they should, whether they would not require some time to recollect all the circumstances to be inquired of. He presumed the sole object of this impeachment on the part of the House of Representatives, was to ascertain by a full and fair examination whether the Respondent was in truth innocent or guilty of the several charges exhibited against him. He averred that if only the single article alluded to had been exhibited, it would not have been possible for the Respondent to have prepared his evidence upon that alone within the very short time limited in the amendment proposed ;— and that if that amendment should be adopted, it would not be possible for him as Counsel for the Respondent to submit such a course of remark on the Respondent's case as the Court must deem necessary to the equitable administration of justice. With regard to the fourteen other Articles it would be necessary for the Respondent to send to various and distant parts of the County of Middlesex, (in which County the acts complained of are alleged to have been committed,) to get evidence of certain facts explanatory of the charges contained in them. Each one of these inquiries, if the Respondent was to bestow on them that degree of attention which he owed, as a duty, to the Hon. House of Representatives and to himself, would necessarily occupy not one or two days only, but a considerable part of the whole time allotted for preparation. Mr. H. said he could not believe it necessary for him to go at length into an argument on this question, before so many gentlemen who must have been accustomed to estimate the difficulty and delay of procuring evidence, and making preparations for trial That it was usual in ordinary cases to grant as much time as had been asked for by the Respondent, and that it could not be thought otherwise than reasonable that such an indulgence should in this case be extended to him. That if so early a day should be assigned as that proposed by Mr. Pickman's amendment, the Respondent would undoubtedly be obliged to submit at that time a new motion of postponement ; and would be able to satisfy this Hon. Court abundantly, that a farther continuance would be absolutely necessary to the attainment of justice.

Mr. KING said, that the managers, acting in behalf of the House of Representatives, did not deem it to be their duty to interpose an opinion in the preliminary proceedings of the court, and that they were willing that such time should be allowed to the respondent as the court should think proper.

The question was then taken for striking out, and carried in the affirmative.

YEAS.—Messrs. Bourne, Thomas, Ruggles, Whittemore, Bigelow, Allen, Reynolds, Tufts, Parker, Williams, Pickman, Bartlett, Gray, Brooks, and Varnum.—15.

NAYS.—Messrs. Doolittle, Sullivan, Longley, Dwight, Lyman, Gardner, Hunewell and Welles. —8.

The question was then taken on the other part of Mr. Pickman's motion and determined in the negative.

YEAS.—Ruggles, Whittemore, Allen, Reynolds, Pickman, Bartlett, Gray and Varnum.—8.

NAYS.—Bourne, Thomas, Doolittle, Sullivan, Bigelow, Longley, Tufts, Dwight, Parker, Lyman, Williams, Gardner, Hunewell, Welles and Brooks. —15.

Mr. LYMAN moved as a substitute for the part struck out that the trial should be postponed to the first Tuesday of the first session of the next General Court. Decided in the negative.

YEAS.—Messrs. Doolittle, Bigelow, Dwight Lyman, Williams, Gardner and Pickman.—7.

NAYS—Messrs. Bourne, Thomas, Ruggles, Whittemore, Sullivan, Allen, Reynolds, Longley, Tufts, Parker, Hunewell, Bartlett, Welles, Gray, Brooks and Varnum —16.

Mr. WILLIAMS moved as a substitute that the second Wednesday of March next, should be assigned for the trial. The motion was carried.

YEAS —Messrs. Bourne, Thomas, Ruggles, Whittemore, Bigelow, Allen, Reynolds, Longley, Tufts, Parker, Williams, Lyman, Gardner, Hunewell, Bartlett, Welles and Brooks.—17.

NAYS.—Messrs Doolittle, Sullivan, Dwight, Pickman, Gray and Varnum.—6.

The President inquired if the respondent or the managers had any motion to offer.

Mr. HOAR after consulting with the Respondent, said that after the order which had just passed, he presumed it would not be proper to submit a motion for an extension of the time allowed the Respondent for preparing his defence The Respondent had fears that he should not be able to make the necessary investigations in so short a time as had been assigned him, but that he would use his endeavours to be ready, as he was well aware that it was his duty to submit to whatever the Court should think proper to order on the subject. From the Respondent's knowledge in relation to the facts mentioned in some of the articles, and his ignorance of those alluded to in others, the Respondent thought that he might be able to prepare his defence against some of the articles, but not against all within the time assigned. Mr. H thought it was his duty to make these things known to the Court, although he deemed it improper, after the order which had been passed, to make a motion for a further time.

Mr. SULLIVAN suggested that it would be proper that motions for continuance should be supported by affidavit as is usual in other courts of justice, that the court ought not to act on these general suggestions of the parties. He therefore moved that the Court should adjourn until tomorrow at 11 o'clock, in order that the Respondent might have time to make an affidavit of such facts as he wished to present to the Court.

Mr. HOAR said the Respondent would be grateful for an opportunity to state the reasons for requesting further time, and he wished that such opportunity might be given, as proposed by Mr. Sullivan.

Mr KING moved to amend the 15th article by inserting the word *Jonas* in the place of *Joseph*, if the Respondent would consent to such amendment.

Mr HOAR answered that the Respondent had

no objection, and the article was amended accordingly.

The Court adjourned at 12 o'clock to tomorrow at 10 A.M.

IN SENATE.

Ordered, that a committee be appointed to inquire whether the Senate can sit as a Court of impeachment after the Legislature shall be prorogued

Messrs Williams, Lyman and Sullivan were appointed on this Committee.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, FEB. 7.

The Hon. Mr. Lyman came down with a message to inform the House that the Senate were now organizing themselves into a Court of impeachment Mr. Tudor was charged with a message to the Hon. Senate to inform them that the House would attend forthwith. The House then proceeded in a body to the Senate Chamber, where they remained until the Court adjourned.

IN SENATE.

THURSDAY, FEB. 8.

The committee appointed to consider and report whether the Senate have authority to sit as a court of impeachment after the adjournment of the Legislature reported, that they cannot find any constitutional provision which will authorize the Senate to sit as a court of impeachment, except during the session of the General Court.

Soon after 11, the President said that the hour had arrived to which the Court of Impeachment was adjourned.

Mr. BIGELOW was charged to notify the House of Representatives that the Court was about to be opened.

Mr. STURGIS came up from the House to inform the Senate that the House having been so notified would immediately attend.

The Speaker, Managers, &c. in the same order as yesterday, entered and took their seats.

COURT OF IMPEACHMENT.

Commonwealth vs. James Prescott, Judge, &c.

The Court was then opened by proclamation, and the Respondent called.

Mr. HOAR rose and said that by leave and direction of the Court, the Respondent had prepared an affidavit, which he begged leave to read.

I, James Prescott, depose and say, that it will, as I believe, be necessary in my defence on the trial of the impeachment now pending against me before the Hon. Senate, to procure the testimony of a witness or witnesses from the State of New Hampshire; the testimony of witnesses from the towns of Groton, Pepperell, Littleton, Tyngsborough, Townsend, Billerica, Sherburne, Burlington and Medford in the County of Middlesex, and in Harvard in the County of Worcester; that the facts and circumstances connected with the charges contained in some of the articles of said impeachment, if any of said facts be true, having been forgotten by me, it will be necessary for me to examine numerous documents in the Probate Office in said County, and that, for the purposes aforesaid, for instructing my counsel and giving them opportunity to compare the charges aforesaid with said testimony, and with the constitution and laws of the Commonwealth, and to prepare to exhibit a full and fair statement of said case to the Hon. Court, which is to hear and determine the same, a considerable time will be necessary. I am fully confident that it will not be in my power so to prepare for my defence, that the Hon. Court can be made acquainted with the facts essential to a just decision of said cause, in a less time than two months from this day.

JAMES PRESCOTT.

Mr. LYMAN said that he had yesterday been in favor of extending the time for the Respondent to answer, and supported as that proposition now was by affidavit, he saw no pretext upon which the indulgence could be reasonably refused. The Respondent had declared on oath that he could not be ready in a less time than two months. It was certainly important that this Court should not only administer justice, but that they should also guard against the appearance of precipitation or unfairness in relation to the Respondent. He therefore moved the following order, viz :

Ordered, That instead of the time heretofore assigned, Wednesday, the 11th day of April next, at 10 o'clock, A. M. shall be the time for receiving the answer of James Prescott, Esq. Judge of Probate, &c. on the articles of Impeachment preferred against him by the House of Representatives, and of proceeding to the trial of the same.

Mr. DOOLITTLE moved to amend by striking out Wednesday the 11th of April and inserting the second Thursday of the first session of the next General Court.

The question on the amendment being taken by Yeas and Nays, it was rejected by the following vote.

YEAS,—Messrs. Bourne, Doolittle, Dwight, Williams, Gardner, Pickman and Gray—7.

NAYS—Messrs. Thomas, Ruggles, Whittemore, Sullivan, Eastman, Bigelow, Allen, Reynolds, Longley, Tufts, Parker, Lyman, Hunewell, Bartlett, Welles, Brooks and Varnum—17.

Mr. PICKMAN moved to amend by striking out the 11th of April and inserting the 18th—assigning as a reason that the town meetings were to be held on the second Monday of April for the people to give in their votes upon the amendments to the Constitution, and that these meetings might be continued till the 11th.

Mr. LYMAN accepted this amendment, and the order thus amended was passed by the following vote:

YEAS—Messrs. Bourne, Thomas, Doolittle, Sullivan, Eastman, Bigelow, Allen, Longley, Tufts, Dwight, Lyman, Williams, Gardner, Hunewell, Pickman, Bartlett, Welles, Gray and Brooks—19.

NAYS—Messrs. Ruggles, Whittemore, Reynolds, Parker and Varnum—5.

Mr. KING said he was instructed by the Board of Managers to inquire if any and what order had been taken by the Court as to subpœnas for summoning witnesses.

The PRESIDENT said an order had been taken and he referred to the Record.

The CLERK read from the Record the provision which had been made, which extended only to bringing in the witnesses themselves.

Mr. KING said it might also be necessary to require witnesses to bring into Court books, papers and documents, and that the Court might see fit upon the suggestion so to amend their order as to extend to this further power.

By direction of the President this motion was submitted in writing as follows, viz :

Ordered, that the Clerk be authorized and required upon application of the managers in behalf of the House of Representatives, or of the Respondent, or of his Counsel, to issue subpœnas to any person or perons having the custody of records, papers or documents, which may be material as evidence on the trial, to produce and exhibit the same.

The order was passed unanimously.

The PRESIDENT then asked if either party had any other motion to submit.

Mr. HOAR said the Respondent had none.

Mr. KING requested time for the Managers to consult and after a consultation of a few minutes, read the following order.

"Ordered, that the Respondent file with the Clerk of the Senate his answer to the several articles of impeachment exhibited by the managers in behalf of the House of Representatives against him, and now pending before the Hon. Court, ten days before the said eighteenth day of April next, and that the said Clerk be required to furnish the managers with a copy thereof."

Mr. HOAR said the Respondent had no objection to make, and the order was passed unanimously.

No other motion being made by either party, the Court was adjourned to 10 o'clock in the morning of the 18th day of April next; and the several parties withdrew.

HOUSE OF REPRESENTATIVES.

THURSDAY, FEB. 15.

Mr. HUBBARD, of Boston, stated to the House that he had been applied to by Judge Prescott to assist in his defence against the articles of impeachment which had been exhibited by the House. He observed that by one of their rules no member was permitted to act as counsel for either party before a joint committee of the Legislature, or a committee of the House. His case did not come within the letter of the rule, but he thought it did within the spirit of it. He therefore requested, if it was consistent with the honor and dignity of the House, that they would grant him permission to act as counsel for Judge Prescott. He stated some personal considerations which induced him to make the request, and observed that precedents of such an indulgence were common in the British Parliament.

On motion of Mr. GRAY, Mr. Hubbard's request was granted.

IN SENATE.

TUESDAY, APRIL 17.

This being the day to which the General Court was prorogued, for the purpose of proceeding with the trial of the case of Impeachment pending before the Senate, a quorum of this body was formed and a committee was appointed, to be joined by the House, to inform his Excellency the Governor that they are ready to receive any communication he may think proper to make to them. The Senate sat a short time with closed doors, and adjourned to 9 o'clock tomorrow morning.

HOUSE OF REPRESENTATIVES.

TUESDAY, APRIL 17.

The Speaker took the chair at 11 o'clock, but there being no quorum, the House adjourned to 4 o'clock, P. M.

AFTERNOON.

The Speaker took the chair at 4 o'clock, but a quorum not appearing, the Speaker was requested to address letters to the members of the neighboring towns, not present, informing them their presence was necessary, and the House adjourned to 9 o'clock tomorrow morning.

IN SENATE.

WEDNESDAY, APRIL 18.

COURT OF IMPEACHMENT.

Commonwealth vs James Prescott, &c.

A few minutes before 11 o'clock, on motion of Mr. Pickman, a message was sent to the House of Representatives to inform them that the Senate was about to resolve itself into a Court for the trial of the impeachment of James Prescott, Judge of Probate, &c. for the County of Middlesex. Mr. Welles was charged with the message.

Immediately after, Mr. Sturgis, of Boston, entered with a message from the House of Representatives, stating that the House with their Managers, would attend forthwith.

The Speaker, Messrs. King, Dutton, Shaw, Fay, and Leland, Managers on the part of the House, together with the rest of the members of the House, entered the Senate Chamber and took the seats assigned them respectively. Messrs. Baylies and Lincoln, of the board of Managers, were absent.

The Court having been opened by proclamation, the President administered to Mr. Hyde, a senator from Berkshire, who was not sworn at the last session, the oath prescribed to be taken by members of the Court.

The Respondent came in, attended by Messrs. Wm. Prescott, George Blake, Daniel Webster, Samuel Hoar, Samuel Hubbard, and Augustus Peabody, his counsel.

The President said that the time appointed for this trial had arrived, and asked the Respondent if he was now ready to make answer to the articles of impeachment preferred against him.

Mr. WEBSTER on the part of the Respondent replied, that he appeared there with his learned associates as Counsel for the Respondent. That his Hon. Client had been furnished with a copy of the articles exhibited against him, and had prepared an answer, which he was instructed to read to the Court. Mr. Webster then read the answer as follows:

The ANSWER of JAMES PRESCOTT, Judge of the Probate of Wills, and for granting Administrations, for the County of Middlesex, to the Articles of Impeachment exhibited against him by the House of Representatives of the said Commonwealth.

AND now this Respondent, in his own proper person, comes into this Court, and protesting that there is no misconduct or mal-administration in his said office, particularly alleged in the said Articles of Impeachment, to which he is bound by law to make answer; and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of said Articles, and each and every of them, nevertheless offers the following facts and observations, by way of answer to the said Articles.

The first of the said Articles of Impeachment charges and accuses the Respondent as follows, viz. That he, "on the 14th day of October, 1816, at his office in Groton, in said County, and not at any Probate Court held according to law did decree and grant letters of Administration on the estate of one Nathaniel Lakin to one Abel Tarbell, Esq. and thereupon did issue a warrant of appraisement and order of notice, and did then and there wilfully and corruptly demand and

receive of said Tarbell for the business aforesaid, as fees of office, other and greater fees than are by law allowed, to wit, the sum of five dollars and fifty eight cents." And that "the Respondent did then and there refuse to make and deliver to said Tarbell an account of the items for which said sum was paid, although by said Tarbell thereto requested." And that "the Respondent afterwards during and upon the settlement of said estate, did wilfully and corruptly demand and receive of and from said Tarbell divers sums, as fees of office, other and greater than are by law allowed therefor; to wit, the sum of thirty-six dollars and nineteen cents."

The matter of charge contained in this Article appears to consist of three separate and distinct accusations, viz. 1. That the said letters of administration were granted and decreed by this Respondent improperly, because not done at any Probate Court, held according to law. 2. That illegal fees of office were demanded and received by the Respondent, for granting said letters and for the performance of other official acts, respecting the settlement of said estate. 3. That the Respondent, although requested, refused to give to the parties an account of the items of fees, so demanded and received by him.

To these several and distinct accusations the Respondent will now proceed to make distinct answers.

And first, as to the regularity and legality of the Court holden at the time, when said letters were granted.—This respondent doth truly feel, and would express, the most unfeigned astonishment at this article of charge. The ground of it is to him wholly unknown. He has supposed that the holding of said Court, in the manner in which it was holden, was not only according to usage, but expressly authorized and provided for by a statute of the Commonwealth; and he is entirely unable even to conjecture the reasons on which this part of the article is expected to be supported. The statute of March 7, 1806, made expressly for fixing the times and places of holding the Court of Probate in the County of Middlesex, declares; *that when it shall appear to the Judge to be for the general benefit, or the interest of individuals, he shall be and he is fully authorized and empowered to appoint such times and places, other than those particularly mentioned in said act, for holding said Court, as he shall deem expedient, by giving public notice thereof, or notifying all concerned.* This law, as far as this Respondent knows or believes, has ever been, and is still, unrepealed and in full force. This plain and express statute provision renders it unnecessary to consider how far, and for what purposes, the Courts of Probate of this Commonwealth are Courts always open, and authorized, at all times, to receive applications and transact business, upon due notice; and whether the laws, made at several times, under the colonial and provincial governments, as well as under the present constitution, requiring Judges of Probate to hold Courts at stated days and places, are to be considered as restrictive of their powers, as to the times of holding their Courts, or only as directory and positive; to the end only, that there might be certain fixed days and places, when and where suitors might be assured of an opportunity of transacting their concerns in those Courts.

Under the provisions of this statute, this Respondent held a Court at Groton, on the 14th day of October 1816, at the instance, and on the request of the said Tarbell, and for his convenience, having first given due notice to all persons interested in the said Court. And this Respondent says, that he did, acting under the authority and according to the provision of the statute aforesaid, deem it expedient to hold said Court, at the time and place aforesaid, and for the purposes aforesaid; and that he did cause due and legal notice of the time and place of holding said Court to be given to all persons concerned therein. And this Respondent further saith, that he never knew or heard of any complaint, or dissatisfaction of the parties concerned in said business, either then, or at any other time since, on account of the time or place of holding said Court; nor has he ever heard or learned that any evil or inconvenience resulted therefrom, or that any one ever made a question of the propriety or legality thereof, until the exhibition of the said Articles against him. And the said Respondent is at this moment wholly at a loss to know, by what construction of said statute, if unrepealed, the Honorable House of Representatives has found his conduct in this respect to be illegal; and he is equally at a loss to know, by what other statute, the said statute is supposed to have been repealed. And he humbly submits, that if he have misconstrued this statute, which he trusts he has not done, or any other statute, which is supposed to repeal it, (of which he has no knowledge, nor ever understood, nor believed that any body supposed there was any such repealing statute) he ought still not to be adjudged guilty in the premises, if his error shall appear to be nothing more than an error of judgment. He confidently trusts, however, that he has committed no error in this particular; that there is the unambiguous text of a written law to authorize whatever he has done in the premises, and that his conduct, in this respect, was in every particular justifiable and proper.

The second matter of charge, in the said first Article, respects the demanding and receiving, by this Respondent, of illegal fees

of office, for granting administration, and for other official services respecting said estate. It is known to the members of this Honorable Court, that the compensation allowed to Judges of Probate, in the several Counties of this Commonwealth, has not been uniform, either in amount, or the manner of making it; that in some Counties, the Judges have received both a stated salary and fees, and in others that they received fees only.

This Respondent has been compensated, by fees alone, for the whole time in which he has holden his office. It is also well known, as this Respondent presumes, to the members of this Court, that the statute of this Commonwealth, commonly called the *Fee Bill*, does not define and limit the fees, which shall be paid for all the official acts, necessary to be rendered and performed by Judges of Probate. Some of those most common and important are enumerated, and the fees thereof defined; others are stated, and the fees defined, subject to conditions and qualifications, of which the person receiving the fees is to be judge; and of others, which are necessary, and are applied for, and rendered in the settlement of almost every estate, the statute says nothing. For example, there are, among many others, the following services and duties, performed and rendered by the different Judges of Probate in the Commonwealth constantly, for which no particular fees are prescribed by the statutes, viz:

Petition for administration; decree thereon; notices and record. Executor's petition for probate of will; decree thereon; letters testamentary; duplicate order of notice. Letters of guardianship over persons *non compos mentis*; or spendthrifts; complaint to authorize such letter; order and warrant to Selectmen; citation to party; return, trial and decree. Petition for the guardianship; decree thereon; bond; duplicate order; notices and record. Petition for guardianship to minors and decree thereon. List of debts, when petition is made to Supreme Judicial Court or Court of Common Pleas, for the sale of real estate; petition for the sale and certificate thereon; bond for the sale; approval thereof; certificate of approval and licence. Widow's petition for allowance, decree thereon and warrant. Widow's petition for dower, decree and warrant. Petition for the sale of personal estate, decree and warrant. Representation of insolvency, and warrant. Petition for sale of real estate, orders of notice and copy, &c. &c.

It is also well known that the jurisdiction of the Probate Court, consists of two parts, technically called its *contentious* & its *amicable* jurisdiction; the *first* embracing those controversies in which adverse parties appear to demand the judgment of the Court on matters in difference between them; the *latter*, those cases in which, as the statute expresses it, there is no litigation, but where the party applies to receive such regular documents and authorities, as are necessary to enable him to assume a particular character, such as that of an administrator, or to perform certain legal acts in that character. In this last class of cases, the persons applying have, in a great majority of instances, the assistance of no counsel whatever; and in as great a majority, are wholly uniformed themselves, of what is necessary to be done by themselves. It is well known, that persons thus situated expect to receive at the Probate office, information and instruction, respecting their duties; and also to be furnished with all necessary papers for them to execute, in order to obtain the order or decree, or authority required.—For example, an Administrator wishes to petition for leave to sell personal property.—He cannot, in nine cases out of ten, draw the Petition himself; it is not made the official duty of the Judge to draw it, but only to decide on it, when it is presented: it is not the duty of the Register to draw it, but only to record it, and to record the order that shall be made upon it. A resort to counsel, therefore, would be, in every such case, the only alternative; and as there are no solicitors or attornies in constant attendance on these Courts, the expense of resorting to Counsel for the purpose of obtaining these formal but necessary papers, would be, in many cases, very considerable. Hence there has been a practice, as this Respondent believes, in all the Probate Courts in the Commonwealth, that such papers should be furnished, at the Probate Office, and fees paid therefor on the same scale, or at the same rate, at which other papers emanating from the Court, are to be paid for by the statute.—If, for example, application be made for administration on the estate of an intestate, there must be a memorial or petition, setting forth the right, in which the party applies; whether as widow of the deceased, or next of kin, or creditor. And if as next of kin, whether there be no widow, or whether the application be made with the consent of the widow; or if as creditor, whether there be neither widow, or next of kin; or whether the application be made with their consent, or for what other cause. This memorial or petition, as this Respondent has already observed, in most cases cannot be drawn by the party himself; the expense of applying to counsel would not be small, and for a long course of time, probably from the very first institution of these Courts, the practice has been to furnish this and similar papers from the Probate Office; the expense of it to be included in the general amount of expenses of administration. The Respond-

ent has stated this merely by way of example; as it is material for a just defence of himself, and the vindication of his character, that he should set forth the actual state of the law, respecting fees in the Probate Office.

From this actually existing state of the law, it results, as might naturally be expected, that between different Counties, some difference exists, as to the expense of obtaining administration and settling estates; either, because a few cents more or less, may be charged, in one place than in another, for the same paper; or, because more correct and complete papers are required, in one Court than another, as the foundation of the orders and decrees of the Court.—So that this Respondent verily believes, that no man can tell what would be the precise expense of obtaining a letter of administration, in any County of this State, merely by examining the fee bill, and without reference to the usage and practice in the Probate Office of such County. It may be, that in the Office which this Respondent has holden and exercised, more complete and regular papers and proceedings may have been required, than in some other Counties. He has too much confidence in the justice of this Court to suppose, that it would attribute that fact, if it existed, to a base and unworthy motive, of multiplying papers and documents for his own benefit, unless some substantial evidence be produced to make out such a charge. Before such an imputation be cast upon him, let it be stated and shewn, what unnecessary paper or voucher this Respondent has been in the habit of requiring; in what cases he has sought to enhance his own fees, by imposing unnecessary burdens on suitors; or how, or when, he has insisted on more accuracy and particularity, in proceedings before him, than the good of the parties themselves, or the public benefit requires. And on an occasion so deeply affecting his interest, his character, and his honor, as the present, he feels himself justified in appealing to the higher Tribunals of Justice, in which his proceedings are examined and revised, and to the whole *Profession* in the County wherein he is Judge, for an opinion on the regularity and accuracy, with which proceedings before him have been conducted, and on the effect thereof, upon the interest of parties, and of the public.

This Respondent humbly trusts, that this Honorable Court will not adjudge him guilty of transgressing the law, in regard to fees, until it be shewn what that law is, and in what measure, and to what extent, he has transgressed it. It can never be made plain and manifest, that he has wilfully violated the law, till it be shewn that the law itself is plain and manifest. This Respondent has already observed, that in his judgment, no man can tell, what would be the expense of a Probate proceeding, in any County in this State, simply by the *fee bill*, and without reference to the practice in such County. And the Respondent derives great confidence in this opinion, from the articles of impeachment themselves. In the very article now under consideration, as well as in others, the Honorable House of Representatives accuse this Respondent of taking illegal fees, for services therein mentioned; but they do not state, nor set forth, what the legal fees would have been for those services, or what excess the Respondent has received. The Respondent does not mention this merely as a technical objection to the form of the article, but as proof that there is no plain, well known, certain and uniform law on this subject, independent of local practice or particular usage. The Honorable House of Representatives allege, in this article, that for granting letters of administration, issuing warrant of appraisment, and order of notice, this Respondent wilfully and corruptly received $5 53; which sum is alleged to be a greater sum than the law allows. But it is not stated, what sum the law does allow, for such services, or what is the amount of illegal fees, alleged to have been received. It is represented, that the Respondent took more than legal fees, for an order of notice. It is admitted therefore, that some fee may be legally taken for such an order; and yet it is not possible to refer to any express provision of law warranting it. There is no such express provision of law. While the Respondent, therefore, is accused of transgressing the law, and of receiving illegal fees, the law, which he is said to have broken, is not produced, and the legal fees are not stated, nor the measure of his supposed offence ascertained or defined.

This Respondent humbly submits to the consideration of this Honorable Court, that the practice of paying Judges of Probate, in whole or in part by fees, has always prevailed in this Commonwealth; and was borrowed, probably, from the usage of the Courts, which exercise similar jurisdiction in England.

In these last mentioned Courts, the Judges and Registers, have been, and still are, as this Respondent believes, paid by fees of office; the particular items of which are established by usage, or the authority of the Courts themselves, according to what is thought just and reasonable, and not by an act of Parliament.

In this Commonwealth, soon after the granting of the Charter of William and Mary, the fees for certain services of the Judges and Registers were fixed by law. Subsequent statutes have extended and altered these provisions. But still there are very many cases, in which the amount of fees is to be settled and determined, without any provision of the statute in that behalf.

If this be an improper or unsafe state of the law, this Respondent is not answerable for it. If it be unwise or injudicious, thus to place a public officer in a situation, in which he must, of necessity, in some cases judge of the amount of his own compensation, it is not the fault of this Respondent that such is his situation. He claims no infallibility for his own judgment; he does not deny that his judgment, like the judgment of other men, may mislead him, without his knowledge, in cases in which he himself has an interest. But he confidently maintains that nothing short of plain oppression, of corruption, and wilful mal-practice can be a sufficient ground for a judgment against him. If there be not a plain and well known law, if any thing be left to his judgment and discretion, it must be shewn, that he has wilfully and corruptly abused that discretion, before this Honorable Court can pronounce on him a sentence of condemnation.

This Respondent readily admits that excessive and extravagant demands of fees for official services, especially if repeated and continued, would be evidence of corruption, or might amount to extortion, if done under color of office. He is entirely willing to be judged, upon this principle and by this rule. If extortion be proved against him, he neither wishes nor expects acquittal. But he knows that this cannot be proved against him; and he solemnly protests against being condemned, because in a particular instance he may have misjudged or mistaken his duty; he invokes that universal sense of justice, which dwells in the breast of every honorable man, to protect him from condemnation, on any such ground as his having received, not an extravagant, but a moderate and reasonable fee of office, in a case in which, whatever others may think, he thought, and had at least some reason for thinking, that such fee properly and legally appertained to the office which he held.

Before adverting more particularly to the case

stated in the first Article, this Respondent thinks it proper to make a few farther observations on the subject of these special Courts, which the statute authorizes to be holden, and which occasionally are and have been holden.

These Courts are holden, not for the convenience of the Judge, but for that of the parties. It is the interest of the Judge, of course, that his Courts should be holden as seldom as possible, and that as much business as possible should be despatched at one Court. Every special Court is a new call on his time and attention, and is often attended with much personal inconvenience to himself. The law does not make it his duty to hold any such special Courts; but it authorizes him so to do, if he see fit, and if the interest and convenience of parties seem to require it. They are therefore always holden, when holden at all, not for his benefit, but for that of others. From the nature of the case, there is some increase of expense necessarily attending the transaction of business, in these special Courts. The Register does not attend these Courts, and the services ordinarily performed by him, are therefore, to be procured to be performed by some one else. If a letter of administration, for example, be granted at such a Court, it cannot be presently recorded, because the Register is not there to record it. Therefore a copy must be taken and certified by the Judge, and kept for, or transmitted to the Register; in order that a regular record may be made up: and so of all other papers. The expense of these copies, and other similar small charges, must be borne, either by the Judge himself, or by the party, at whose request, and for whose benefit they are incurred. Hence it has been well understood, by those who have frequent occasions to attend these Courts, that the transaction of business therein is liable to be attended with some small augmentation of expense; and information of this is ordinarily given to persons applying for such Courts.

Having submitted these general facts and observations, this Respondent will now proceed to a more particular statement of the circumstances of the case mentioned in the first article. This Respondent admits, that in October 1816, a letter of administration was granted by him to Abel Tarbell, on the estate of Nathaniel Lakin. He admits also, that for various fees and expenses, he received of said Tarbell the sum of $5,58; but he denies, that said sum was paid exclusively for the services and duties in the said Article mentioned. This letter of administration was granted at a special Probate Court holden for that purpose only, and for the convenience, and by the special request of said Tarbell. It was not attended by the Register; and this Respondent was therefore bound to see that proper provision was made to take and preserve copies of the papers and minutes of the proceedings, to enable the Register afterwards to make up a proper and regular record.

The papers and documents usually necessary for such an occasion, and which this Respondent believes were made and prepared on this occasion, are as follows, viz: A petition or memorial for the administration on said estate; decree of the Judge granting administration; the Letter of Administration; the administrator's bond for the faithful discharge of his duty; a warrant of appraisal; an order on the administrator to give notice, prescribing the form, according to the provisions of the statute; and the notices themselves, in triplicate, which are usually made out at the Probate Office. The whole expense of obtaining these papers, at a regular Probate Court, in the County of Middlesex, would have been $3,60; and in some Counties it would have been more.—The additional expense, arising from the various circumstances before mentioned, this being a special Probate Court, and unattended by the Register, appears to have been a few cents lower than two dollars; making in the whole $5,58.

This Court therefore will at once perceive, that in this case the Respondent, for the mere benefit and advantage of the party, assigned a day for the holding of this Court, and gave his own attention and time to it, which no law required him to do, which time and attention thus given, were therefore given entirely gratuitously; the amount received beyond the ordinary sum, being barely sufficient to defray the expense of the extraordinary clerical duty, which the case made necessary — And this Respondent now, upon these facts and circumstances, cheerfully and confidently submits to the judgment and justice of this Honourable Court, whether his conduct, in this particular, has been illegal and oppressive. The article proceeds further to charge this Respondent with having subsequently received, during and upon the settlement of said estate, wilfully and corruptly, the sum of thirty six dollars and nineteen cents, which, as it is alleged, is more than the legal fees in that behalf accruing and arising. Here, as before, this Respondent has great difficulty in answering the charge, because it is not definite and particular.— But he alleges and avers, that he received no illegal fees whatever, and that his own fees, the Register's fees, and as he believes, the expenses of an application to the Court of Common Pleas relative to this estate, together make up the sum of $35,24; which are charged and allowed in said administrator's account. And it appears from the record, that for the accommodation of the parties, this Respondent held six special Courts, for the transaction of the business of this estate. For a more minute and particular answer to this part of the article, the Respondent must reserve himself, till he shall be better and more fully informed of the particulars, on which the charge itself is founded. The only remaining charge in this article, is that which alleges, that this Respondent did refuse to make and deliver to said Tarbell an account of the items, for which said sum of $5,58 was paid, though thereto by the said Tarbell requested. To this the Respondent can only say, that he has no knowledge or recollection of any such demand and denies that any such was ever made. He could possibly have had no expectation, if he had the wish, of keeping any thing secret by such refusal, as the amount of the sum received by him was of course to be entered in the administrator's account nor was there any motive for any concealment whatever. If there be any evidence therefore of the fact thus alleged against the Respondent, it must be founded in mistake or misapprehension, and this he confidently trusts he shall be able to shew, when he shall be informed of the nature of such evidence, and what it is. At present he is wholly unapprised of any such evidence. He is perfectly conscious, that the fact is not as is charged, and he shall meet the evidence, therefore, when it is produced, in such manner as may be in his power. This Respondent has now gone through the observations, which he wishes to submit on this first article of Impeachment. He has stated no fact, which he does not believe to be true, and which he is not willing to maintain by his oath, if so required. And he avers, that he is not guilty of the misconduct or mal-administration charged in this first article, or any part thereof.

The second Article of Impeachment charges the Respondent, with having transacted Probate business, at a time and place, other than such as are authorized by law; and, also, with having received illegal fees, for certain Letters of Guardianship, granted to *Lemuel Parker*,, over the persons and estates of *John F. Shepherd, John Shepherd,*

and *Francis Shepherd*. For an answer to the first of these charges, the Respondent refers to what has been stated in the answer to the first Article.

As to the second, he admits that on the 29th of June 1818, he did grant Letters of Guardianship to the said Parker, over the persons aforesaid, and did receive fees therefor; but he denies that he received any illegal or improper fees whatever.

The facts and circumstances attending this transaction are substantially as follows. About the period alluded to, there lived in Pepperel, one John F. Shepherd, mentioned in the article. He had a wife and two sons, John Shepherd and Francis Shepherd. These sons were supposed, by reason of mental debility, to be incapable of taking care of themselves, and as the father was a spendthrift, the family either then was, or expected soon to become a charge upon the town. An annuity had been given to Mrs. Shepherd, the wife of John F. Shepherd, by the will of her father. The overseers of the poor of the town of Pepperel were desirous of securing this annuity, so that the annual payments should not be wasted, by the said husband, but appropriated and applied to the maintenance of the wife and family. They deemed it proper to take legal advice on this subject, and applied to this Respondent, as a practising lawyer, for his opinion in the case; which opinion he gave, and charged and received therefor a proper and just fee. Finding that the overseers, as such, could exercise no authority or interference in the case, an application was then made to this Respondent, as Judge of Probate, for the appointment of a Guardian over the three Shepherds, the father as a spendthrift, and the sons as persons, *non compotes mentis*. An inquisition issued on this application in common form, and being returned, and no objection being made, the said Parker was appointed Guardian over these persons. No person appeared to resist the application, and it was accordingly granted, in usual form, and as matter of course. Being thus appointed guardian, the said Parker had further occasion for legal advice and assistance, with respect to the manner in which he should secure the aforesaid annuity; a subject which had no manner of connexion with any thing which had come or which was likely to come, before this Respondent as Judge; and on this subject, the said Parker desired, and this Respondent gave, as well he might, advice and direction as Counsel; and charged and received therefor, as well he might, a proper and reasonable fee. And this Respondent doth not know, but he supposes it probable, that these fees were paid to him, at the time when the said Parker paid the official fees for his letters of Guardianship. Whether this Respondent gave any receipt therefor, he doth not remember and cannot say, nor doth he know, nor can he say, precisely, what sum he charged and received for his advice as aforesaid. The official fees for the said letters and other necessary papers, would be $19,80; the additional expense, it being a special Court, would probably be two or three dollars, and the difference between the amount of these sums, and the sum paid by said Parker, was the amount due from said Parker to this Respondent personally, for professional advice and direction as aforesaid. Whether this Respondent had a right, in this case, to give professional advice, of which however he supposes no doubt can be reasonably entertained, is a question, which does not at present arise. He is charged in this article, with having demanded and received illegal fees of office; this charge he utterly denies, and it cannot be made good by now contending, that although he did not officially receive any excess of fees, yet that he did receive in another capacity money, which he had no right to receive. Reserving therefore, for a subsequent part of his answer any observations, which he may wish to submit on the charges of having acted as counsel, in certain cases, the Respondent concludes his answers to this article by averring, that he is no wise guilty of the misconduct and mal-administration charged therein.

The third, fourth, and fifth Articles of Impeachment, respectively charge the Respondent with having holden Courts in an illegal manner, and with having received illegal fees, in the cases of Benjamin Dix, administrator of Eri Rogers, Joseph Butterfield, administrator of Simeon Brown, and Lucy Allen, administratrix of Shobal C. Allen. For the general principles and observations applicable to these cases, the Respondent refers to what he has said in answer to the first Article. He wholly denies, that he has holden any illegal court, or received any illegal fees, as set forth in the third, fourth and fifth Articles, or either of them; and says, he is not guilty of the misconduct and mal-administration, as charged in said Articles, or either of them.

The sixth Article of Impeachment, advances against this Respondent an accusation of great importance, and of a most grave character.

It charges him with having been of counsel, and of having received fees, in a case pending in his own Court, before himself as Judge; & with having taken a retainer to carry on, before himself, and and to prosecute to a successful issue a legal process, in which there were adverse parties and adverse interests. It alleges in particular, that on the 23d day of May 1805, he was retained in behalf of Mary Trowbridge, as her attorney, to procure, in the Probate Court, the assignment to his client of an estate, of which she and her sister were co-parceners; and that he, as Judge of said Court, on the same day, did issue his warrant, for the appraisement of the estate, as preparatory to a final judgment in the case. It is not indeed further expressly said, that he did in fact, render a final judgment, in the premises, in favor of his client; but the general complexion of the article is such, as to make a clear and decisive impression, that this Respondent has been of Counsel, and taken fees, on matters judged and to be judged between party and party, in his own Court, and before himself.

The Respondent cannot but know and feel, how unfavorable an impression, such a charge, sanctioned by the House of Representatives, must necessarily make, on his case and on his character. And he cannot but most deeply lament, that that Hon. House should have given the sanction of its authority to a charge of such enormity against him, without a somewhat more exact knowledge of the facts attending the transaction. And this Respondent cannot but perceive clearly, and feel most sensibly, that however innocent he may be, of the matter of this charge, and however clear he may now be able to make his innocence appear, he still is a great and distressed sufferer under the effect necessarily produced, by the mere bringing of such a charge, on such authority, against him.

A short narration of the facts, connected with the subject of this Article, will put the Honorable Court in possession of the case, as it actually exists.

The Respondent, long before he was appointed Judge of Probate, had been Counsel for the said Mary Trowbridge. She lived in Groton, and with her sister, the wife of Francis Champney, who lived in New Hampshire, was coparcener of the estate alluded to, inherited from their ancestors.

The sisters were not on terms of amity or intercourse. The said Mary was in possession of the estate, and her sister's husband demanded rent, for his wife's part of it. The said Mary objected paying rent, but as rent was still insisted on, she wish-

ed to obtain a severance and division of the property. The Respondent was applied to, on her behalf, on this occasion; and he, for a long time, endeavored to obtain, either a severance of the property by agreement, or some other amicable adjustment of the difficulty. For this purpose, among other services, he made one journey to New Ipswich, in New-Hampshire, where Champney lived. These attempts proving all ineffectual, nothing remained but to resort to legal process, in order that the land might be either divided, or assigned to one of the sisters, according to the provision of law. Before the petition for this purpose was however actually presented to the Court of Probate, the Judge of that Court died, and this Respondent was appointed in his place. Having accepted the office, he immediately informed the parties in this case, that an embarrassment had arisen, and that he was, of course, indisposed to take judicial cognizance of a cause in which he had been counsel. And yet this Respondent supposes, that if no other arrangement had been adopted, it would have been his duty to have granted the common processes, and to have rendered judgment in the case, at least *pro forma*, so that the parties might have taken the cause to the higher Court; for otherwise he doth not know how the parties could ever obtain their rights, as no particular provisions, for such a case, then existed, as far as this Respondent knows. In point of fact, however, he never did adjudge the cause, even *pro forma*, nor do any thing further in the premises, except as hereinafter stated, and by the express desire of both parties. Both parties well knowing his situation in the case, and being now desirous of putting an end to the controversy, agreed that the land should be appraised by competent judges, and the moiety of one of the sisters conveyed to the other, by deed, for such sum as these appraisers should award. It was agreed also by the parties, that this Respondent should designate the appraisers, and he did so, and a formal warrant was issued, that they might be sworn. They appraised the land, the parties were satisfied with the appraisement, and deeds were executed releasing and conveying the moiety of Mrs. Champney to Mary Trowbridge.

This is the whole and true history of this transaction; and surely this Respondent may be allowed to express his regret and astonishment, that such an occurrence, fifteen years after it took place, without complaint or suggestion from the parties concerned, should now be made the foundation of such a charge as the Honorable House of Representatives have, in this Article, exhibited against him. And he avers that he is in nowise guilty of any misconduct or mal-administration, as charged against him, in this sixth article.

The seventh article accuses the Respondent, of having given advice and counsel, to one Whiting the guardian of certain wards, in and about the settlement of his accounts, as such guardian. This Respondent admits, that it is very probable that he rendered certain professional services to said Whiting, as guardian, as well he might do, for which he charged and received the customary fees; but he wholly denies that he was counsel of, or retained for, said Whiting in any controversy before him, in which said Whiting was party, or that he in that case, or any other, acted as counsel in any matter in judicial controversy before himself; and he denies that he charged said Whiting fees, as counsel, for any act or thing proper to be done by him as Judge; and in as much as the said Article does not state in particular, who the wards were, or what the advice was, or what circumstances existed making it improper in the Respondent to give professional advice in the case, he must reserve a more particular answer to this Article, till he shall be more particularly informed of the matters, of which he is herein accused; and so he saith that of the misconduct and mal-administration charged in said seventh Article he is in nowise guilty.

The eighth Article alleges, that in Nov. 1818, the Respondent, advised with and directed one Josiah Crosby, as his attorney and counsel, concerning the settlement of a certain account, then and there to be settled by said Crosby before him as Judge; and that the Respondent received two dollars therefor, and allowed it in the account.

This Respondent saith to this charge, that he has a very imperfect recollection of the transaction referred to in this Article. He is confident that at this time, he gave no advice to any executor, administrator, or guardian as such, in any civil action, and that he charged and received no fee, or compensation as counsel, for any thing which he ought to have done as Judge. He thinks that he recollects that the said Crosby had some individual personal interest connected with the estate, of which he happened to be administrator; that in relation to that interest, he was asked for, and gave professional advice, as well he might do. Farther than this he has no recollection. He must wait therefore the development of the circumstances in the evidence; perfectly satisfied that if no more than the truth appears, nothing can be substantiated to impeach his integrity or the propriety of his conduct. He says, therefore, that he is not guilty of the misconduct and mal-administration charged in this eighth Article.

As to the matter charged against this Respondent in the ninth Article, he saith that he denies the existence of any such occurrences or circumstances, as are therein mentioned and saith he is not guilty, in manner as charged therein.

The tenth article of impeachment charges and accuses the Respondent, in substance as follows, viz. that he advised with and directed one Peter Stevens, as attorney and counsel of said Stevens, upon the subject of an administration on the estate of the father of the said Peter, then lately deceased, and received two dollars therefor. This Respondent contends that this Article, like several of the foregoing, contains no allegation of any offence or misconduct in the Respondent. Why might not the Respondent give advice to the said Stevens, as well as to any other client? It is not alleged that any application was pending before this Respondent, or that he was called on, officially, to do any act whatever for or affecting the said Stevens. It is not said even, that said Stevens was an administrator, or had occasion for any official act of this Respondent whatever.

This Respondent, however, does not refrain, notwithstanding the obvious insufficiency and nullity of this Article, from stating the facts in relation to the case, which he supposes is alluded to. Peter Stevens mentioned in the Article, had interfered and intermeddled with the estate of his father, Simon Stevens deceased. He was, in consequence thereof sued as executor *de son tort*. Being thus sued, and judgment obtained against him, he applied to this Respondent for advice, how far he could still protect himself, by taking out letters of administration. This Respondent gave him such advice as he thought correct and proper, and there the matter ended. Stevens never was administrator of his father's estate, and of course never applied to the Respondent as such. The Respondent knows no other fact material to a full understanding of this transaction; he avers, that his conduct in the premises was every way correct and proper, and that he is not guilty of any misconduct or mal-administration as charged against him, in this tenth article.

The charge contained in the eleventh article, is that the Respondent, in April 1818, gave advice to

one Josiah Locke, as administrator of Josiah Locke deceased, relative to an administration account; and received therefor five dollars. The Respondent in answer to this charge saith, that as far as he remembers, he did render and perform certain professional services for the administrator on this estate, as well and lawfully he might do; it being relative to no matter in controversy in his Court, or in which he was not as competent as other counsel, to give advice and assistance. He saith, therefore, that of the matter charged in this article, he is not guilty.

The Respondent now proceeds to the twelfth Article, which charges and accuses him as follows; viz. that "he, in June 1815, at Framingham, in said County of Middlesex, one Alpheus Ware, who before had been, and then was guardian, of one Jotham Breck, a person *non compos mentis*, being about to present his account of his guardianship, of his said ward for allowance, and thereupon a controversy having arisen between the said Ware and one Nathan Grout, who, as one of the overseers of the poor of the town, in which said Breck had his settlement, attended said Court to examine said accounts, respecting some property belonging to the ward of said Ware, and thereupon the said Prescott, overhearing the conversation between the said Ware and the said Grout, respecting said ward's estate, proposed to advise and instruct them therein; and thereupon the said Prescott being then and there Judge as aforesaid, did advise with and direct the said Ware and Grout, concerning the settlement of the account aforesaid, and the interest and estate of the said ward, and the guardianship of the aforesaid Ware, and the said account thereafter, on the day aforesaid, was sworn to by the said Ware, and was examined and with the consent of said Grout, was allowed by the said Judge; and the said Prescott then and there first demanded of said Grout, as fees for advice and counsel as aforesaid, the sum of five dollars, and upon the refusal of said Grout to pay the same, the said Prescott demanded the same of the said Ware; and the said Ware objecting to the payment thereof, the said Prescott then and there proposed to the said Ware, that if he would pay the said sum of five dollars, he would in his said office of Judge, insert and allow the same to the said Ware, in his said account of Guardianship, then before sworn to, and with the consent of said Grout, allowed by the said Judge. And the said Ware then and there still objecting thereto, because the said account as allowed, had been consented to by the aforenamed Grout, acting as overseer to the poor as aforesaid; the said Prescott insisted on the payment thereof, and to overcome the objection of said Ware thereto, stated to the said Ware, that 'the overseers of the poor need know nothing about it.' And the said Ware then and there, upon the urgent and repeated demands of the said Prescott, and upon his proposition to insert the same charge in the guardianship account aforesaid, and to allow the same without the knowledge of the said Grout, did pay to the said Prescott the said sum of five dollars.—And thereon the said Prescott did insert by interlineation a charge of five dollars, for the money so paid to him, as aforesaid, in the guardianship account of said Ware, and did pay and allow the same accordingly."

Before proceeding to remark on the substance of this charge, or on the manner, in which it is expressed, the Respondent will lay before this Court a concise history of the facts, as they exist, and as he expects to be able to make them appear. At or near the time mentioned in the article, the said Ware therein mentioned was about to present, for allowance, to the Probate Court, his account, as Guardian of one Breck, a person *non compos mentis*. He had exhibited the account to the Overseers of the Poor of the town, for their examination. No law requires this; yet it is often recommended to be done, for better security against the allowance of unjust accounts in such cases. These overseers had examined the account, and were satisfied with it, and had signed a certificate to that effect; and the account, when presented was unobjected to, and appearing to be regular and correct, would be allowed of course. Ware the guardian, presented this account for allowance, at Framingham, at the time mentioned in the article. Grout, who was one of the overseers of the poor, in the town where Breck lived, happened to be present at Framingham, either accidentally, or on account of other business in the Probate Court. As before observed, there was no objection to allowing and passing the account, and it was matter of course, that it should be done, and that the common order and decree should be drawn up by the Register. Ware then applied to the Respondent, for advice and information respecting certain notes of hand, in which his ward was interested. The circumstances attending these notes were these.—Breck, the ward of Ware, had sometime before, probably before the guardianship, given a deed of certain land to two men of the name of *Bridges*. Breck's wife had refused to relinquish her dower in the land; the purchasers therefore had given notes for the purchase money, payable when she should so relinquish. She still declining, the object of Ware's inquiries was to learn, in what manner the purchasers could pay the purchase money, with safety to themselves, notwithstanding this her refusal to relinquish dower or how to furnish them an indemnity. On this point Ware asked advice from this Respondent, and as the Respondent supposed, asked it of him professionally, and as a lawyer. The case had nothing to do with any official duty of the Respondent. He was not bound to give advice to guardians what processes to institute in the Courts of law, or what other remedies to pursue to obtain the property or assert the rights of their wards. He never imagined that Ware expected this advice of him as Judge of Probate, it being so entirely and exclusively a case for professional advice, and not for official direction. Having given this advice, he expected of course to be paid for it, like other counsel, and although Ware manifested some reluctance, he paid it, nevertheless, and it was allowed to him, and as the Respondent supposes properly allowed, in his account; and the Respondent was happy afterwards to learn, that by following the advice thus by him given the object sought had been obtained. The Respondent avers upon his veracity and conscience, that he was conscious of no illegality or impropriety in this matter.

It appeared to him a very proper case, for the guardian to ask and obtain professional advice; indeed he could hardly proceed without it. It appeared to him, most clearly, that it was proper and competent for him to give such advice; and, of course if the advice was necessary and proper, the expense of it was to be allowed, like any other expense, in the account. Whatever opinion may be holden of the prudence of this transaction, in a matter so inconsiderable, this Respondent declares, that he was wholly innocent of any improper or corrupt motive. It never occurred to him that his conduct, in this case, might be questionable, or that it would expose him to any crimination or suspicion whatever. If he acted wrong, it was merely and entirely an error of judgment, for which he hopes the candid interpretation of this Court. But he contends that he has been guilty of no misconduct or mal-administration whatever.

The only official act done by him in the case was allowing the five dollars paid by Ware for the ad-

vice. Before this is made out to be misconduct or corruption, it must appear, that this Respondent knew, that Ware, as guardian, had no occasion to lay out that sum for such a purpose; or that he procured him to lay it out, for his, the Respondent's own benefit, still knowing that there was no just and proper occasion for it. But this Respondent avers, that it was a fit and proper case, at least in his opinion, for the guardian to take advice; that the sum paid by the guardian was reasonable, and that therefore it was properly and justly allowed. And this Respondent doth utterly deny, and if this Court would allow him, is ready to maintain this denial by his oath, that he ever, in the first instance, proposed to offer this his advice while unasked, or that he interfered in the conversation of the parties for the purpose of offering such advice; or that he ever said or intimated to the said Ware, that the transaction might or could be kept secret from the overseers.

The Respondent hopes he may be allowed to invoke the caution and candor of the Court, in regard to charges, to which the zeal of willing and heated witnesses appear to have given great coloring, and which therefore might produce an unjust effect, on the Respondent's case, unless divested of that coloring and examined in their own nature and character. This article would represent the Respondent in an odious and disgusting point of view, independent of any legal crime or official misconduct. It would hold him forth as officiously overhearing other persons' conversations; as volunteering and obtruding his professional advice, on those who do not wish for it; as not only asking a fee, but as, in an extraordinary manner, insisting upon it, and being urgent for it; and, finally, as allowing the item in the account by interlineation, as if a sort of forgery had been added to his other crimes.

The Respondent means not to complain; but he does most solemnly adjure this high and Honorable Court, not to adjudge him guilty till some substantial act of wilful and corrupt misconduct be proved against him.

He trusts that his judges will examine into the substance of the charges produced; that they will judge him by the plain standard of the law; that they will require a well proved case of legal misconduct and maladministration, before they condemn him; and that they will not judge him by any incidental or unessential circumstances, which may consist merely in peculiarity of manner, and which are often easily misrepresented, and difficult to be disproved, even when wholly unfounded.

With respect to giving advice to administrators, executors and guardians, generally, this Respondent supposes that every Judge of Probate in the Commonwealth, who was a practising lawyer, before the late law, gave such persons advice and professional assistance, as freely as to other persons, except in matters of controversy coming before them as Judges. If an administrator wished to sue a note, or a bond, or to defend a suit on a note, or on a bond, or to do any other act or thing requiring counsel, this Respondent knows no reason, nor any practice, rendering it improper for such administrator to apply either to the Judge or Register of Probate, and for them to afford such assistance and advice. The law by the recent statute, has made a particular provision, as to some cases in this respect. The Respondent has no fault to find with this statute, but the very passing of the law proves, what was understood to be legal before. The Respondent therefore saith, that he is not guilty of the misconduct or mal-administration charged in this twelfth Article.

The thirteenth article charges the Respondent with having been counsel for one Susan Clapp, administratrix of Jeremiah Clapp, about and concerning said estate, and with having, as her counsel, as aforesaid, received a fee of three dollars. The Respondent wholly denies that this article contains a charge of any legal crime whatever, or any thing to which he can properly answer. In point of fact, however he believes that he never did receive any fees, as counsel, of the said Susan Clapp on any account whatever. He therefore denies all the matter of fact contained in said Article. He believes that the said Susan did settle an account before him, as Administratrix of said Jeremiah; that for the transaction of this business, for her special accommodation, two special Probate Courts were holden, and he thinks it probable, for reasons already given in answering other articles, that two or three dollars additional expense might be incurred, by the holding of said Courts, and may have been paid by said Administratrix. But he wholly denies having been of counsel for said Susan, or having received any fees as such; and says therefore that of the matters and things in this article contained he is not guilty.

The fourteenth article charges and accuses this Respondent as follows, viz. that "he being Judge as aforesaid, became and was the counsel of one John Walker, administrator of one John Walker, deceased, and on the first day of April, 1815, did advise with and direct the said administrator, respecting his administration on said estate, and did demand and receive as fees therefor, of and from said administrator the sum of five dollars, and the said James Prescott, being Judge as aforesaid, on the first day of June 1816, did further advise with and direct said administrator, and as his counsel and attorney, of and concerning his administration on said estate, and did demand and receive, as fees therefor of and from said administrator, other and further sums of money, amounting in the whole to the sum of 15 dollars, and the said Prescott being and continuing Judge as aforesaid, on divers days and times, between the said first day of June aforesaid, and the seventeenth day of May next after, did, as counsel and attorney of said administrator, advise with and instruct him in the further administration of said estate and for his fees, for his advice and instruction and counsel, as aforesaid, the said Prescott did demand and receive, of and from said administrator, other large sums of money; to wit, in the whole, the sum of one hundred and twenty dollars; and the said Prescott thereafter in said office of Judge of Probate, did allow all the aforesaid sums to the said John Walker, in the settlement of his administration of the estate aforesaid."

As was observed in relation to the last preceding Article, the Respondent perceives in this no charge imputing any legal offence whatever. In relation to the case, supposed to be alluded to, he remembers, that the administrator of John Walker had various controversies and concerns in law, in no way connected with any official duty of this Respondent; that this Respondent was retained and acted as counsel for the said administrator, in these concerns, for which he was paid, as far as he remembers, by sums similar to the small sums mentioned in this Article. And as to the sum of one hundred and twenty dollars mentioned therein, this Respondent recollects, that a suit was brought in the Circuit Court of Common Pleas, by one Hopkins against *Benjamin Thompson, James Walker* and *Jesse Dean*; that this Respondent was retained as Counsel on behalf of the defendants; that it afterwards appeared that the heirs of John Walker would be eventually the sufferers, if a recovery were had against the defendants; and that therefore the said administrator requested this Respondent to continue to conduct the defence, at the expense of said estate, which he did, and in

the end, he rendered a just and true account of his fees therein to said Walker, which were paid and he presumes were afterwards allowed, like other similar charges, in the settlement of the account. And so the said Respondent saith that he is no way guilty of the misconduct or mal-administration, charged in said Article.

The fifteenth and last article of these charges alleges, in substance, that the Respondent permitted himself to be retained as Counsel for the executrix of Jonas Adams, and did act as such, in advising her in relation to her liability as executrix, for the support of a person supposed to be chargeable on the estate, for which advice he received $5, and subsequently for similar advice on the same subject $10 more; which said sums were afterwards allowed by him in her account as executrix.

The Respondent in relation to this article has in the first place to remark, what has been already observed in relation to more than one of these articles, that he doth not perceive what crime or offence was intended to be imputed to him by this charge.—He presumes it was as proper for him to give professional advice to an executor or administrator, as to any other clients, unless it were for some matter pending before him, in his official character, and in which there was a controversy between adverse parties. Executors and administrators on estates, in their controversies with other persons, and in a great variety of legal questions which arise, although the will might have been proved before this Respondent, or the administration granted by him, have nevertheless, in these subsequently arising controversies and questions, no more connexion with this Respondent in his official character, than with any other Judge of Probate in the Commonwealth.

In point of fact, this Respondent remembers, that the said executrix did apply to him, not for any official act to be done by him, nor for any process or proceeding in the Probate Court, but for certain legal opinions to be given by him as a lawyer on questions, in which she was interested.—These opinions he gave, and was paid for them, and he presumes the sums so paid were allowed in her accounts.

And the Respondent saith, that he is not guilty of any misconduct or mal-administration in his said office, as charged in the fifteenth and last article.

This Respondent has now laid before this Honorable Court such facts and circumstances by way of answer to the charges exhibited against him, as the time allowed him would permit. These charges extend over a period of sixteen years, they relate to very various transactions, and are some of them accompanied with circumstances now probably forgotten. He trusts the Court will make due allowance for considerations of this nature and not expect from him more minute details of transactions long since past, than he may reasonably be supposed capable of making, after such a lapse of time.

The Respondent is not insensible to the effect, which the exhibition and publication of these articles have necessarily produced on the public sentiment. He has nevertheless cautiously refrained from any effort to control or counteract that effect. Called upon constitutionally to answer before this high Court, he has forborne all appeal to any other tribunal; satisfied that if his constitutional judges shall pronounce him not guilty of the crimes and the misdemeanors of which he is accused, an impartial and enlightened community will cheerfully do justice to his reputation and character.

He now earnestly entreats of this Court a patient and unbiassed examination of his case. If any one of its honorable members should have conceived against him or his case any prejudice of whatever sort, he would solemnly call upon him to guard against its effect upon his judgment. By the law, which is just and impartial; by the law, which knows neither favor nor affection, nor passion nor prejudice; by the law, which holds its equal and sovereign authority over him and those who are now to judge him; by the law, which in its benignity considers all men innocent, till they are proved to be guilty; by the law, this Court has, in the presence of God, solemnly sworn to try and judge him.—He now awaits the result, with deep concern, but not without composure; with a confidence in these his judges, which bids him to hope assuredly for the best; and with a consciousness of his own uprightness and integrity which will be sufficient with God's blessing to enable him to sustain the worst.

JAMES PRESCOTT.

Mr. KING, chairman of the managers, said that the committee appointed by the House of Representatives to conduct the Impeachment against James Prescott, Judge of Probate for the County of Middlesex, having heard the answers of the Respondent to the several articles exhibited against him, would report said answers to the House of Representatives, that they might make their replication thereto.

The President inquired whether the managers would propose any time for offering their replication.

Mr. KING, after being informed that the Court would sit in the afternoon, replied that the managers would be ready to file the replication at 4 o'clock.

The president asked if the managers, or counsel for the respondent, had any motion to submit.

Mr. KING requested that if the subpœnas for the witnesses summoned on the part of the prosecution were returned, the witnesses might be called, in order to ascertain whether they were all present.

The Clerk called them accordingly.

Mr. WEBSTER said he did not hear Nathan Grout answer to his name. The Respondent considered his testimony to be of great importance to his defence—he would therefore inquire of the honourable managers whether they expected the attendance of this witness.

Mr. KING answered that he was regularly summoned, and he knew of no reason for supposing that he would not attend.

It appeared however, upon the clerk's reading the return of the subpœna, that the witness was ill, and would not be able to give his attendance.

Mr. WEBSTER then asked the managers if they had any objection to taking his deposition under a commission from the court.

Mr. KING said the managers would take the proposition into consideration, and if the witness should not come, they would give an answer to the Respondent's counsel tomorrow morning.

[It was afterwards agreed that the deposition of Nathan Grout, taken in the manner hereinafter described, should be received as evidence in the case.]

The Court was then adjourned to the afternoon, at 4 o'clock.

[The Senate Chamber during the recess had been arranged for the expected trial, and the seats were accordingly occupied as follows: The Senate, as Judges, sat in two curved lines on the farthest side of the Chamber, fronting the entrance. The rear line was considerably raised, so that all the Judges could see the witnesses as they were brought upon the stand, and be seen by them face to face. The President's Chair was in the centre of the second line, and somewhat elevated above it. The Clerk's desk was in the centre of the first line, directly before and under the President In front of the President, on the opposite side of the Chamber, a few feet from the entrance, was the witnesses' stand;—on one side of which at a little distance, was a long table with seats for the seven Managers, facing the Senators on the President's right—and on the other side a similar table and seats for the Respondent and his Counsel. At right angles with these tables, and between them and the seats of the Senators, were two smaller tables facing inwards so as to complete the outline of an area, square at the bottom and semicircular at the top. At that which was near the Managers, sat the Sheriff of the County of Suffolk; At the opposite table, was the Crier of the Court. The Lieut Governor and Council, together with several other distinguished spectators, occupied seats assigned them without the area on the same side with the Respondent. The Speaker and Clerk of the House of Representatives sat near the Sheriff; and the Members generally filled the seats behind them without the area.]

AFTERNOON.

A Message from the House of Representatives was delivered by Mr. PHELPS, stating that HORATIO G. NEWCOMB, Esq. was elected a manager in the place of LEVI LINCOLN Esq.

At 4 o'clock, Mr. LYMAN was charged with a message to inform the House of Representatives that the Senate was about to resolve itself into a Court of Impeachment.

The Speaker, the Managers and other Members of the House of Representatives came in. The Respondent also attended with his Counsel.

The Court was then opened and the Respondent was called.

Mr. KING said the Managers on behalf of the House of Representatives were ready to present their replication to the answer of the Respondent. Mr. KING then read the replication as follows:—

REPLICATION,

By the House of Representatives of the Commonwealth of Massachusetts, to the Answer and Pleas of James Prescott, to the Articles of Impeachment exhibited against him by the said House of Representatives, in their own name, and in the name of the people of Massachusetts, before the Hon. the Senate of the said Commonwealth, on the 5th day of Feb. A. D. 1821:—

The House of Representatives of the Commonwealth of Massachusetts have considered the Answer of JAMES PRESCOTT, Esq. to the Articles of Impeachment against him, by them exhibited, in their own name, and in the name of the people of this Commonwealth; and alleging that the said Answer of the said PRESCOTT contains no sufficient answer to the Charges by them exhibited, as aforesaid; nevertheless, for replication thereto, observe, that the said JAMES PRESCOTT has attempted to cover his misconduct and maladministration in office, by evasive statements, and perversions of the law; that the said Answer does give a false and deceptive coloring to the various charges of misconduct and maladministration, contained in said Articles; that the said JAMES PRESCOTT did, in fact, commit the various acts, and is, in truth, guilty of the misconduct and maladministration of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation, and not doubting that the Hon. Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives, and to vindicate the honor of this Commonwealth, do aver their charges against the said JAMES PRESCOTT to be true; and that the said JAMES PRESCOTT is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose.

Mr. WEBSTER said that with leave of the honourable managers, he would make a single suggestion, before they proceeded to the introduction of their evidence. It was the opinion of himself and his learned associates in the defence, that the first and some of the succeeding articles, if proved, were wholly insufficient to fix any criminality upon the Respondent. He did not wish to impede the progress of the trial, by raising any preliminary question on this account, as he was well aware that the insufficiency of the articles was involved in the question of guilty or not guilty upon the several charges. He made the remark simply with the view to prevent its being inferred, from the Respondent's not objecting to the admission of evidence, that he made any concession in respect to the sufficiency of the articles. He would now observe, in behalf of the Respondent's counsel, that they should not oppose any proper evidence to prove the facts stated in the articles of impeachment, but that they should consider themselves bound to resist the introduction of any evidence to prove facts not specifically charged.

The President asked the Managers on the

part of the House of Representatives, if they were now prepared to proceed in the trial; upon which Mr. KING, the Chairman of the Managers, opened the prosecution, as follows:—

Mr. PRESIDENT, I am commanded by the House of Representatives to open to this Hon. Court, the grounds upon which they have impeached the Judge of Probate for the County of Middlesex, and have called him to your bar for trial. In the discharge of this duty, I shall endeavour to confine myself to such statements and remarks as may be connected with the charges contained in the articles of impeachment, and with the matter of defence alleged in the Respondent's answer, and with as much brevity as may be consistent with a proper exhibition of the principles and facts of the case. And while I hope never to lose sight of that respect and deference which I owe to this high and honourable Court, nor of all possible regard for the rights and feelings of the Respondent, I must ever recollect that my first duty on this important occasion is to the people, who sent me here.

Mr. President, the representatives of the people could have none but the most worthy and honourable motives for preferring this Impeachment. They had no injuries to avenge—no prejudices against the Respondent to indulge—no selfish objects to attain. Some impeachments have originated in party feelings, have been used as instruments of vengeance, in times of public excitement, by a triumphant majority, against the partizans of an opposite faction. But we are happy to live in better times—to stand here to day on higher ground. This Respondent is called to your bar to answer for misconduct and maladministration in his office, by a unanimous vote of a House of Representatives, in which party divisions have never appeared—not upon the rumours of general reputation and public complaint, which have sometimes been considered sufficient to authorize this solemn proceeding, but after a long and patient examination upon oath. From the evidence laid before that house, they could not doubt but a spirit of dissatisfaction with the Probate Office, existed in every part of the County of Middlesex, and that the good people of that county had been injured and oppressed by the present incumbent, under colour of office. Their constitutional duty then was plain and unavoidable. To shrink from it would have been unworthy of the representatives of a free people—of a people justly proud of the purity and integrity of their judicial institutions. They were bound too to proceed by impeachment, as well in justice to the Respondent, as in discharge of their duty to the people. The inquiry pursued by their order was of necessity *ex parte*; the counter proofs, which might vary or control the evidence thus obtained, if any such existed, could not be before them; and the course adopted of bringing these charges to the bar of this high and honourable Court, was the only one befitting the high judicial station of the Respondent, the grave character and aggravated circumstances of the charges, and the dignity and high responsibility of the Grand Inquest of the Commonwealth.

The managers for the House of Representatives, then, are only discharging an imperious duty in maintaining as well as they are able, these articles of impeachment—a duty which they have not voluntarily assumed, but which they discharge by command of the representatives of the people. If these charges shall be made good, the public interest will require a merited punishment upon the offender,—but if they are not maintained, if the Respondent shall succeed in clearing his official character from the imputations, which are cast upon it, then let him be restored to public confidence in a station which he is not proved to have abused.

Mr. President, although the managers have the utmost confidence in the justice of the cause, which they are sent here to maintain in the name of the people of the Commonwealth, and derive support and encouragement from their conviction of the candour as well as of the wisdom and integrity of this honourable Court, yet they cannot but feel embarrassed and oppressed by the novelty and solemnity of this scene. This is the first instance of the trial of a Judge under our present constitution; the first instance, in which the people have appealed to their constitutional protectors against the ministers of justice. Every circumstance connected with this trial partakes of this solemn character and deep interest. They are impressed upon the constitution of this court—upon the character of the accusing party—upon the high judicial station of the Respondent—upon the nature and aggravation of the offences charged against him.

The Court in whose presence we now stand, is composed of the highest branch of the supreme legislature of the Commonwealth. It sits only to protect the people against powerful oppression—to chastise all abuses of their delegated power, and to bring it back to its just limits and proper uses. It is clothed with the power of trying the highest officers of the state—of deposing our governors, and judging the judges of the land. To this High Court, composed of citizens of tried wisdom, integrity, and patriotism, it appertains to be governed by its own judgment alone in relation to all its forms of proceeding—to take its rules from no other tribunal—to do justice between the people and all persons accused by them, in such manner and by such forms, under the sanc-

tion of the constitution, as the public good shall require. The ordinary rules of law and evidence in their large and comprehensive import and relations, but not under any special or formal restrictions, are indeed adopted for its guide and government, not *because* they have the authority of the courts of common law, but because in themselves and of their own brightness they enlighten the path of justice, and are founded in reason and right. To a court thus constituted the people look with unlimited confidence, while they find its ear open to the just complaints of the humblest and most defenceless, while they find its arm strong enough to reach and punish oppression and corruption in the highest station.

The accusing party are the representatives of the people—a co-ordinate branch of the legislature. To their vigilance is committed the superintendance of the public conduct of all the officers of the government, and on their fidelity the people depend for the detection and proper presentment of the misconduct and mal-administration of their public servants, in their several degrees and employments. This transcendent power, vested in that house as the Grand Inquest of the Commonwealth, has constituted it the guardian of the rights of the people, and the watchman of the constitution.

The office held by the Respondent is one of the highest importance. It is a branch of the administration of the justice of the Commonwealth. It is an office of extensive jurisdiction—of great power—of large discretion—all vested in the person of an individual. Within the period of one generation the whole property of the county—of an extensive, populous, and opulent community,—passes under its administration in some one or other of the branches of its jurisdiction; and there is not a person within its limits who is not deeply interested in the purity and uprightness of its administration. To the wisdom and discretion of this officer is committed the care of the widow, and the fatherless, of helpless old age, of unprotected infancy, of miserable idiocy—of those, to whom the law has not given the right, and of those, from whom providence has taken the power of governing and protecting themselves. To this court, moreover, many of the suitors come in the weeds of mourning, with tears in their eyes and sorrow in their hearts, thinking more of the friends who are gone, than of the property which may be left. At this moment of the freshness of their grief, they are little able to settle precisely the exact amount which should be taken from them for official services, little inclined to dispute any demand, however exorbitant, anxious only for a speedy release from the burden of a public court. There is obviously then the strongest imaginable reason that the duties of this officer should be clearly defined, his compensation precisely limited, and that the rights and liabilities of the suitors in his court should be so fixed and explained as to preclude all misunderstanding, or imposition. There are the strongest reasons resulting from all the feelings of private obligation, and all the claims of public duty, why this important officer should refuse to trust himself to determine how much he possibly might, or how little he certainly must receive for his services.

The offences charged against the Respondent, are of flagitious character, though some of them seem small in their amount. We come here with no splendid offences or daring exploits of vice, which astonish the mind and powerfully interest the feelings, because they imply great talents, or great courage. The plain story we have to relate is of a different character; the details of petty extortion afford no theme for eloquence. We have all heard and read of those great officers, who have been brought to the bar of Justice, to answer for breaking down the constitution of their country—for the plunder of provinces—for the unlawful acquisition of millions. Detested be such crimes, and exemplary have been their punishment. But the sin of wresting one single cent from the scanty patrimony of an unprotected orphan, of breaking one crumb from the loaf of a desolate and broken hearted widow, is a crime of a deeper dye, of most blasting enormity—should be more shunned and detested by man, and will assuredly be more awfully punished by the widow's God!

The offences charged in the articles against the Respondent, may be conveniently arranged in three classes:

1. Demanding and receiving other and greater fees for performing the duties of his office, than are by law allowed.

2. Transacting the business of the Probate Court at his own private office, and not at any Probate Court held according to law.

Distinct instances of each of these offences are contained in the articles from the 1st to the 5th, inclusive.

3. Acting as counsel, and demanding and receiving fees for advice and assistance in matters upon which he had passed, or might be called to pass, or which were pending before him as a judge.

Distinct instances of this offence will be found in each of the articles from the 6th to the 15th, inclusive.

In his answers to the articles, the Respondent has taken great pains to establish the doctrine that the subject of Probate fees is left wholly at the discretion of the judge. For such I suppose to be the *effect* of his reasoning, although he does not appear to maintain the proposition in this extent. When the law has already provided a fee for a par-

ticular service, the Respondent claims the right of demanding another fee for some act to be done, or paper to be used, or decree to be made in and about the same subject matter, which act he himself determines to be necessary, but for which the law has provided no fee. So that every fee now provided by the fee-bill may be doubled by a *rider*, the necessity of which is to be determined by the Judge, and not by the law. I shall presently illustrate this by an example taken from the answer of the Respondent.

Against this whole doctrine of the unrestricted discretion of any judicial officer over his own fees, the managers deem it their duty to enter their solemn protest. It is a doctrine subversive of all responsibility in public officers, obnoxious to the most enormous abuses, and leading inevitably to bribery and extortion.

To support the articles which charge the Respondent with having demanded and received illegal fees, the managers think it sufficient to shew that the law has fixed and limited the fees of this officer for certain services, and that for those services he has demanded other and larger fees. And we apprehend that he is equally guilty of the charge, whether he have violated the law by taking larger fees for such service *eo nomine*, or have evaded it by demanding an additional fee for some paper, or decree, used or passed, in and about the same service, and for which the law has provided no fee. For instance: among the "services and duties," mentioned in the 16th page of the Respondent's answer, "for which no particular fees are prescribed by the statute," are mentioned "*Petition for Administration; Decree thereon;*" and these services are said to be "necessary" in the settlement of almost every estate. Now the fee-bill has expressly provided a fee for "granting administration," and if he may lawfully take another fee for "a decree" on the petition for administration, he will be paid twice for the same service. In other words he is paid by the fee-bill for "*granting* administration," and he pays himself for *decreeing* administration. Can it be pretended that these are not one and the same thing? or that there is any other difference between them than there is between *doing* a duty, and *performing* a duty?

The Respondent in his answer has attempted to defend the practice of taking *other* fees than are by law allowed, by the practice of the ecclesiastical courts in England, whose officers he says are paid by fees established by usage, or by their own authority, and not by any act of parliament. But can it be shewn that a *judge* of any court in England has ever undertaken to regulate *his own* compensation, where that compensation has been established by law—or has presumed to take other and greater fees than such law has allowed? The Respondent seems to rest with confidence upon the *custom* of other Judges of Probate, and upon a long established usage upon this subject. But can it be possible that in a government of the people, where the laws are sovereign, the highest tribunal of criminal justice can for a moment admit the plea of a *custom* to violate the law—of a *usage* for a judge to assume the functions of the legislature, and regulate his own compensation at his pleasure?

[Mr. King proceeded to argue at some length against this custom from its liability to abuses—and from the provisions contaiintained in the 4th and 5th sections of the statute called the fee-bill, which require a list of all fees prescribed by that act to be suspended in the Probate office, and a bill of items of all fees paid to be delivered to any person demanding it—which provisions, he said, might be wholly defeated, and the grossest extortion covered up under pretence of other fees not provided by that statute.]

The answers of the Respondent to that class of charges contained in the articles, which relate to his *transacting the business of his court at his own private office, and not at any court held according to law*, the managers cannot but consider as irrelevant and evasive. He proves indeed that he is authorized by law to hold special probate courts under certain circumstances, and on certain conditions. And this will be readily admitted. But the cases in the articles are not cases of special Probate Courts—but occasions upon which the judge has undertaken to act without any court, without the presence of the register, or of any sworn recorder, and without such notice as this special law requires. By the same statute, which authorizes these special courts, the times and places for holding the stated Probate Courts for this county are fixed and established. Now will it be pretended that a regular and stated Probate Court could be held without the register, under the first section of this statute? Such a construction has never been given to it. And upon what principles can *the court* mentioned in the first section be distinguished from that mentioned in the second? The judge is authorized by law in the necessary absence of the register, to appoint a substitute. But why this authority, if he may hold his court without any recording officer?

This practice, like that of multiplying the forms and documents used in the transaction of probate business, may, as respects the suitors, be merely harmless, when it is not attended by an increase of their expenses—as is doubtless the design of the law—but as soon as the judge consents to receive a compensation not warranted by law for these special courts, which he is *permitted* and

not *required* to hold, a wide door is opened for bribery, corruption and extortion, and a gratification for the special favour of the judge may at any time be concealed under cover of the extra expenses of the special court.

On the subject of the last class of charges, that of *receiving fees for advice and assistance as counsel in matters which had been passed upon by, or which might be brought before him as a judge*, the answers of the Respondent are truly astonishing. He seems to argue that it was understood to be legal for Judges of Probate to receive fees for their advice in such cases before the statute of 1818, because this practice is forbidden in that act. Perhaps this prohibition may prove the existence of a loose practice under the existing laws, but surely it cannot prove that this practice was legal, or understood to be so. By the same reasoning it might be proved from the laws which exist to restrain any particular offences, that the acts thus restrained were considered legal and right, before these laws were made.

Another circumstance which seems to be considered material by the Respondent to his defence against this charge, is, that he has never taken a fee for advice in any *controverted* case in his court—that his practice as a lawyer and his duty as a judge have met only on the *amicable* side of his jurisdiction; and therefore no injury has been done to his own integrity or his suitors' interests. But how is he to determine beforehand in any particular case, whether it will be controverted or not?

Suppose for a moment that a judge of the Supreme Judicial Court were called to the bar of this honourable court, to answer for the "misconduct" of demanding and receiving fees for advice given to a suitor about matters pending in his own court—would it be admitted as a sufficient answer, that in this case there was no controversy—that the action was defaulted—that justice was done and no one injured?

But there is one other ground upon which this practice is justified by the Respondent, namely, that every judge of probate who before his appointment was a member of the bar has followed this custom. That this is a mistake in respect to more than one judge of probate now in office may easily be proved. But admitting it to be so, it is sufficient to answer, that a custom which leads to such enormous abuses can be "no good custom," and is to be abolished—a custom which contradicts all received notions of that impartiality and integrity, which are essential to the judicial character—a custom, which has never before existed in any court in any country—a custom which must bring the mind of a judge into the most perilous state of embarrassment between his duty and his interest! Can any man of a fair and honourable mind, any man who is qualified to administer the justice of his country, consent for a moment to place himself in a situation which will require him to weigh all his words in the nicest balance, to ascertain how many of them he is bound to deliver as a judge, and for how many he may take his fee as a lawyer—which will force him to enter into a controversy with the suitors in his court as to the character of his own conversation, he contending that his words are legal advice, and his suitors claiming them as parcel of the business of his court—and, still further,—which will oblige him to determine the delicate questions whether his own advice were necessary, and whether the fees he had received were reasonable!

Mr President, it cannot be necessary for the Managers in their opening, and perhaps it would not be proper, to go particularly into the facts which it is expected will be proved in evidence to support the several articles of impeachment. Having already divided the charges into general classes, and considered their nature and aggravation as official "misconduct," I shall only observe that these charges, as the managers believe, will be proved as they are laid in the articles, without any variation sufficient to change their legal import. The sixth article, and the twelfth article disclose transactions of a very extraordinary character, upon which I shall refrain from remarking in the opening, hoping that the evidence which the Respondent shall be able to produce to meet these charges, may be more successful in changing their character, and explaining the circumstances of aggravation which appear to attend them, than have been the ingenious and elaborate reasonings of his answer upon these articles.

Mr. President, this imperfect development of the charges which the Representatives of the people have brought to your Bar against the Respondent, will now be supported by legal evidence. We have considered these charges as one cause, as exhibiting together a view of his official conduct, and although any one of them, without evidence of other transgressions, might not have been considered by the House of Representatives as absolutely requiring them to prefer an impeachment against the Respondent, yet taken collectively they exhibit such a case of misconduct and maladministration as imperiously demanded their Constitutional interposition.

Mr. President and Gentlemen of this Honorable Court, the character and power of the Highest Criminal Court in the Commonwealth are now to be tried. The House of Representatives have done their duty by examining the complaints laid before them, and by presenting them in usual form at your

Bar. They have sacredly preserved the rights of the Respondent from violation in this proceeding, by surrounding it with all those guards which the honor of the accusing party and the safety of the accused required. They found reasonable and probable assurance that their charges were true—that they applied to the Respondent in his official character—they have legal proofs of his guilt to offer—and they now afford him the amplest opportunity of establishing his innocence, if he is not guilty of the charges.

The solemn decision now rests with you, upon the evidence we are prepared to adduce. That decision the Representatives of the people await in full confidence of the wisdom and justice of the award—believing, indeed, that it will establish the guilt of the Respondent, and vindicate the violated majesty of the laws—but still desirous that it may evince his innocence, and restore his official reputation.

Mr. President, the House of Representatives ask for the Respondent not only an impartial, but an indulgent hearing. To the law of the land he has solemnly appealed for his acquittal. To the law of the land we appeal for justice. To the law, which protects the innocent by detecting and punishing the guilty; to the law, which is a terror only to evil-doers, but imparts safety and hope to all who follow its guidance and walk in its light—to the law, which cheers and supports "the very least, as feeling its care," and governs and restrains "the greatest, as not exempted from its power."

The Managers proceeded to the examination of witnesses in support of the Impeachment.

ABEL TARBELL sworn.

Question by Mr. FAY. Were you administrator on the estate of Nathaniel Lakin?

Witness answered in the affirmative and produced the letter of administration and order of notice, which were dated at Groton, Oct. 14th 1816, and not countersigned by the Register of Probate.

Q. Where was this letter of administration granted?

A. At Judge Prescott's office in Groton, in October 1816. I received also the order of notice and warrant of appraisement at the same time.

Q. Did you give a bond there?

A. I gave a bond I believe.

Q. Were the appraisers sworn at that time?

A. I do not recollect that the appraisers were sworn at the time. I think they were named then, and I gave them notice afterwards, and they were sworn.

Q. How much did you pay to the Judge of Probate?

A. I think I paid him $5,58.

Q. Were you apprized that you would have to pay more than at a regular Probate Court?

A. No, and I did not know that what I paid was more than the legal fees.

Q. Did you know what the legal fees were?

A. No; the fees I paid did not agree with the Probate Directory which I had.

Q. Was the Register present?

A. No, he was not, I think.

Q. Did you request a bill of the items?

A. I requested a bill of the fees paid. The Judge said it was not necessary. I told him I should be glad to have it to show to the heirs; it might be satisfactory to them to see it. He said he did not usually give a bill. I did not receive any at that time I think.

Q. How came you to go to the Judge on that particular day?

A. I do not recollect. I do not recollect whether there was any assignment of that particular day or not.

Q. Were you an heir at law to Lakin?

A. No, but I was requested by some of the heirs to take out administration.

Q. Did any of the heirs go with you?

A. I do not recollect whether one of the heirs went with me, or whether I had a letter.

Q. Was there any previous arrangement about your taking out administration?

A. I do not recollect whether the Judge knew I was coming at the time to obtain administration on this estate. It was usual for me to go without giving any notice: sometimes I asked him whether he would be at home.

Q. Where was the business of settling this estate transacted?

A. It was all done at Judge Prescott's office in Groton. Only one account was settled.

Q. Have you any bill of particulars?

A. Yes. After the first business the Judge gave me some vouchers. I wished to pay for business as I went along. I told him I wanted a voucher to shew to the heirs. [The witness produced several receipts given to him as administrator.]

Mr. WEBSTER. Are they signed by the Respondent?

A. Yes.

Mr. FAY reads one of the receipts as follows:—

1816, Nov. 26. Fees &c. on return of inventory,	$2,79
do. on affidavit of notice,	1,50
do. licence to sell real estate,	2,50
Dec. 16. To preparing list of debts,	2,
To advice and preparing several writings,	3,
	11,79

Mr. FAY. Do all those items relate to this administration?

A. Yes.

Mr. FAY reads another as follows:—

1816, Dec. C. C. C. P. To obtaining licence to sell real estate $5,
To paid Clerk's fees, 1,75
1817, Jan. 6. To fees &c. for bond, certificate &c. 2,

3,75

Q. Does this relate to the same estate?

A. Yes.

Q. Have you a copy of the administration account settled?

A. No. I suppose the account is in the Probate Office. I have a memorandum of it.

Mr. FAY reads another bill not receipted, but signed by the Respondent.

1818, Feb. 9. Whole fees, $9,70
Administrator 2,

Q. When was this given?

A. When I returned the account.

Mr. FAY reads—

1817, Feb. 22. To fees &c. for E. Wheelers' affidavit 2,00
March 8. To do. for admr's affidavit of sale of real estate, 2,50
Paid Mr. Farnsworth for his services, 0,50

5,00

1816, Dec. 23. To charges paid for guardianship of E. Lakin, 3,10
do. of N. Lakin, 3,10

6,20

Mr. HOAR said he did not perceive that this last receipt had any bearing on the case. It had no connexion with the charges in the articles of impeachment, and was not mentioned in them.

Mr. FAY replied that the administrator was charged for the fees of the guardianships.

Mr. WEBSTER said the only question was whether these items were charges of the settlement of the estate. He contended that they ought not to be admitted in evidence.

Mr. FAY prayed the judgment of the Court, but the Respondent's Counsel did not think the evidence of much importance, and waved their objection.

Mr. DUTTON. How many times did you go to the office of the Respondent in the settlement of this estate?

A. Seven times in the whole I think. Once I did not receive any vouchers.

Q. Did you go by appointment?

A. I generally went when it was convenient to me. I sometimes asked him when he would be at home. He was very accommodating.

Mr. FAY. What was the family of Lakin?

Mr. WEBSTER said he could not imagine what pertinency there was in the question.

Witness. Lakin left a widow and four children. Two of them were of age and two under age, a son over fourteen, and a daughter under. I went with them to the Judge to have a guardian appointed. The guardian told me he had no money, and said I had better pay the fees; which I did and charged them in the administration account, and they were allowed by the Judge.

Mr. WEBSTER. Were you guardian?

A. No.

Mr. WEBSTER. This has nothing to do with the case.

Cross-examined.

Mr. HOAR. State the words which you used when you asked the Judge for a bill of particulars the first time.

A. I do not recollect exactly the language. I told him I wanted a voucher to show to the heirs. The Judge said it was no matter about it, it was not usually required. I merely wanted something to show to the heirs the amount I had paid.

Q. Did you want the voucher for any other purpose?

A. No.

Q. Was the estate supposed to be insolvent?

A. It was uncertain.

Q. One charge in one of the accounts is for "several writings"—what were they?

A. I do not know.

Q. Did you not try to make an agreement with the widow and creditors for the sale of the real estate, including the dower, on the supposition that the estate might be insolvent?

A. There was an agreement made.

Q. Were not those writings drawn by Judge Prescott?

A. Yes.

Q. Did you not pay him for them?

A. Yes, I suppose I did, and that this charge was for them. I paid him all he asked.

Q. Was it not necessary to have guardians to consent for the minors?

A. I do not recollect. I think it might be.

Q. Did you state to the Judge that the estate would be insolvent unless this arrangement was made?

A. I do not know. I told him I thought there would be a saving by taking this course. I do not recollect that I told him the estate would be insolvent if this arrangement was not made. I thought it would be a saving and therefore made the arrangement.

Q. What would it have cost you to have transacted your business at the regular Probate Court?

Mr. DUTTON objected to the question.

Q. by Mr. HOAR. Where do you live?

A. In Groton, three miles from Judge Prescott's office.

Q. Was it an accommodation to you and a saving of expense to have the business done as it was, rather than to go to the regular Probate Court?

A. It was. I should have been obliged to go some distance—and there were guardians and sureties who would have to travel the same distance.

Mr. WEBSTER. Where was the next Probate Court to be holden?

A. I do not recollect.

Q. What is the distance from your house to Cambridge?

A. Thirty-six miles.

Q. To Framingham?

A. I do not know.

Q. To Concord?

A. Nineteen miles.

Mr. HOAR. Who did the writing at the time that you took out administration?

A. It was done in Judge Prescott's office by the Judge and his Clerk.

Q. Did you prepare any of the papers yourself?

A. No. I think I copied the inventory.

Q. Did you go to any other counsel?

A. I asked Mr. Lawrence about settling the real estate, and I asked advice of gentlemen in town, but I did not pay any body except the Judge for direction in the administration of the estate. The Judge drew the petition for license to sell the real estate, and obtained the license and paid the fees of the Court of Common Pleas.

Mr. BLAKE. What were the precise words of Judge Prescott, when you asked for a bill of particulars?

A. He said no matter about it; he did not usually do it. He said I need not pay the fees then.

Mr. DUTTON. If you applied to Mr. Lawrence first, how came you to apply afterwards to Judge Prescott?

A. I had some talk with the Judge about going to Mr. Lawrence. He said he could do it—that if I went to Mr. Lawrence, Mr. Lawrence would have to come to him to do the business.

The witness produced an agreement of the creditors of the estate.

Mr. DUTTON. Was this agreement signed by all the creditors?

A. No. It was signed by the principal ones. They wished that I should not represent the estate as insolvent. They said if the estate fell short they would deduct from the amount of their claims.

Mr DUTTON. This is an agreement to authorize the witness to pay the widow $400, upon her releasing her dower, and to indemnify him.

Q. by Respondent's counsel. Was this agreement written by the Respondent?

A. Yes. [The agreement was read.]

Mr. WEBSTER. Did the Respondent write the release of dower?

A. I think he did. I have it with me.

Mr. DUTTON. In pursuance of this agreement he wrote a release?

A. Yes, he did.

Mr. KING. Have you any receipt for the $5,58?

A. I think not. I had a memorandum that satisfied the heirs.

Mr. SHAW. Who was appointed guardian?

A. Samuel Dodge.

Q. When was it?

A. I do not recollect. I have a paper that shows it—Dec. 23, 1816.

Q. by a member of the Court, read by the President. Was there any Register of Probate present at any of these meetings, in doing any of the business on the settlement of the estate?

A. No.

Mr. HUBBARD. Who was Register at this time?

A. Mr. Winthrop, I think. I got an agreement in writing from the heirs to allow the account.

Mr. HOAR. When did you first learn or suspect that you had paid more than you ought?

A. I never knew that I did pay more than the legal fees.

Q. Were you ever interrogated about the fees paid in this case?

A. I was asked once, before this trouble, by Judge Prescott's brother, to show him the papers. I never showed the papers nor stated the facts to any person, before I was called upon by order of the House of Representatives.

Q. How much did you pay the judge?

A. I think about 50 dollars in all. The items are charged in the account settled with the judge and recorded. I have a memorandum of all paid by me. The last 9 dollars and odd cents, whether they are included or not, I cannot tell; it was a separate thing.

Q. Was the letter of administration granted to you, at the request of the widow and children?

A. I believe the Respondent knew of their request—in what manner I do not recollect. I think I carried a paper to him.

Q. by the Court. Relative to the $5,58—Did you request a bill of the particular items, or merely a receipt?

A. I requested a bill of the items, with a receipt.

Mr. HOAR. State the precise words as near as you can recollect.

A. I wished him to give me a voucher with the items, that I might show the heirs

how much I had paid, and what I had paid for. I do not recollect that I asked him to state the cents for each paper.

Mr. HOAR. I want you to tell precisely the language you used.

A. I cannot tell the precise words.

Mr. HOAR. Then I hope you will not. The object is to know whether you mentioned to him, that you wanted the items, or only a receipt?

A. I only wished at first to show that I had paid $5,53 for services.

Mr. WEBSTER. You had no suspicion that you paid illegal fees?

A. I did not say so to any one.

Q. Did you think you did?

A. I thought I paid him a great deal of money, and I could not reconcile it with the Probate Directory.

PRESIDENT. Did you ask for more than a voucher?

A. I cannot say I did for any thing more: my impression is that I requested items, but I cannot say.

Mr. DUTTON. Did you ask for the purpose of ascertaining whether the amount was correct?

A. I asked because I wanted to know what the charges were for.

A copy of the inventory was produced.

Witness. I copied the inventory, and the Judge made the certificate.

Mr. BLAKE. Did any person appear during the administration to contest any act that was done?

A. No.

Q. Did any one find fault with the arrangement that was made?

A. No.

Q. It was thought to be a happy arrangement?

A. Yes. It was a profitable one.

Q. Did the estate turn out to be insolvent?

A. No. It turned out better than was expected. There was something left for the heirs.

Mr. FAY. Have you a list of claims against the estate?

A. I do not know that I have.

Q. What was the amount of the claims?

A. About 2000 dollars.

Q. by a member of the Court. Was notice ever previously given to parties concerned, before you went to the judge at any time?

A. Application was made to me by the heirs and creditors to administer upon the estate.

Mr. DUTTON. Was notice given by the judge to show cause?

A. I do not know. I think it likely there was.

Mr. HOAR. When you settled the account, was notice given to the parties concerned?

A. I think there was: all the items of money paid Judge Prescott, were in the account which the heirs assented to have allowed.

Q. Did the guardian know when the account was settled?

A. Yes. He told me he signed the certificate, and the heirs too.

Q. Did the judge know of their assent?

A. I think it likely he did.

Mr. FAY. Was notice given when the inventory was returned?

A. I do not recollect.

Mr. HOAR. At all times, when you did business at the judge's office, did you let the widow and children know of it?

A. I did not. I always let them know when I had done any thing.

ISAAC FISKE, sworn.

Witness stated that he was Register of Probate for the County of Middlesex, and had been since the 11th of Nov. 1817.

Question by Mr. FAY. What is the usual fee taken in your office, on the granting of letters of administration?

A. $3,60 for all the papers made out and services rendered at that time.

Q. Have you the original inventory on this estate? If you have, produce it, and state what would be the usual fee demanded on the return of that instrument.

A. The original papers are all here, and this is the inventory. [Paper produced.] The fees on the return of such an instrument are 15 cents to the register, for the return, and 70 cents to the judge for swearing the executor or administrator, and making the decree. There is then a charge of 12 cents a page for recording, and 12 cents a page for the administrator's copy; so that if the inventory consisted of five pages, for instance, the charge for recording it would be 60 cents, and if the administrator were furnished with a copy, there would be a charge of 60 cents more.

Q. What would be the aggregate charge for that inventory?

Mr. WEBSTER. Do you mean to ask the witness his opinion of the law on this point?

Mr. FAY. I mean to ask him his experience of the custom in the county of Middlesex, and therefore put the question to him what he should have charged in the whole, on the return of this inventory?

A. It would depend on the number of pages. This inventory is marked in the hand writing of my predecessor Mr. Winthrop, as making seven pages, and the charge is, as already stated, 12 cents a page for recording, and 12 cents a page for the copy, if one be made,—that is in this case 84 cents—total on return of inventory, without a copy, $1,69, and with one $2,53.

Mr. FAY. The item charged in this ac-

count is," fees, &c. on the return of inventory, $2,79."

Q. What is the customary fee for a license to sell personal estate, and what on return of the affidavit of notice ? A. $2,50 for the license, and $1,50 for the affidavit.

Q. What for recording a list of debts ?

A. Uncertain—depending on the length of the list—generally from $2,00 to 2,50.

Q. What charges are made after the license to sell ?

A. For the bond and certificate of sale, together with the administering of the oath, we used formerly to charge $2 ; but since the law of 1818, we have charged $2,50.

Mr. DUTTON. You state the usual fees taken on the issuing letters of administration to be $3,60 in the whole. What are the items which make up this charge ?

A. I do not know that I can state them precisely. The several papers then made out, or received and recorded, for which charges are made, are in their order, as follows. First the widow, if there be one, may renounce her right of administering the estate in writing, and of this a certificate must be made by the judge. The children if there be any join in the renunciation, together with the request at the foot of the same, that some person there specified may be appointed to administer. Then follows the petition or memorial of the person applying for the administration, to which petition the aforesaid papers are annexed. Lastly is the judge's order or decree, that administration be granted accordingly. Besides these papers there is the letter of administration and recording —the administrator's bond—the order of notice—the warrant of appraisal, and the blank notices. These are all the papers necessary to taking out administration. I cannot state the particular charge made for each one : but the regular charge for the whole is $3,60, of which $1,65 goes to the judge, and $1,95 to the register.

Mr. FAY. What is the charge on receiving the affidavit of sales made in pursuance of license ?

A. It varies with the length of the instrument, which sometimes comprehends a complicated statement. It is however from 2 to 3 dollars.

Question by Mr. WEBSTER. Is the widow's renunciation and the memorial or petition for administration brought to the Judge by the party, or is it prepared in Court ?

A. It is generally prepared in Court, but in a few instances it has been brought by the party.

Q. Is it usual to employ counsel out of Court in drawing up the petition ?

A. It is done in very few instances. The party commonly commences his process at the Probate Court, and has his papers made for him there.

Q. How is it with the warrant, bond, affidavit and notices of sale ?

A. They are usually made at the Probate Office, if not, they are carefully examined there. Indeed it is seldom that any papers are made out of the Office, for fear of mistakes.

Q. Does it not often happen that administrators' accounts are presented in a state not fit to be passed upon ?

A. They are often informally stated, and charges erroneously made or omitted.

Q. Do you not know that the Judge, in such cases, has often directed suitors to go elsewhere, and have their accounts put into proper form ?

A. Yes, when the Court is much crowded with business. At other times it is done by the Judge himself or the Register. This is not however, any part of our regular duty.

Q. Do you not however usually prepare the papers, or put them in form ?

A. Yes, but there is often such a pressure of business that we have not time for that, and then the party is directed to go to a lawyer.

Q. Do you usually attend to those first who come with their papers properly prepared ?

A. It is the general practice to attend first on those who come with witnesses or bondsmen, then those whose papers are prepared.

Mr. BLAKE. Have you not a sort of docket by which you regulate the order of proceedings ?

A. Yes—there is a paper usually kept at the tavern, at or before the commencement of the term, and suitors usually write their names there in the order in which they come. They are then attended to as they stand on the list, excepting, as I before said, that those who have the greatest number of witnesses, or other persons in attendance, are commonly despatched first; and so of those whose papers are ready.

Examined in chief again.

Mr. FAY. Will you look at the record of Tarbell's administration account on Lakin's estate, and state the regular fees for the papers and services there mentioned ?

A. The regular charge on examining and allowing an administrator's account is 40 cents to the Judge for an account not exceeding two pages, and fifteen cents for each page after ; to the Register 15 cents for entry, 12 cents a page for recording, and 12 cents a page for the copy furnished to the administrator.

Mr. FAY. You have the record of this particular account before you, and I wish you to state what would be your regular aggregate charge on the receiving and allowing of that account.

Witness (examining the record) Do you wish me to estimate the number of pages ? It is impossible for me to tell the amount ex-

actly without some calculation. [A page as allowed by the Statute consists of 224 words.]

Mr. FAY. Please to make an estimate as nearly as you can.

Witness. I should estimate this account at from 11 to 13 pages. Say there are 12 pages, then the charge would be 40 cents to the Judge for the 2 first pages—10 pages following would be at 15 cents the page $1,50. To the Register for entry 15 cents,—12 cents a page for recording would be $1,44, and the same for the administrator's copy. The Judge's certificate of the balance is 25 cents more.

Mr. FAY. The sum total then is $3,74 exclusive of the administrator's copy, and $1,44 for that?

A. It is.

Mr. FAY. The charges on the allowing of this account are for office dues $9,70.

Cross-examined.

Mr. WEBSTER. The fees you have just mentioned are exclusive of the distribution fee; are they not?

A. They are.

Q. What are the fees on an order of distribution?

A. 20 cents to the Judge, 20 to the Register, besides 12 cents a page for recording, and 12 for the copy; total usually 64 cents.

Q. It is usual, is it not, to charge a copy of the inventory and administrator's account?

A. It is customary to make such a charge, unless the administrator expressly says he does not want a copy. If nothing is said about it we always make out a copy, and charge accordingly. But the copy is usually called for.

Q. Have you ever known an instance where an executor or administrator has been permitted to settle an account without producing a certified copy of former accounts?

A. No—I never have.

Mr. WEBSTER. The reason is that the Register does not carry the Records with him to different places where the Court happens to sit.

Mr. FAY. The only other evidence we have to offer on this Article, is the accounts themselves, which I now offer to the Court.

1st, fees charged on granting administratration,	$5,53
2d, do. return of the inventory,	11,79
3d, do. two letters of guardianship,	6,20
4th, do. obtaining license to sell, &c.	8,75
5th, do. return of two affidavits,	5,00
6th, do. final settlement,	9,70
	$41,44

Q. read by the President for a member of the court. In cases where the court is crowded, and the preliminary papers and bond are prepared out of court by counsel, do you not charge the same fees as if they were prepared in court?

A. Yes we do.

Q. by Mr. WEBSTER. The blanks are furnished at the office to be filled up; are they not?

A. They are.

The court then ordered one copy of each of the receipts which had been read, and an abstract of fees usually charged and allowed, to be made out and laid upon the table.

Mr. FAY said the managers had gone through the whole of the evidence on the 1st article.

Mr. FAY stated the substance of the charge in the second article to be, that for three letters of guardianship granted to Lemuel Parker, at a special Court, together with the warrants of appraisal, the Respondent did demand and receive the illegal sum of $32,10.

LEMUEL PARKER sworn.

Mr. FAY. State what you know respecting this transaction.

Witness. I was appointed guardian by Judge Prescott, on the 29th day of June, 1818, over John F. Shepherd, a spendthrift, and his two sons John and Francis, non compos. An order of notice, to appear and show why a guardian should not be appointed was served upon John F. Shepherd; and as he did not appear, I was appointed by the judge, on the day mentioned, at his office in Groton.

Q. Was the register present?

A. He was not; but on the 20th of October following, the regular Probate Court sat at Groton, and then I returned my inventory, and was sworn.

Q. What did you pay for these papers?

A. I paid $29,10 for the three letters, and the judge said he must pay Mr. Farnsworth $3 for helping make out the papers.

Q. Were these all probate fees?

A. I did not know of any charge for any thing but the probate fees.

Q. You paid the whole as such?

A. Yes.

Q. Were the $3 paid for Mr. Farnsworth included in the bill of $29, or were they in addition to it?

A. I do not certainly recollect; they might have been included in the $29,10.

Q. Was there a previous application made to the judge for the holding of this special court, and a time appointed?

A. Yes—there was; an order of notice was issued to the parties concerned, to show cause why guardianship should not be taken out, and the selectmen of the town of Peperell, where the Shepherds lived, went to the judge's office with me.

President. Was this $29,10 paid to the judge at Groton?

A. Yes.

Q. When? at the regular probate court holden there in October?

A. No—it was when I took the letters of

guardianship at the judge's office in June, that I paid the $29,10 ;—afterwards, when I made a return of the inventory into the probate court, on the 20th of October, I paid Mr. Fiske $3,79.

Mr. FAY. What papers did you receive for the $29,10 ?

A. Three letters and one appraise warrant—I took only one appraise warrant, because the sons had no estate to appraise.

Q. Did you know that you were to pay an extra charge for taking these papers at a special court ?

A. No—I did not suppose there would be any difference ; nothing was said about any extra charge.

Cross-examined.

Mr. WEBSTER. What was the subject of conversation between you and the judge, when you went to take out those letters of guardianship ?

A. There was some conversation about an annuity which had been left to John F. Shepherd's wife.

Q. Had you ever been to the judge about it before ?

A. Once before ; that is, when I first applied for the guardianship.

Q. Where did Shepherd live ?

A. In Peperell.

Q. And who went with you the first time you called on Judge Prescott ?

A. Some of the selectmen of the town of Peperell.

Q. Was there a probate court holden that day ?

A. No.

Q. Did you consult Judge Prescott about that annuity ?

A. No.

Q. Did you tell him about it ?

A. Yes.

Q. And the selectmen were with you ?

A. Yes.

Q. Well, what was the object of that visit?

A. It was our object to secure the property which Shepherd was spending, and keep the family off the town. And we wished to know whether this could be done by taking out letters of guardianship. One of the selectmen who was with me made the inquiry of the judge, and as I had been attorney for Shepherd about three years, they thought I had better be guardian. The selectmen then opened the whole case to the judge, and said that certain executions were in force against Shepherd, and that if he went to gaol, his family would come upon the town.

Mr. DUTTON. When was this conversation you speak of ?

A. Some time in June.

Q. And who do you say went with you at that time ?

A. One or more of the selectmen.

Q. If the object of the visit was to secure the town of Peperell, why did you go with them ?

A. I had previously been Shepherd's attorney, and thought it proper to attend as his agent.

Q. Did you consult the judge yourself as a lawyer, about securing the annuity ?

A. No.

Q. Did you ever consult him at any time after you were appointed guardian ?

A. No; excepting that I once asked the judge how to put down the annuity in the appraise warrant, as I did not understand it; and the judge told me I must appraise the estate just as if the man was dead, and make my return accordingly. But about the annuity the selectmen and the judge talked the matter over, and they had the most of the conversation.

Mr. WEBSTER. Which of the Selectmen was it who went with you?

A. Dr. Walton was one, and Capt. Jewett, or 'Squire Buttrick, the other.

Q. Do you not recollect any subsequent conversation with the Judge about the securing of this annuity?

A. I do not remember any.

Q. By the President for a member of the Court. Was the witness informed by the Respondent at the time that any part of the fees paid were for advice about securing the annuity?

A. I was not.

Mr. LELAND. Were they paid when you took the letters of guardianship ?

A. Yes, I paid part at that time in money, and gave a note for the rest.

Q. Did you take a receipt ?

A. I asked for one, but the Judge said it was no matter—he did not usually give receipts for such business; that I might charge it in my account, and it would be allowed.

Q. And was the account allowed ?

A. It was.

Mr. Fiske the Register was called again.

Mr. FAY. What are the fees usually paid when these letters of guardianship are granted ?

A. The whole fees are $6,60 for letters of guardianship including the complaint to the Judge—the citation of the party complained of—the warrant of inquisition to the Selectmen of the town where the party resides, and their return on it—the return of the citation—the adjudication on inquiry into the truth of the facts alleged—the petition of the party applying for guardianship—the order upon this—then if the party complained of be adjudged a spendthrift, or non compos, the warrant of appraisal—the bond given by the guardian—the letter of guardianship—the order of notice—and the blank notifications. The usual charge for the whole, together with the recording, is $6,60 ; but none

of the items are provided for in the statute excepting the warrant of appraisal that I know of.

Cross examined.

Mr. WEBSTER. This $6,60 is the expense attending one letter, is it not?

A. It is.

President. Where there are three letters granted is the expense three times $6,60?

A. Yes—the charge would then be $19,80.

Q. by the President for a member of the Court. Were the sons John and Francis minors—and what was their age?

A. No—they were adults; their exact age does not appear.

The Managers informed the Court that they had gone through their evidence upon this article, and were directed to proceed to the third.

BENJAMIN DIX sworn.

Mr. FAY stated the substance of the article to be that the Respondent at his office in Groton, and not at any regular Probate Court, granted to the witness administration and a warrant of appraisal on the estate of Eri Rogers for which he demanded and received the illegal sum of $5,70; and afterwards, upon the return of the inventory, at his office also, decreed a commission of insolvency for which he received the illegal sum of $39,02. Mr. F. then proceeded to examine the witness.

Q. When did you take out administration upon the estate of Eri Rogers?

A. I have got the original letter and the account of fees paid.

(Witness produces the papers.)

Mr. FAY remarks that the letter of administration is dated Groton, Aug. 2, 1819, signed by the Judge, but not countersigned by the Register, and reads the account as follows:

August 2nd, 1819.

To bond, letter and warrant,	$4,70
" extra writing,	1,00
	$5,70

Q. Where was this administration granted?

A. At the Judge's office in Groton.

Q. Was the Register present?

A. No he was not.

Q. Did you pay the sum mentioned in the account?

A. I paid $5,70 at that time.

Q. Did you pay any farther sums?

A. On the 19th of Aug. I took out some other papers and represented the estate insolvent, for which I paid $39,00.

Q. For what did you pay that sum?

A. I can't recollect the particulars of that account, but I took a number of papers on account of the insolvency of the estate and guardianship of the children.

Q. Where did you receive this second set of papers?

A. That was at the Judge's office also.

Q. Were the parties concerned previously notified?

A. They were.

Mr. FAY. State generally the circumstances attending this administration.

Witness. Mr. Rogers died on the 2d of July, 1819, leaving a large farm, and nobody able to take care of it. He left no will, but before his death he had requested me to administer upon his estate. His widow also requested me to do so. The farm required immediate attention, so I went to the judge and told him the situation of the estate, and that I expected to administer; but I did not want to hurry the business, because perhaps some of the relations might choose to apply for it; and I wanted to know what should be done with the estate in the mean time. The judge said he saw no impropriety in my taking care of it for the present—and that I had better go on till an administrator was appointed. On the 2d of August I went to him again, with my bondsmen, carrying with us the widow's renunciation, together with a request in writing, that I should be appointed. I then took out the letters of administration. I am not certain whether it was that time, or afterwards, that I told the judge the estate was likely to turn out insolvent; but I soon found it must be so; and I had several conferences with him before the return of the inventory, and told him just how the estate was situated; that it must be insolvent; that I should want a license to sell both real and personal estate; that a guardian must be appointed for the children; and that I wished to have it all done at once, at the same time that I returned the inventory. I got some instructions from the judge how all this was to be done; and on the 19th of August, I went up to the judge's office with the widow of Mr. Rogers, and a child of 14 (for whom it was necessary to have the guardianship,) my bondsmen, the person to be appointed guardian, and his bondsmen; intending to return the inventory, and get the other business done all under one. The judge said he should prefer having the business done at a regular probate court. But as I represented to him that it would be best to have the business done in Groton, that the case required despatch, and that there would be no probate court held there for some time, he consented to attend to it at his office. So the commission of insolvency, license to sell, and guardianship were all taken out at once, and the inventory returned at the same time. And for the whole I paid $39,00.

Q What were the particular items of the $39,00?

A. I have a minute of expenses which was given me by the judge at the time. I

see there was $36,02 charged for the papers, and $3 for extra writing. I believe I did not pay the two cents.

[Witness hands the paper to Mr. Fay.]

Mr. FAY. The account is in the Respondent's hand writing, as follows.

August 19, 1819,

Return of inventory, &c.	$7,72
Affidavit of notice, &c.	1,50
Allowance of account,	2,00
License to sell personal estate,	2,50
Relinquishment of dower,	2,00
Commission of insolvency,	2,50
License to sell real estate,	5,50
1st letter of guardianship,	3,70
1st appraise warrant,	,75
2d letter of guardianship,	3,85
2 appraise warrants,	1,50
Bond, oath, &c.	2,50
	36,02
Extra writing,	3,00
	$39,02

Cross examined.

Mr. HOAR. Why did the judge do the business at his office, rather than at a probate court ?

A. It was for my accommodation.

Q. Did he tell you he should charge more for doing it at a special court ?

A. He did.

Q. Did you consider the $3 extra, an exorbitant charge ?

A. No ; I thought it a moderate compensation enough, as it was done to accommodate me.

Q. And you often called upon the judge for advice as to the settlement of this estate ; did you ?

A. I asked him first how I ought to act till an administrator was appointed ; and after my appointment I asked him about the settlement of the estate.

Q. Did the judge tell you that if he did the whole, he should charge you rather more for it ?

A. Yes, he did, but I considered it would be a saving.

Mr. WEBSTER. Do you live in Littleton ?

A. I do.

Q. How far is that from Groton ?

A. Seven miles.

Q. And how far from Concord ?

A. I do not know.

Q. Well, do you know how far it is from Cambridge ?

A. Twenty-six miles.

Q. Were there not certain mortgages on this estate ?

A. Yes, the estate had two mortgages on it ; one to myself, and one owned in Boston ; I believe by Mr. Samuel Parkman.

Q. And there was some difficulty about these mortgages, was there not, about which you consulted the judge ?

A. No ; not about the mortgages, but there was some difficulty about an attachment on the estate prior to Mr. Rogers' death, and the judge gave me advice about this.

Q. What did you pay for it ?

A. I never paid any thing more than I have stated, till I came to the final settlement. When I closed my account of administration I paid the usual fees.

Q. What do you suppose was the difference of expense in transacting the business at Groton, instead of going to the probate court at Cambridge ?

A. I cannot tell off hand ; but I think it would have been much greater if I had gone to Cambridge ;—I should have had to have carried my bondsmen with me, and the widow, as guardian, must have gone with hers ; and Mr. Kimball the other guardian, with his ; so that I thought there would be a considerable saving to the estate by having the business done at Groton.

Q. by the President for a member of the court. Did you understand from Judge Prescott, before you took this administration, that an extra charge was to be made for its being done at the office instead of the regular probate court ?

A. The judge told me there would be a little something to pay. He charged $3, which I thought reasonable, and considered a great saving.

Mr. DUTTON. What was the difficulty as to the attachment about which you consulted Judge Prescott ?

A. Why a little before Mr. Rogers' death, in order to secure a certain note of hand, property was attached to the value of about $200 and receipted for. I heard nothing more about the action till after the commission of insolvency was taken out. The note for which the attachment was laid was then sent to the commissioners and allowed. But soon after I received a summons to attend a Court at Boston on that account. I came here, and saw the attorney who brought the action, and when I asked why it was brought, he told me it was only to save the costs. Afterwards when I was speaking to Judge Prescott about it, he told me I must go right back to Boston, and prevent a judgment against me. He advised me to employ an attorney there, which I did.

Q. Did you mention this to Judge Prescott incidentally in the course of conversation ?

A. I think I did—but I am not sure whether I did or did not—but he gave me the advice mentioned.

Q. Did you consult him as counsel then or at any time ?

A. I don't know that I consulted him as counsel, or any way, except as to forms of proceeding.

Q. Was there any advice given you by Judge Prescott for any thing else?

A. I recollect asking the Judge before about the cancelling of the mortgages. I wanted to know what evidence I must have of their discharge.

Q. by the President for a member of the Court. Is there any regular Probate Court holden at Groton or Concord?

A. There are two Courts at Groton and one at Concord.

Mr. WEBSTER. When did you first come to the knowledge of your having been wronged by the Judge? When did you first find out that you had paid more than you ought?

A. I never have found it out, and don't know now. I never made any complaint of these things for I never was dissatisfied about them; and I don't know that any wrong has been done to me or to those I represented. I never knew there was any difficulty about it till I was summoned to appear and give my evidence before the House of Representatives.

Mr. SHAW. Who drew up these papers?

A. Judge Prescott and a young man in his office prepared them all.

Q. Was any Register present?

A. No.

Mr. HOAR. May it please the Court, we not only admit that, but we assert it. I mention it merely to save your Honors and the Hon. Managers the trouble of that inquiry in future. We assert uniformly that no Register was ever present at any of these Special Courts.

Mr. SHAW. Have you a copy of the inventory returned?

A. I have.

[Witness produces the paper.]

Mr. *Fiske* was called again to the stand.

Mr. DUTTON. What would be the regular charge on the return of this inventory?

A. I should estimate this at about 20 pages—the charge would then be 85 cents for the return, twelve times 20 cents for the recording, and the same for the copy—total $5,65.

Mr. DUTTON. The actual charge is $7,72. Please to state the usual charges for all the items in that account.

Witness. The usual charge on return of inventory is $5,65

Affidavit of notice,	1,50
Allowance of account,	2,00
License for personal estate,	2,50
Relinquishment of dower,	2,00
Commission of insolvency,	2,00
License for real estate,	5,00
1st letter of guardianship,	2,10
1st appraise warrant,	,75
2nd letter of guardianship,	2,25
2nd appraise warrant,	1,50
Bond, oath, &c.	2,50
	$29,75

For the license to sell real estate I have mentioned the highest charge; if there is no order or decree we charge only $4,50. For the letter of guardianship I have allowed only one minor; we charge 15 cents more for every additional minor.

Cross examined.

Mr. WEBSTER. For which of these items is there a charge provided in the fee-bill?

A. The 85 cents on the return of the inventory, and the 12 cents a page for recording and for copying are fixed by law. No other of these items is provided for.

Mr. BLAKE. Is there any charge in this whole account greater than is allowed by statute?

A. No;—there is no excess in any case where the fee is fixed by law.

Mr. HOAR. Is this a case where a copy must be made for the Judge, and preserved in order to be recorded?

A. It is.

Evidence on the fourth article.

JOSEPH BUTTERFIELD sworn.

Mr. FAY. State whether you were appointed administrator on the estate of Simeon Brown, and where and when and what fees you paid.

A. On 15th Aug. 1818, at Judge Prescott's office, I took out letters of administration on that estate, and had appraisers appointed. I paid $6;—no bill was given, or fees marked on the papers.

Q. Was previous application made to the judge to appoint a time for holding the court?

A. No.

Q. Was notice given to the parties?

A. I carried a letter from the widow, and I think from some of the creditors, containing a request that I should be appointed administrator. The heir was only a small child.

The letter of administration was produced; which Mr. F. observed was signed by the judge, but not countersigned by the register.

Cross examined.

Mr. HOAR. What was the object in going to Groton to take out letters of administration?

A. To save the extra expense of going to the next probate court at Concord, which was double the distance, and to save time. The estate was a manufactory, which required immediate attention, or it would stop.

Q. Where do you live?

A. At Tyngsborough.

Q. Did you ask any legal advice of the Respondent?

A. I think I asked him some advice respecting my rights and duties as to the administration of the estate.

Mr. WEBSTER. Did you ask him about some estate in New-York?

A. Yes—I asked the judge what to do about it, and he gave me his advice.

Mr. HOAR. Was the judge going out? was his chaise harnessed?

A. Yes, the judge had his horse ready tackled to go somewhere, and he waited at my urgent request. He was detained as much as two hours.

Q. Did the judge prepare all your papers?

A. I believe I carried my bond executed.

Q. Did he prepare all the others?

A. Yes, and took copies of some.

Q. How much did you pay?

A. Six dollars.

Mr. FAY. Was this allowed in your administration account?

A. Yes.

Q. Did you pay nothing more.

A. No.

Q. Was it a great saving of expense to do the business at Groton?

A. Yes, it was a saving of several dollars.

Q. Did this six dollars include pay for advice?

A. I supposed it did, as I expected to pay reasonably for the advice, and I paid nothing else—I considered the charge a reasonable one.

Mr. WEBSTER. If you expected to pay, whence does your dissatisfaction arise?

A. I have no dissatisfaction.

Q. Have you never complained?

A. Never.

Mr. FAY. Was the six dollars charged in one item?

A. Yes.

Mr. FAY remarked that in the account settled, it was all charged as "probate fees."

Mr. HOAR. Do you recollect any conversation about a charge for advice?

A. Nothing was said at the time, or at any other time, what part was for fees, and what for advice.

Q. Was the advice given, such as you would have been obliged to ask of some one?

A. Yes—I was uninformed respecting my duties as an administrator.

ISAAC FISKE examined again.

Q. by a member of the court. Did Judge Prescott pay over to the register any different sum for his fees, when business was transacted at his own office, from what he did when business was done at regular courts?

A. The same fees were paid to me as at the regular courts: the labour is the same.

Q. by a member of the court. What would be the usual fees for granting administration in this case?

A. $3,60, where there is no dispute.

Mr. SHAW. How do the papers get to the register from these special courts?

A. The judge generally brings them to the next probate court. They are recorded just as if the business was done at a regular court.

The court adjourned to 9 o'clock tomorrow morning.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, APRIL 18.

At 11 o'clock a message from the Honorable Senate was delivered by the Honorable Mr. Welles, informing the House, that they were about to resolve themselves into a Court of Impeachment to proceed in the trial of the articles of Impeachment exhibited against the Honorable Judge Prescott. The House after having despatched a message announcing that they were ready to give their attendance, proceeded to the Senate Chamber.

After the proceedings which were there had were completed, the Members of the House returned to the Representatives' Chamber.

Mr. KING laid before the House the answer of the Respondent, which was read from the Chair by its title.

Mr. KING on the part of the Managers reported a Replication to the answer of the Respondent, which he laid upon the table, and which was read. On motion of Mr. SAUNDERS it was accepted by the House, and the Managers were directed to present it to the Court of Impeachment.

AFTERNOON.

The House being informed by Message, delivered by the Honorable Mr. Lyman that the Senate were ready to resolve themselves into a Court of Impeachment, and to proceed with the trial, went up to the Senate Chamber. After the proceedings there had, they returned to their Chamber at a quarter past 8 o'clock, and adjourned.

SENATE.

THURSDAY, APRIL 19.

COURT OF IMPEACHMENT.

Mr. Tufts was sent with a message to inform the House of Representatives that the Senate was about to resolve itself into a Court of Impeachment. Mr. Saunders brought an answer that the House would attend forthwith. The Speaker and six of the managers came in, followed by other members of the House.

The Court was opened at a quarter past 9.

The Respondent and his counsel attended, and the Respondent was called.

Mr. FAY said the managers would proceed to offer evidence in support of the 5th article of impeachment.

PETER STEVENS sworn.

Mr. FAY read from the records of the probate court, a letter of administration, dated June 21st, 1819, granted to Lucy Allen, upon the estate of her husband, Shobal C.

Allen. The letter was not countersigned by the register.

Witness testified, that on the 21st June, 1819, he went with the widow Lucy Allen to Judge Prescott's office, in Groton, to obtain a letter of administration on the estate of Shobal C. Allen. A letter of administration, warrant of appraisement, and order of notice were received; for which he paid the judge $5. On the 31st July he went to Judge Prescott's office again, to return an inventory, and to get a license to sell personal estate, and paid the judge $10.

Mr. DUTTON. Was that all you got?

A. Yes; I do not recollect that any thing else was done.

Mr. FAY. Was no allowance made to the widow at that time?

A. There was an allowance to the widow; I am not able to say whether it was made then, or at another time. On the 21st Feb. 1820, I went again, and carried a list of debts, to get a license to sell real estate. The judge said the list of debts was not correct. He gave me directions how to make it out, and gave me a suitable blank. I paid him $2. Nothing more was done at this time. I went afterwards on the 24th March, with the guardian, to get letters of guardianship to the children. The judge made out three letters of guardianship for seven children, two over fourteen years of age, for each of which a letter was taken, and five under fourteen, for all of whom one letter was taken. They were charged to the widow. I was her agent. I got at the same time a license to sell real estate, and a commission to set off the widow's dower. This was the last time I went.

Q. by one of the Managers. Was this all that was done?

A. I think it was.

Q. What did you pay?

A. The whole amount paid was $23,65. I do not know the items.

Q. Was all this done at the Respondent's office?

A. Yes.

Q. Was the register present?

A. No.

Q. Was notice given beforehand to the judge, when you went to him?

A. I think there was, by sending him a line, that he might be found at home. I think no notice was given except for the first application.

Q. Did you ask for a bill of particulars?

A. When I got through the business, I asked him what was to pay;—the judge gave me the gross amount, without stating the particulars.

Mr. DUTTON. Who was appointed guardian?

A. William A. Bancroft. He was present when the letters of guardianship were granted.

Q. Were these all the times you attended in this case?

A. Yes.

ISAAC FISKE was called again to state what would be the usual fees in this case. He stated that they would be $32,10, according to the papers appearing in the case. It only appeared that there were two letters of guardianship; if there were three, a further sum of $2,10 was to be added to the $32,10. The whole fees charged amounted to $40,65. The fee-bill did not provide for all the fees in cases of administration, guardianship, &c. —he stated the customary fees. Mr. F. enumerated all the papers on record in the case of Shobal C. Allen.

Q. by a member of the court. Has it been usual to expose the fee-bill at the probate office, when the probate court is in session?

A. It has never been usual to expose the fee-bill in any other way than in a book that lies on the table.

Evidence on the sixth article.

JONATHAN LORING sworn.

The witness was asked to relate what he knew respecting the facts charged in this article.

Witness. In the latter part of 1804, I applied to Judge Prescott, on behalf of Mary Trowbridge, for a petition for the partition of real estate.

Mr. FAY. Was he judge at that time?

A. He was. He prepared the petition and the other necessary papers, and appointed commissioners to make the division.—When the commissioners came on, Benjamin Champney, attorney for Mrs. Champney, wife of Francis Champney, was asked if he would take the real estate. He refused. I told the commissioners, that if it could not be divided, Mary Trowbridge would take the whole. It was thought best not to make a division, and the whole was set off by the commissioners to Mary Trowbridge. The other party became dissatisfied, and the thing was continued from court to court, through 1805 until Jan. 6th, 1806, when the judge was about to make a decree. Benjamin Champney came to Groton at that time, having obtained a warranty deed to himself from Francis Champney and his wife of her half of the estate. He made a deed of the same to me, and I gave security for the payment of the money, and so the matter ended.

Q. Did you apply to the Respondent as an attorney?

A. I told the judge I should have need of counsel, and the judge told me he should expect pay as an attorney; he told me so several times, and I expected and was willing to pay him so. At one time he told me he should charge $50, and I paid it.

Q. When did you first apply to the Respondent?

A. In Dec. 1804—it might have been in Jan. 1805.

Q. Are you sure he was judge of probate at the time?

A. Yes.

Mr. WEBSTER. Are you sure you applied in 1804?

A. Yes, I am sure. I received a letter from Champney, dated Dec. 19, 1804, demanding rent. I think I went in a day or two after to the judge for advice. Within a fortnight the judge appointed commissioners. He advised me to go to New Ipswich, to see if Mrs. Champney would not sell out. I went to New Ipswich for this purpose, but Mrs. Champney refused to sell. Judge Prescott then granted the petition.

Mr. FAY. Did the Respondent state to you that he was a judge, and could not act in the business as counsel?

A. I do not recollect that he did.

Mr. DUTTON. Did the Respondent go to New Ipswich?

A. No, I went myself.

Q. by a manager. When did Champney come to Groton?

A. On the 6th of Jan. 1806. The probate court sat at Cambridge. The commissioners had made their return, and the judge was about passing a decree when Champney came down.

Mr. LELAND. What makes you recollect that you applied to the Respondent in Dec. 1804.

A. The letter of 1804.

Q. by a manager. Was the sum of $50 paid as counsel fees?

A. Yes, I paid the probate fees as I went along. The $50 was in addition.

Cross-examined.

Mr. HOAR. When did you apply first to Judge Prescott for advice?

A. Within a week after receiving the letter.

Q. Did you never call on him before you received the letter?

A. No.

Q. Did not Mary Trowbridge call on him before?

A. I do not think she did.

Q. Who is Mary Trowbridge?

A. She is now my wife. I was her agent. I then expected to make her my wife—which I did afterwards.

Q. Did Judge Prescott tell you he should make a charge as attorney or counsel?

A. He told me several times he should charge separate.

Q. Were all the papers made out at once?

A. I do not recollect. I presume within a month—perhaps within a fortnight after the receipt of the letter. We went about it directly.

Q. Who were the commissioners?

A. Esquire Lawrence, Esquire Little and Esquire Longley. Esquire Longley refused to serve, and I then went to Judge Prescott, and he appointed Dr. Prescott, who did serve.

Q. To whom did the commissioners make return, to the judge or to Mary Trowbridge?

A. They made a little sketch of a verbal report (witness produces it) to the parties, and afterwards a more particular report to the judge.

Q. Was the second report made after the difficulties between the parties?

A. I cannot say.

Mr. BLAKE. The first application to the judge was for a division of real estate?

A. Yes.

Q. How long was it pending?

A. From 1804 to Jan. 1806.

Mr. WEBSTER. Do you, or do you not remember that Judge Prescott, in some capacity or other, went with Mr. Champney to New-Ipswich on this business?

A. I do not; I believe he did not.

Q. Which was the eldest sister?

A. Mrs. Champney.

Q. Was there any misunderstanding before between the two sisters, Mrs. Champney and Mrs. Loring?

A. Not respecting the real estate.

Q. Was there on any account?

A. There might be some difference.

Q. Were they on good terms?

A. I do not know that they were not.

Q. Did you live in the house with Mary Trowbridge at the time?

A. Yes.

Q. How long before had the sisters visited each other?

A. A year before, Mary went to New Ipswich to see her sister.

Q. On this business?

A. No.

Q. How do you know?

A. I went with her.

Q. Were they friendly at the time of the division?

A. I do not know that there was any coldness between them respecting the estate.

Q. Were they friendly?

A. Not so much so as some.

Q. Had not the Judge been applied to by Mary Trowbridge before you applied to him?

A. No.

Q. How do you know?

A. From my connexion with her, I should have known of it.

Q. What connexion?

A. I had some expectancy of making a wife on her.

Q. When you first applied to the Judge, did he tell you about counsel fees?

A. Yes.

Q. Did you always expect to pay them?

A. Yes.

Mr. DUTTON. Did the Respondent ever intimate to you that there was any dif-

ficulty in his acting in the case, because he was a Judge?

A. Not that I recollect.

Mr. WEBSTER said he would take this opportunity to read the Commission of the Respondent as Judge of Probate. It was dated the 1st Feb. 1805, and the oaths were administered to him on the 19th of the same month.

Mr. FAY reads the petition of Mary Trowbridge for partition, dated March 18th, 1805 —the decree and warrant to the commissioners, dated May 23d, 1805, to set off a moiety of the estate according to the prayer of the petition. In the mean time there was an order of notice.

PRESIDENT. Is there no return of the warrant on the record?

Mr. FAY. None. By the record the process seems to have stopped there.

Evidence on the seventh article.

Mr. WEBSTER said that to save time, the Respondent's counsel were willing to admit the seventh article as it stands.

Mr. FAY said he wished to call a witness to prove what the services were, to which this article relates.

Mr. WEBSTER objected. He said the article was admitted. If the counsel for the Commonwealth were not satisfied with this admission, then they expected to prove something that was not stated in the article, and something that the Respondent was not called upon to answer.

Mr. DUTTON. We propose to call the witness to prove what the advice and assistance was, for which the Respondent charged the $15 mentioned in the article. We think it is perfectly competent for us to shew that the sum was received extorsively for services which he ought to have rendered as Judge of Probate without compensation, or that if he took it as counsel, he took five times as much as others would have charged—that under pretence of advice and assistance, the $15 was taken corruptly *colore officii*. The words in the article, "advice and assistance," &c. are quoted from the Respondent himself. We quote them, meaning to shew the intent —the corrupt motive; and we submit to the Court, that we have a right to go into this evidence.

Mr. WEBSTER. As this motion trenches directly on the merits of the case, I must ask the indulgence of this Hon. Court, to make a few remarks. We give the Hon. Managers this article as true. I confess I am not a little surprised, considering the general correctness of the Hon. Managers, and the legal and honorable course they have pursued, that they should attempt to prejudice the Respondent by allegations not contained in the articles. The question amounts to this, whether they may charge one thing, and prove another which is not charged. I do not advocate the proposition that this Hon. Court is bound by all the rules and forms of other inferior Courts, but I do contend that the Constitution is as imperative on this Court as on any other, where it declares, that every man's offence shall be described to him plainly, substantially and formally. This Court is a criminal Court; its judgment is as deep, as penal, as the judgment of any Court. It does not take away life, but it takes away every thing that makes life worth having. You take away not only a man's property, not his office merely; you disfranchise him, you dismember him, you turn him out of his society, you disqualify him, you take away the privilege which every citizen enjoys, of holding and being elected to office if the people see fit to choose him. You are a Court of criminal jurisdiction, and are bound substantially by the universal, fundamental rules of justice, by which all Courts are governed. It is a dictate of natural justice that a man is not in any Court to be charged with one thing and tried on another. If the Hon. Managers had preferred this article against the Respondent in a Court of common law, and the Respondent had demurred to it, would it have been pretended that they could call on a witness to give a coloring to the article? Here, though the form is different, the principle is the same. It is impossible to admit that any thing can be proved that is not charged. In the present case, what is the charge? It is not pretended in it, that the Respondent took improper fees *colore officii;* he is not come prepared to meet such a charge. It is not stated that he took too much as counsel. But the charge is that he rendered services as counsel and received fees for them, which he allowed in the account of the administrator. This we admit, and we are prepared to defend it. The gentlemen want to prove that the services rendered were not worth so much as the Respondent received for them. They wish to convince your Honors that ten dollars and a half, or at most eleven dollars, would have been enough. They are going to establish a new charge. They have not counted upon it. The evidence is to introduce new substantial matter, and we are bound to resist its admission.

Mr. SHAW said it appeared to him, that the words "being Judge," the Respondent did "unlawfully and corruptly demand and receive," &c. constitute the gist of the charge in this article. The admission of the article does not admit the corruption, and the question now is, whether we are bound to take the admission *viva voce* of the Respondent's counsel, after issue joined.

Mr. WEBSTER. My objection is not against the Hon. Managers proving the facts alleged in the charge, but it is against their proving any thing more.

SAMUEL WHITING sworn.

Mr. FAY reads the 7th article and directs the witness to state what he knows about it.

Witness. I can state only what I stated before the House of Representatives. I was guardian of five minors, children of Benjamin Baldwin of Billerica, and went to Concord—

Mr. HOAR interrupts the witness, and objects, that the Hon. Managers were already bringing in facts not alleged; as nothing was said in the article about the number of the wards; and even that ought not now to be stated.

Mr. BLAKE. There is no intimation in the article that any letter of guardianship was ever granted; and that very omission was one reason why we considered it safe to admit the article as it stands.

Q. by Mr. FAY. Did you settle an account as guardian?

A. I brought my accounts to the Judge, and he told me they were informal. I asked him to put them right.

Q. What did he then do for you?

Mr. WEBSTER. That is the very thing we object to.

Q. Did he give you directions—

Mr. WEBSTER. No, sir, I object.

Mr. DUTTON. What were the services rendered? I think we have a right to ask the question.

Mr. HOAR. Our objection, may it please the Court, is not to the form; it is substantial. The Respondent in preparing to answer very many of the charges brought against him, meets with this real difficulty—the difficulty of ascertaining what were the facts. There is no allegation in the article of the particular services rendered; and here lies the difficulty; that it is impossible to find the papers necessary to enable us to prepare an answer to the charge. If I go to the Register and ask of what wards Samuel Whiting was guardian, the answer is he does not file his papers by the name of the guardian, but by that of the ward. The name of the guardian is no help to us; and as that only is mentioned in the article it would be impossible to answer the allegation in a year. This difficulty therefore makes it proper for the Respondent to stand on his constitutional and legal rights. The position of the Hon. Managers, if pushed to its full length, would amount to this, that the House of Representatives might make a general charge of misconduct and maladministration, and under that charge commence their inquiry with the beginning of the Respondent's administration, and go into an investigation of the whole of his official conduct; which there would be no possibility of answering. It becomes necessary therefore to insist that the charges be specific. It was observed by one of the Hon. Managers that the charge against the Respondent contained in this article was for taking fees as counsel for services which he should have rendered gratuitously as Judge. We find nothing of it. We pray your Honors to look at the article. It contains no such charge. If it does the Hon. Managers have the full benefit of it, for we admit it. If they are not satisfied with that let them prove it; but do not let them prove what was never alleged. We assert that it is matter of substance that we should not be compelled to answer any thing with which we are not substantially charged. The Respondent must certainly be admitted to the benefit of the common provision in the 12th article of our Bill of Rights, that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him."

Mr. BLAKE. The 7th article, if it charges any crime against the Respondent, charges that of bribery—a charge of a high and extraordinary character. If any form of allegation be necessary in processes of impeachment, the form of this article is clearly imperfect. We do not however object to the defect of form, but of substance. The definition of bribery is "when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in office." (4 Blackstone's Com. 139.) If there be any allegation in this article that the Respondent has received 'an undue reward to influence his behaviour in office,' we have had the temerity to admit it. We may have acted unadvisedly in doing so. But we can perceive no such charge; there is only one official act to which this article has any relation. The allegation is, "that said Prescott, being judge as aforesaid, at a probate court at Concord, in said county of Middlesex, on the 7th day of June, A. D. 1815, did then and there advise one Samuel Whiting, in and about the settlement of his accounts as guardian for certain wards, and did then and there, as the attorney of said Whiting, give him directions therein." So far we are left to conjecture even the residence of Samuel Whiting. Nothing is said of any application *there* for letters of guardianship. There is nothing to show that Samuel Whiting had not taken out administration in New-Hampshire or New-York; and not a word is said of any process pending before the Respondent in the county of Middlesex. The article goes on to state, "that the said Prescott did then and there, for his services as attorney in the business aforesaid, unlawfully and corruptly demand and receive of the said Whiting, the sum of fifteen dollars." If any thing is here charged, it is the taking of exorbitant fees as counsel; for the case is not alleged to have been

within the jurisdiction of the Respondent's court. If that means any offence, it means taking unlawfully and *corruptly*, as counsel or attorney, larger fees than by the rules of practice he ought to have taken. The article proceeds thus. " and did then and there, in his said office of judge as aforesaid, charge and allow in the account of said Whiting, with his said wards, said sum of fifteen dollars, for advice and assistance about preparing this and other accounts and papers." Here is the substance of the charge—the only fact alleged which it is important to consider. We find that there was at some time or other a guardianship account commenced. When—we are left entirely at a loss to conjecture. It may have been long anterior to the Respondent's appointment to the office of Judge. The only thing to be considered then is whether this charge as counsel was a reasonable charge. Here was an account unsettled ; as judge he was to adjudicate upon it—and of course if the counsel fee there charged was reasonable—it was not his privilege, but his duty to allow it. Nothing is hinted in the article of any impropriety in his conduct as judge—nothing that has any relation whatever to his official duties—unless it be what is contained in those three last lines. We submit the question therefore to the honourable court, whether it is proper upon a charge of misconduct and maladministration in office as *judge*, to examine the witness as to the services for which fees were taken by the Respondent as *counsel ;* or whether any facts are to be admitted in evidence which are not substantially alleged.

Mr. SHAW. It would appear from the remarks of the Respondent's counsel, that the learned gentlemen were arguing a special demurrer. We have not indeed the benefit of many precedents to guide us ; but we know that this court is vested by the constitution with the power of trying and deciding questions of impeachment for misconduct and maladministration in office, and it must necessarily have the privilege of prescribing its own rules. I readily admit in its full force that constitutional provision of our bill of rights, which has been insisted upon by the learned counsel for the Respondent. I agree that no citizen or subject of this Commonwealth can be convicted of a crime which has never been alleged against him, and that his offence must be so specifically described, that he shall be able to answer it ; and I ask your honours whether this article does not import a specific charge? It accuses the Respondent generally of misconduct and maladministration as judge; and under that head specifies a particular act done at a particular time, when he was in fact judge. Is it further necessary in order to fix upon him the charge of official misconduct to state when he was made judge ? or is it not already sufficiently implied that the offence complained of was committed while in office ? It is alleged that the advice given was at a probate court ; that Samuel Whiting to whom it was given then acted as guardian ; and it is then distinctly alleged that the account containing that charge for advice was allowed by the Respondent at a probate court. This surely taken together does substantially allege that the Respondent did, as judge of probate, and under colour of his office, unlawfully and corruptly demand and receive of the said Whiting, the sum there mentioned. But we contend now as before, that the words ' unlawfully and corruptly' are the very gist of the accusation—the essence of the charge. It is not necessary to set forth in the allegation the evidence by which it is to be supported. But having alleged a particular act to have been done unlawfully and corruptly, the Respondent is bound either to plead *not guilty*, or to demur. He has done neither. In his answer he has made a general denial of the charge, and now tenders an admission of the facts. Here is an offence charged—time, place and circumstance sufficiently described—on a certain day—at a certain probate court, when it must be presumed he was the presiding judge—fees taken as counsel, and afterwards in the guardian's account allowed as judge ;—and is it not competent for us to show that this was done wilfully and corruptly ? Is the witness not to be asked what sums he paid, and for what services, in order to ascertain the degree of corruption ? I had not anticipated this objection, and therefore have not prepared myself with authorities to meet it. But I recollect the case of Lord Chancellor Bacon, who made a general answer of *not guilty*, and then upon trial admitted the facts. A special commission was notwithstanding appointed to inquire into the truth of the charge, and he was called upon to show that the admitted facts were not done wilfully and corruptly. He was called upon to show that there was no offence. Here the case seems to be precisely similar, and if the article under consideration does give in form and substance sufficient notice of the nature of the charge, we must be allowed to go into evidence to shew the corruption, which the Respondent will be bound to rebut.

Mr. WEBSTER. The counsel for the prosecution have misunderstood our objection. It is true the learned manager has made a very good argument to show that the article does contain a charge. And if it does we admit it. We admit all that is there stated. What effect this admission is to have we shall see afterwards.

The learned manager has not been able to shew any precedent for this extraordinary proceeding, although he has gone back almost three hundred years to the time of Lord

Chancellor Bacon. But his was entirely a different case. Lord Bacon did not admit the whole charge, but made a special answer, denying part and admitting part. We admit the whole fact, and all the legal inferences from that fact. The authorities upon this point are, that if the facts alleged be insufficient, the party accused is to have the full benefit of it on the general issue *guilty* or *not guilty*. In Lord Melville's case all the facts of the several charges were admitted, and the accused was acquitted on the ground of their insufficiency. And so it was in Judge Chase's trial. I insist that these honourable gentlemen have no right to prove any thing not alleged ;—no right to introduce new facts—no right to *make* charges. They are not the Commonwealth ;—they are not the House of Representatives. They are the mere managers appointed by that House, to conduct the prosecution on the articles here exhibited. This is to all intents and purposes an indictment—brought before the court—and Mr. Attorney is not now to amend it. I protest now and ever against any enlargement of these articles, directly or indirectly—I shall resist to the extent of my abilities, the admission of any fact not distinctly alleged. We stand upon the law and the constitution in this objection, and I insist that there is no allegation whatever, that the Respondent took fees of office as counsel. If there be, we have admitted it.

I pray the judgment of this honourable court, whether the question put to the witness shall be answered. We may have been rash in admitting this article.—Be it so.—The peril is on us. If the article stands sufficient and effectual, let the Respondent suffer judgment upon it.

The President then put the question to the court. Shall the managers ask the witness what sums were paid in this case, and what services they were paid for ?

It was decided as follows, by yeas and nays.

Yeas—Messrs. Thomas, Doolittle, Rantoul, Whittemore, Sullivan, Eastman, Allen, Reynolds, Tufts, Dwight, Parker, Lyman, Gardner, Hyde, Hunnewell, Pickman, Bartlett, Brooks, Varnum—19.

Nays—Messrs. Bourne, Ruggles, Moseley, Bigelow, Welles—5.

Mr. FAY then directed the witness to state what the judge did for him.

Witness. I carried my accounts of guardianship to the judge ; he said they would not answer, not being in proper form. and gave me directions how to put them right, and for this I paid him $15 ; but in the account allowed, it did not say to whom the money was paid, but only so much for advice and assistance, The judge wrote the head of one account, and did a little more to it, and then I went on with it—and then I believe he wrote the head of one other, and I copied the rest from this. It was a pretty long business—took about two days, but it all related to the forms of these accounts, and I did the chief of the writing myself, after I had got my directions from him.

Q. by Mr. FAY. What is the last charge against your wards in the general account allowed ?

A. "To advice and assistance about preparing this and other accounts and papers, $15."

Mr. FAY. Now please to state precisely what those accounts and papers were, and what the judge did about them.

Witness. This is a certified copy of the account allowed ; which was my general account of guardianship in which this charge of $15 was put ; and besides this I had a special account against each ward. (Account exhibited.) The other writings meant in that charge about which advice was given, were my five special accounts of guardianship. The Judge wrote a form of caption upon one of them, and I copied it into the others. The Judge did, however, considerable about the business, as I was quite ignorant of such affairs, and had to ask a great many questions ; and was there engaged about it the best part of two days.

Q. by Mr. FAY. Did that charge of $15 relate to the form of these accounts merely ?

A. I don't recollect any other account, and I paid the $15 supposing it to be for this. But it kept me two days at work, and I had to go and ask the Judge about it several times.

Cross examined.

Q. by Mr. WEBSTER. You were guardian to five minors, were you ?

A. I was.

Q. And you had put all your guardianship accounts into one ?

A. I had—and it was a pretty long one too—as much as a third of a quire of paper.

Q. And the Judge told you it would never do so—that you ought to make up your account against each ward separately ?

A. Yes, he told me so and I became convinced it was correct, because I had spent more for some of the wards than I had for others.

Q. And you then made one general account and five special ones ?

A. I did.

Q. And the Judge showed you how the separation was to be made ?

A. Yes.

Q. And the account to be so separated was a very long one ?

A. There was a large mass of papers—for I had kept a very particular account with each of my wards—only I had put 'em all into one ; there was as much as a third of a quire which I had stitched into a book.

Q. Could you have separated these ac-

counts propo ly without the assistance of counsel?

A. No.

Q. Did the Judge assist you in making the calculations?

A. He did.

Q. And he was occupied about the business at times for the best part of two days you say?

A. Yes, it took me two days to finish it.

Q. And during those two days you frequently consulted him how to proceed?

A. Yes I did.

Q. And for all this he charged you $15?

A. Yes.

Q. Well, did you think that very unreasonable?

A. Why I thought it was pretty good pay—but I didn't know as it was more than any other professional character would charge.

Q. How much did the Judge write himself?

A. He wrote the heading to two of the accounts.

Q. Did he not write a considerable part of some of the accounts themselves?

A. He wrote a good deal of the general account.

Q. Did you make any objection to his charge?

A. No I didn't object. I didn't know whether it wa. right or wrong, and I supposed I should have to pay.

Q. by Mr. DUTTON. Did Judge Prescott tell you he should charge counsel fees?

A. No.

Q. Did you suppose you were consulting Judge Prescott as a lawyer or merely asking him as Judge?

A. It never passed my mind that I was applying to him as a lawyer. In fact I didn't think about it, for I knew nothing about such services, or what was usually charged for them. I wanted advice, and could not get along without it; and I applied to the Judge because I was ignorant, and I supposed he knew.

Q. by Mr. FAY. Where was this advice and direction given?

A. It was all done in open Court, while the business of the Court was going on.

Q. by Mr. WEBSTER. Are there stated hours for the sitting of the Probate Court?

A. No. The Judge does business at all hours till the Court is over.

Q. by Mr. HOAR. Did you talk with the Judge out of Court at different times about this business?

A. No, I don't know that I ever said a word to him about it except in Court.

Q. Are these the accounts you speak of? (Showing witness certain papers.)

A. They are.

Mr. HOAR. I will thank you to point out what is in the Judge's hand writing, and what is your own.

Witness points out a considerable part of each account as in the Respondent's hand writing.

Q. The Judge made the division of the estate, did he?

A. Yes, he made the division of the estate, which was about $3000, and cast interest upon it.

Q. by the Court. At what time did Judge Prescott first state to you he should charge fees as counsel?

A. He never did state it.

Q. When did you pay the $15?

A. On the second day after the Court had adjourned.

Q. by *Managers*. You paid the Probate fees besides—did you not?

A. I did.

Q. by Mr. HOAR. Upon what occasions did you go to the Judge for assistance?

A. Whenever I found any difficulty about progressing with the accounts, which happened pretty often; because the five accounts were all mixed up together, and the Judge had a good deal to do in referring the items to the several particular accounts, which I then made out by his direction for each minor, besides a general account against the estate.

Mr. WEBSTER. You find now upon examining the accounts that the Judge did more about them than you supposed?

A. Yes, more than I thought for and more than I stated at first. I thought there was nothing but the heading and the charge for his fees at the bottom done by him. But the Judge must have examined the business pretty minutely. I should think he wrote about a third or a half.

Q. by *Managers*. Was the sum you paid the Judge inserted by him in the general account?

A. Yes, the minute at the foot of the account is in Judge Prescott's hand writing "for advice and assistance about preparing this and other accounts and papers $15;" and then for "Probate fees $2,25."

Q. by Mr. HOAR. The Judge examined the account very minutely as you now recollect, did he?

A. Yes—I believe he saw into the foundation of the charges, and made them correct.

Q. Could you not have gone on without the Judge's help in examining and dividing these accounts among the wards?

A. No.

Q. Did you charge each of your wards alike at first?

A. No.

Q. Do you recollect any of the particular corrections which the Judge made for you?

A. I recollect the administrator of the estate put a mortgage into my hands, to get the interest paid upon it, and I had charged myself with it in my guardianship account; but the Judge said I had nothing to do with that, and struck it out. Another mistake was about the board of the minors.

Q. How long was your account when it was made out correctly?

A. I should think it took up about a quarter of a quire of paper; and I recollect that as I had opened a separate account with each ward I told the Judge I should divide the expense of his help among them.

Q. And the Judge charged for all he had done $3 apiece, did he?

A. He did.

Q. Were there not others present who were concerned in the settlement of the estate?

A. Yes, two or three.

Q. And you detained them there or they chose to stay till you had got through?

A. Yes.

Mr. WEBSTER. You say you thought it pretty good pay, when the Judge charged you $15, but when did you first become dissatisfied about it?

A. I never was dissatisfied.

Q. What led you to complain then?

A. I never did—I never said any thing about it till I was called before the committee of the House of Representatives.

Q. When did you first hear there was any difficulty about it?

A. The first I knew of it was when I was summoned by the Deputy Sheriff to go before the General Court. He asked me if I would attend without pay. I told him no—for I did not want to go *with*.

Q. Then neither you nor any of those interested in that estate ever complained?

A. No—not unless it was Goodwin. I don't know but he complained some.

Q. Who was Goodwin?

A. He married one of the wards.

Evidence on the 8th article.

JOSIAH CROSBY sworn.

The witness produced a copy of an account, relating to the estate of Samuel Hopkins. He testified that he presented it to the Respondent for settlement, on the 11th Nov. 1818, at a probate court at Cambridge—that the judge added, in his own hand writing, the last item of two dollars, which was paid him.

Q. on the part of the managers. Did the judge perform any unusual services in the settlement of the account, or give any advice?

A. I was not aware that he did any thing unusual. I do not recollect asking any advice of him.

Q. Did he make any alteration in the account?

A. I think none, except to add the last charge. I held a note against the estate; the judge examined it, and cast the interest—he also examined my account against the estate, to see if it was right. The account was correct and was allowed.

Q. Did every thing pass in common form?

A. I think so.

Q. Did you ask for any professional advice?

Mr. WEBSTER objected to the question. He said that it was with great reluctance that he addressed the honourable court on a subject which had a bearing on their late decision. We before objected to the managers proving that which was not stated in the articles. It has been decided, and is now law, that they may give evidence of what was not charged. We now object to their contradicting what they have alleged. It appears on the face of the article, that the two dollars were given for professional advice; is it competent for them to show that no professional advice was given, and so no money paid for professional advice, but that the two dollars were a gratuity to the judge? They allege that professional advice was given, and we admit it, and are prepared to maintain the propriety of giving advice. If the managers are not holden to what they have charged I had as lief burn all the articles, and go upon the general impression of the court, in respect to the Respondent's guilt or innocence. There might as well be one single general charge of maladministration and misdemeanor, and the managers be allowed to examine into all the Respondent's official conduct for sixteen years, and to find and prove faults never before heard of.

A slight discussion ensued between the managers and the counsel for the Respondent, but no question was taken by the court. The witness however answered that the Respondent gave him no professional advice.

Cross-examined.

Q. by Mr. HOAR. Was the estate of Hopkins insolvent?

A. Yes.

Q. Were you a creditor of the estate?

A. Yes.

Q. Was your claim allowed?

A. Yes.

Q. Was it necessary to apply to the judge to have your claim added to those allowed by the commissioners?

A. Yes.

Q. Who drew up your memorial to have it allowed?

A. I do not recollect any such paper.

Q. Did you employ any counsel, other than the judge, to draw up any writing about the estate?

A. No.

Mr. HOAR stated that if the managers had produced the papers, which they should

have done, it would have appeared that the witness was a commissioner on the estate of Hopkins. If a creditor is a commissioner, he must make out his claim before the judge, who acts as a commissioner for that claim. A memorial is presented to the judge to have it allowed; and this paper in the present case was drawn up by the judge.

The same witness was about to be examined by the managers in relation to the ninth article. The Respondent's counsel called for the record of administration on the estate of *Jonas* Kendall, named in this article. Mr. *Fiske* testified that he had searched the files of the probate office, and found no such case Mr. FAY observed that there was a mistake in the christian name of Kendall, and he would pass to the evidence on the tenth article, unless the Respondent's counsel would permit them to amend. Mr. WEBSTER replied that their admissions had been held in so little esteem by the honourable Managers, that they could not admit the amendment.

Evidence on the tenth article,

The Respondent's counsel said they would admit this article; but the Managers said they preferred proving it.

PETER STEVENS examined again.

Witness. In January last I went to Judge Prescott's office at Groton, to take out letters of administration on my father's estate. My father died something like a year before. There were but two heirs, and we supposed it would not be necessary to take out letters of administration. Afterwards I found there was a debt against the estate, which I did not know of; upon which judgment was recovered against me. I asked advice of an attorney, fearing the estate was insolvent, and he advised me to take out a letter of administration. I went to the judge for that purpose, and told him the circumstances. I told him I supposed the creditor would recover only a dividend, if I took out a letter of administration. He said he thought otherwise—that if a judgment had been recovered against me, I must pay the whole debt. He said it would cost me $20 or $30, to take out a letter of administration—that he would give me one, if I wanted it, but he thought I had better not take one. I asked his advice about another charge on the estate. I concluded not to take out a letter of administration, and asked the judge what was to pay. He said he would leave it to me pretty much. I was standing by the fire, and took out of my pocket-book a two dollar bill. The judge said that would answer, and I gave it to him.

Cross-examined.

Mr. HOAR. Certain persons had sued you as executor in your own wrong, and judgment had been recovered against you?

A. Yes.

Q. And in consequence you went to the judge to take out a letter of administration, and stated the circumstances?

A. Yes.

Q. by the court. Did you apply to Judge Prescott as counsel, or had you other counsel to advise you?

A. I had other counsel, and went to the judge only to take out a letter of administration. I had no other object.

Q. by Respondent's counsel. What advice did your counsel give you?

A. He advised me that it would be most prudent to take out a letter of administration. The judge being older, I thought I had better take his advice.

Q. Was the gentleman you consulted very young? had he just opened an office?

A. I do not know. He had been only about six months in my town.

Evidence on the eleventh article.

BENJAMIN WYMAN sworn.

Witness. In April 1813, Mr. Locke administrator on his father's estate, applied to me to make out his second account of administration. He brought me certain papers, —his vouchers. I made out the account as far as I could from those papers. He said that somehow he was had a thousand dollars. I said I could not tell how it was. I told him to bring his first account. I looked at the first account, and I saw the difficulty. On the settlement of the first account, the judge had decreed a partial distribution, among the widow and seven heirs, ordering the administrator to pay each of them $1000, amounting in the whole to $8000. The administrator and the rest of the heirs, made an agreement with the widow, by which she was to receive $2000. The administrator had paid $1000 to each of the heirs, and $2000 to the widow, so that he paid $1000 too much. We were both puzzled as to the proper mode of rectifying the error. I told him I would go with him to the probate court and ask the judge's advice. The judge was accordingly consulted; he spent some time about it, and told us he thought Locke had better petition for leave to retain the $1000, in the second account. He drew a petition for Locke to sign. We then finished the account, and Locke presented it. The judge said it was worded right, and allowed it. I was sitting between the judge and Locke, and the judge said, "I believe Mr. Locke must give me," or "I believe I must have five dollars for my advice and assistance in this business." The judge handed the account to the register to compute the legal fees; it was then handed back to the judge, and he added the five dollars in the same line, and carried it out with the office fees—making I think $12,36 in the whole. [Witness turned to the account and read—"To paid office dues, &c. $12,36."—It was dated

29th April, at a regular probate court at Woburn.]

Cross-examined.

Mr. HOAR. Was there any difficulty among the heirs about this settlement?

A. None at all; they all certified the account for allowance.

Q. You never heard of any dissatisfaction?

A. No, they were perfectly satisfied.

Q. What was the reason you applied to the judge?

A. Because I did not know how to word the account in making the correction.

Q. Has the judge been in the habit of sending persons to you to have their papers prepared?

A. Yes, for many years.

Q. Has he taken pains to give you information as to the proper forms and mode of preparing them?

A. Yes, he has given me a great deal of advice at different times on this subject, which has been useful to myself and to my neighbours. He has sent persons to me to have their papers made out, one half or two thirds of the time since he has been in office.

Evidence on the twelfth article.

ALPHEUS WARE sworn.

Witness. I attended at a probate court at Framingham, the latter part of June, 1815, to settle an account as guardian of one Jotham Breck, a person *non compos mentis*. A few days before the court, the selectmen met together and examined my account; they were satisfied that it was right, and certified that it was just and reasonable. I went over to the court, and Nathan Grout, one of the selectmen and overseers of the poor, in Sherburne, went with me. It was just at the close of the court, and very few people were present, when I gave in my account for allowance. The judge took the account, and seeing Grout's name, and he being present, the judge asked him if it was reasonable, and whether it ought to be allowed. Grout said yes. I told the judge I had vouchers. He said he did not wish to examine them, he had no reason to dispute the account, if the selectmen were satisfied with it. He asked me if I was ready to swear to the account; I told him yes, and then swore to it. The judge sat down to the table and went to writing. Grout and myself sat together near the judge. We had some conversation at the table about the estate of Breck. It appeared that the property collected was almost spent. I talked with Grout about two notes given to Breck, by two persons of the name of Bridges, and another given by myself, for some real estate, which were to be paid upon Breck's wife releasing her right of dower; she refused to sign the deed. We talked about the money to be received being secured, so that it might be expended for the benefit of the family, and prevent their coming upon the town. Grout said he wished the money might be secured. When the judge had done writing, he turned himself round to us, and said he thought he could put us in a way of saving the money. Grout said he wished he would. Then the judge said he wanted the facts stated to him, that he might understand the case. Grout began to state them, but not stating them correctly, I told him he was not right. Grout told me to go on with the story; which I did, and finished it. The judge considered the case, and advised us at the next town meeting to insert an article about it in the warrant, and that the town should authorize the treasurer to indemnify the Bridges against the claim of the wife, and let them pay their notes. The judge demanded $5 of Grout for his pay. Grout objected to paying it. He said "it is a little *tinctured* with probate business, and you are not entitled to any fee." The judge said to him, "I'll take care that you do not *tinc* any thing out of me again in this way." Grout went down stairs, and the judge followed him. Shortly after I went down, and found them in conversation together. The judge took me into another room. He there says, "the old man was a little too old for me; you have got Breck's property in your hands, you must pay me the $5." I objected, because I did not know that the overseers would be satisfied to allow it in a future account. He said the advice was worth more than the amount to the town. He said if I would pay it, he would go up stairs and get the account, and enter it on the account, and the selectmen or the overseers need know nothing about it. He went up stairs and got the account and interlined the charge of $5 in his own hand-writing, and I paid him the $5. The Judge said all the papers must agree, it wont do to have the writings clash; give me your certificate out of your pocket. He took the certificate of the settlement and altered the foot of it so as to agree with the account, and said it all stands fair now.

Mr. FAY. Did the judge offer to give the advice, before you applied for it?

A. Yes.

Q. Were you and Grout conversing together without reference to the judge?

A. Yes. The judge interrupted us and said he thought he could instruct us in what we were talking about. He said he *thought* he could, he did not say that he *could*; and then Grout said he wished he would if he could.

Q. by a member of the Court. Was Grout present when the interlining took place?

A. No.

Mr. FAY. Was it in the Court room?

A. No, in a room below. The judge asked me to go to that room.

Mr. DUTTON. Did the judge propose to you to go up stairs and alter the account?

A. No, he said he would go up stairs and get the account, and he did, and the insertion was made in a lower room. No body was present but us.

Q. by a Manager. Did he call you, or you him?

A. He called me.

Q. Whom did he mean by the "old man"?

A. I supposed he meant Grout.

Q. Did you see the certificate altered?

A. Yes. [The certificate of balance was produced, in which the amount of the allowances was altered from $713,57 to $718,57, and the balance in the guardian's hands, from $871,39 to $866,39.]

Q. Where was the Register?

A. I do not know where he was at this time.

Cross-examined.

Q. by Respondent's counsel. In what did Breck's property consist?

A. In three notes of hand, one given by myself for $200, the other two by the Bridges for $98,67 and $74,75.

Q. What were these notes given for?

A. For real estate bought of Breck before he was under guardianship. The wife had not joined in the deed to relinquish her dower, and the notes were made payable when she did relinquish it.

Q. Was Breck's estate nearly expended?

A. Yes, there was nothing left to Breck except these notes, and the family were like to become chargeable upon the town.

Q. You wanted to prevent this?

A. Yes, the town wanted to secure the money due on these notes; they wanted to know how they could avail themselves of this property to help support the family. I was willing to pay my note, if I could be indemnified against the claim of dower.

Q. And the judge hearing you talking about this, told you he could put you in the way of effecting your object?

A. Yes, and Grout told him he wished he would if he could. The judge told Grout to state the facts; he made a mistake and I interrupted him to correct him, and then I went on and finished the statement.

Q. The judge told you to have a town meeting and direct the treasurer to give an indemnity to the promisors of the notes?

A. Yes.

Q. And was this advice followed?

A. Yes, the thing was laid before the town and they passed a vote to indemnify.

Q. And the money has been paid?

A. I have paid my note, and Nathan Bridges a great part of his. The town gave a bond of indemnity.

ISAAC FISKE called again.

Witness produces Ware's original account.

Mr. WEBSTER. What is the certificate of balance? Is it any thing more than a statement of the balance due, that the guardian may know how his last account stands?

A. That is all; a statement of the allowances on each side, and the balance struck. It is given in order that the person receiving it may carry it home and show it to his friends or the parties concerned.

Q. And this is to supply for the present the want of an official copy of the account?

A. Yes, it is in anticipation of the record.

[The item which appeared to have been inserted in the original account was—"To paid for advice about the circumstance of the estate, $5,00." The foot of the account was altered to conform to this insertion. The certificate of balance was signed by the register.]

Q. Is the certificate provided for by law?

A. No, it is given for the convenience of the parties.

Evidence on the 13th article.

ABNER BARTLETT sworn.

Mr. WEBSTER objects to the examination of the witness and called for the record of the administration in this case.

Mr. *Fiske*, upon direction of the Managers, produced the record by which it appeared that administration was granted Dec. 3d, 1817, to Susan Clapp on the estate of one Jeremiah Clapp, deceased.

Mr. WEBSTER. I still object to the examination of the witness. There is no pretence of any substantive charge in the article—nothing that bears any resemblance to a charge. There is no allegation that the administration was granted in the county of Middlesex, or even in the Commonwealth. For aught that appears this good lady might have been administratrix in Suffolk or in Essex. But if the Hon Court intimate an opinion that the witness ought to be examined notwithstanding, I shall withdraw my objections without putting them to the trouble of taking the question upon it.

The Managers, no objection being made on the part of the Court, proceeded to examine.

Witness. In November, 1819, the Respondent transacted official business at a Probate Court holden at the Hotel in Cambridge. I appeared there as the attorney of Mrs. Read, formerly Susan Clapp. The circumstances of the case were these;—

Mr. WEBSTER interrupts. Do you know that Susan Clapp retained the Respondent as her counsel?

A. No.

Mr. WEBSTER. Then I object to the introduction of this evidence. I object to any testimony but to the single fact that Judge Prescott received fees of Susan Clapp for acting as her counsel.

Witness. I do not know that any thing was paid for counsel fees, or that any thing paid was charged as such. I had no such idea.

Q. on the part of the managers. Do you know that money was paid?

A. I know that some probate business was done at that time by the judge, and that Read, the husband of this Susan Clapp, paid some money there.

Mr. HOAR objects to proving orally what is contained in the account.

The record of the account was then produced in which appeared a charge of $3 for extra services.

Evidence on the 14th article.

JOHN WALKER sworn.

Witness said he was administrator on the estate of John Walker deceased, and settled an account as such, at a probate court at Woburn, in April 1815. [Produces a copy of the account then settled.]

Q. by Mr. FAY. Did you pay the judge any thing for advice at that time?

A. I paid $5, but I believe it was not charged.

Q. Did you settle more than one account?

A. I settled one and prepared a second, but then found it necessary to represent the estate insolvent.

Q. What was the advice, for which you paid the $5?

A. There was a difficulty about the board of a minor.

Mr. WEBSTER objects to any evidence of that charge as it does not appear to have been allowed in the account.

The account was examined and appeared to contain no such charge.

The Managers then passed to the next charge in the article, which was the taking of $15 for counsel fees on the 1st day of June, 1816. The witness said he believed he had paid that sum; but on examining the account the charge was not found in it.—There was however in the account a charge of June, 1816, "for money paid James Prescott, Esq. for counsel relating to the sale of the real estate, $10," and another charge of June 14th, 1816, "for money paid James Prescott, Esq. for counsel, $10;" which two charges Mr. FAY contended must be received as the charges of $5 and $15 set forth in the article—the amount being the same and the difference merely in the division of it. The counsel for the Respondent however did not agree to this substitution. The last charge of $120 stood in the account as follows: "1817, Sept. 15th, For money paid James Prescott, Esq. for counsel and professional assistance before referees and C. C. C. P. $120"

Mr. FAY remarked that on a re-examination of the account it appeared the first charge was there, though not in its proper place. It was as follows: "1815, April 25th, for money paid James Prescott, Esq. for assistance, $5. There also appeared a charge of Dec. 10th, 1816, "for money paid James Prescott, Esq. for obtaining a license to sell part of the real estate and paying fees of Court, $8.

Q. by Mr. FAY. For what were these several sums paid?

Mr. HOAR. We have no objection to the question being put if the Court wish the inquiry; but the article alleges that the charges were for advice concerning the administration.

The Court made no objection, and Mr. FAY directed the witness to answer the question.

Witness. The $5 was paid for advice. There was some difficulty about the board of one of the minor children. The person who boarded the child charged more than the guardian thought right. We requested the judge to decide for us. He declined at first, but finally agreed to do so after the Court was over. We then left it to him, and he gave his opinion; for which he said he must have something, and I paid him the sum of $5, and then charged it equally among the heirs.

Q. by Mr. FAY. What were the charges of $10 and $8 for?

A. They were for preparing three orders to sell real estate, and getting them through the common pleas. With regard to the $5, Judge Prescott did not state that sum particularly for his services, but said he must have something; and Mr. Locke said he ought to.

Q. And what was the last charge of $120 for?

A. Samuel Hopkins brought an action for $1200 against Benjamin Thomson, John Walker, and Jesse Dean, who were partners in trade in the life time of John Walker, whose administrator I was.

Q. The action was brought against you then as administrator?

A. No. It was brought against the surviving partners; and Judge Prescott was employed by them to manage the cause. He attended to the action in the court of common pleas, where it was continued two or three times, and finally submitted to a reference. Judge Prescott attended the reference two days at Burlington, and one day at Charlestown; and afterwards argued against the report in the common pleas.

Q. If the action was brought against the firm, why was the whole expense charged to the estate of John Walker? what had you to do with it?

A. It was understood that if Hopkins recovered, the money must come out of John Walker's estate, because he had received the money in his life time, for which the action was brought. [Witness produced the original writ.]

Q. Did you employ Judge Prescott yourself?

A. We all spoke to him about it; Thomson desired to have him; but I took upon myself the expense of defending the suit.

Q. Was any other counsel employed?

A. No.

Cross-examined.

Q. by Mr. HOAR. Was there not likewise another action brought by Samuel Hopkins and Benjamin Thompson, against James Walker, Jesse Dean, and John Walker?

A. Yes. Judge Prescott was consulted in relation to that action but I do not know that it was ever entered.

Q. Have you the judge's bill?

A. I have.

The bill was produced and read as follows:

1817. *July.* For preparing for, and managing the reference, $50

Aug. Same at Charlestown, 40

Arguing in exception to report twice, 30

$120

Q. Had the nominal defendants retained the judge as counsel before you spoke about it?

A. I think I was the first who spoke to the judge. But it was at the request of the other parties.

Q. Did you suppose that you were bound as administrator to defend?

A. It was understood that the estate would be responsible, and therefore I considered the action mine. Thompson and Dean said that if I did not defend the action they would be defaulted, and call on the estate.

Q. by Mr. DUTTON. When did you first find out that your father's estate was liable?

A. When Hopkins called on me for the money, which was some time before the action was commenced.

Q. What was the action about?

A. My father had sold some hops and barley for Hopkins, which had not been accounted for.

Q. And what was the report of the referees?

A. They reported, I think, that the amount was due to the plaintiff from the estate of John Walker.

Mr. HOAR. We are not now to try that case over again.

Evidence on the fifteenth article.

AMOS WOOD sworn.

The records of the probate court relating to this article were produced. The will of Jonas Adams was proved and letters testamentary issued, Dec. 2d, 1812, to Dorcas Adams.

The counsel for the Respondent offered admit this article, but the Managers said they preferred to explain it by evidence.

Mr. WEBSTER. Do the honourable Managers expect to prove what is not charged in the article?

Mr. DUTTON. We shall endeavour to prove what *is* first.

Mr. WEBSTER. We have a right to expect that the learned gentlemen will state what further they intend to show.

Mr. DUTTON. I do not know that we are bound to state all the witness will testify. We call the witness to prove the charge in the article. The Respondent's counsel say they admit the article. We contend that we have a right to go on to prove certain circumstances and expressions, which we did not think it necessary to state on the record, which go to show the motive and intention with which the acts charged in the article were done. It was never required in any court, to spread the whole evidence upon the record.

Mr. WEBSTER. We ask no great boon of the hon. managers. We only wish to have them adopt some principle by which they are willing to abide. With respect to a former article which was admitted, they said they must introduce evidence to prove it, because an admission of the facts, was not an admission of their having been done corruptly. Here there is no corruption charged.

Mr. DUTTON. The charge is for misconduct and maladministration in office, and these imply corruption.

PRESIDENT. When any particular question, foreign to the article, shall be asked, it may then be proper to determine whether the witness shall answer it.

Mr. FAY produced the account of the executrix of Jonas Adams, settled in June, 1817.

Q. Was this the only account that was settled by the executrix?

A. This was the only account ever settled.

Q. Were the sums paid by you to the Respondent in behalf of the executrix allowed in the account?

Mr. WEBSTER objected to the question. The witness cannot state what is allowed in the account. The record must speak for itself. [It did not appear that there was any fee allowed in the account.]

Mr. HOAR. In this case we are willing to admit the facts, that Dorcas Adams was the executrix of Jonas Adams—that she received advice—that she applied to the Respondent, who gave her advice and received a fee for it. She was the only person concerned in the estate, and it was immaterial to her whether the sum she paid were allowed in her account or not. In point of fact no such allowance was made.

Q. by a Manager. Did you apply to the Respondent for advice on the subject of the estate of Jonas Adams, and pay him fees as

Mr. WEBSTER objects. The essence of the charge is that the Respondent allowed such fees in the account. Now no such charge appears in the account.

Mr. FAY. The first part of the article states that the Respondent as an attorney gave advice to an executrix and received money for it. If this is proved it will be sufficient to maintain the article. It is an after consideration whether the fees were allowed in the account.

Mr. WEBSTER. We request the sense of the Hon. Court, whether, it being seen that no such charge was allowed in the account, the witness shall be asked whether the money was paid. We ask whether the question is pertinent. The official crime is the allowance; it is now admitted that there was no official act about it.

Mr. DUTTON. We charge the Respondent with maladministration in the conduct of his office. We allege advice given to an executrix concerning a person supposed to be chargeable upon the estate, and that money was received for the advice We contend that this was misconduct. We go further and allege that the money so received, was afterwards allowed in the account of the executrix. This part of the charge fails; but if we cannot substantiate one part, it is no objection against our proving the residue, which we shall show in point of law to be criminal.

Mr. WEBSTER. The Hon. Managers cannot prove a fact which in itself is no crime, and is not material. None are material here except those which are official. The giving advice in such a manner is no offence; it must be some official act. Here there is no official act but the allowance charged, and it is admitted that he did not make any allowance.

It was determined by the Court that the Managers might ask the witness the question last proposed. The yeas and nays were as follows, viz:

Yeas—Messrs. Bourne, Thomas, Ruggles, Moseley, Doolittle, Rantoul, Whittemore, Eastman, Allen, Reynolds, Tufts, Parker, Lyman, Gardner, Hyde and Varnum—16.

Nays—Messrs. Clark, Sullivan, Bigelow, Dwight, Hunnewell, Pickman, Bartlett, Welles and Brooks—9.

Witness. I went in 1813—

Mr. WEBSTER. I object to the witness stating any thing relating to a different transaction from that alleged in the article.

Mr. DUTTON. What took place at Groton in May, 1815? Did you take advice of Judge Prescott?

A. Yes.

Q. Did you pay him $10?

A. Yes.

Q. What was it for?

A. For advice relating to the estate of Adams.

Q. What was the advice?

The question being objected to, was waived.

Q. Did you not at a previous time apply to the judge for his advice on the subject of the estate being chargeable with the support of a poor person, and pay him $5?

The counsel for the Respondent admitted that he did give the advice and charged $5 for it.

Mr. DUTTON. We want to know what the advice was. Did the Respondent tell you that the executrix was or was not liable?

Mr. WEBSTER. I do not consider this to be a pertinent question. It is not sufficient to say that it can do no harm. It is travelling out of the record. The evil, if any, is giving advice at all; the Respondent is not on his trial on the question whether he was a good or a bad lawyer. We admit the Respondent gave advice; the Hon. Managers wish to go further, and show what sort of advice was given. We pray the judgment of the Court whether the question is a pertinent one.

The Court decided unanimously that the question should not be put to the witness.

The Managers said they had gone through with the evidence in support of the impeachment.

The Court adjourned at 2 o'clock, until half past 3 in the afternoon.

AFTERNOON.

The usual messages between the two Houses were delivered by Mr. Parker on the part of the Senate, and Mr. Russell on the part of the House of Representatives.

The Court was opened at 20 minutes before 4.

Mr. DUTTON moved the Court to introduce some further evidence relating to the fifteenth article. We have proceeded so far as to show that the Respondent permitted himself to be consulted by an executrix relative to her liability to support a poor person—that he gave her advice, and that he received a certain fee. We charge this as misconduct, for it was giving advice in a matter which might, and must in some shape or other, come before him as a judge. We now propose to show by collateral facts that it did actually come before him as judge—that he made a decree—that his decree was appealed from and was reversed by the Supreme Court. One part of the evidence will be the petition of Eljah Fiske; which has a bearing upon the opinion given by the Respondent to the executrix as her counsel, on a matter upon which he was afterwards called to give an opinion as judge. It will show that it was a case where there were adverse interests—the petitioner, Elijah Fiske, being on one side, and Dorcas Adams the executrix on the other.

The Respondent's counsel said they did

not object to the Managers putting in any thing that was done in the Probate Court.

The Managers then produced and read the petition of Elijah Fiske presented at a Probate Court in April, 1818, to be appointed administrator *de bonis non* with the will annexed on the estate of Jonas Adams, setting forth all the facts of the liability of the executrix to provide for the support of a black woman named in the petition. They also produced the decree made after the hearing of the parties, rejecting the petition—the judgment of the Supreme Court in Oct. 1818, reversing the decree—and the mandate to the Judge of Probate to admit Elijah Fiske as administrator *de bonis non* of Jonas Adams.

The *Court* inquired whether Mrs. Adams was sole heir or legatee of her husband.

Mr. HOAR said it would appear from the papers that the testator by his will appointed Dorcas Adams his sole executrix—that she was to pay his debts and retain the residue of the estate. Nobody was interested but the executrix and the creditors.

Mr. FAY stated that the evidence on the part of the Managers was closed.

PRESIDENT. The Court now wait the Respondent's defence.

Mr. HOAR. Mr. President; the general view which the Respondent has taken of his case is presented in his written answer. The Hon. Managers have now offered their evidence upon it; but neither in the articles themselves, nor in the opening of their chairman, have they exhibited their views of the law. They have stated certain cases only; they have told their story in short; but in such language that it does not appear to us with what crime the Respondent is charged. There is at present nothing tangible in the case. They tell us indeed that the Respondent has sinned, but do not point out which of the commandments he has broken, or what duty he has neglected to perform. We are therefore under the necessity of presenting to the Court the little evidence we see fitting to the cause in its present state. But we shall introduce it reserving to ourselves the right, under leave of the Hon. Court, of stating our views of the whole testimony, and of the principles of law, as applicable to the case, when the views of the Hon. Managers shall have been more fully disclosed.

Evidence on the part of the Respondent.

On the first article.

Mr. *Fiske* took the stand.

Q. by Mr. HOAR. What would be the amount of the usual fees in the case of the administration on Lakin's estate?

A. I have not yet computed it. I must request a little time to examine the papers and draw up a statement.

Mr. HOAR. I have requested the Register to make out a complete set of papers, in cases of guardianship and administration, with fictitious names. These, with the leave of the Hon. Managers, I now offer to the examination of the Court, to be accompanied by a full statement of the usual fees, as soon as the Register shall have completed it.

Mr. KING said the Managers would like to look at the papers before they were submitted to the inspection of the Court.

The papers were accordingly handed to the Managers.

On the 2d article.

JOHN WALTON sworn.

Mr. HOAR. Please to state what you know in relation to the application to Judge Prescott for the guardianship of the Shepherds.

Witness. I was an overseer of the poor in the town of Peperell in the year 1818; when a representation was made to the overseers that John F. Shepherd and his sons, Francis and John, needed to be put under guardianship. This application came from the wife of John F. Shepherd. We then had a conference upon the subject with the selectmen, and a number of the principal persons in the town; and they concluded it would be proper to have letters of guardianship taken out. Accordingly I went down together with Parker and Buttrick, to see the judge about it. This interview was on the 15th of June. A question arose about a certain annuity, which we wished to secure. The object of the overseers was to secure the continuance of this annuity to the family—quarterly payments having been hitherto made by a gentleman of this town. The judge at this time made out the necessary papers, which were a warrant of inquisition, and a citation to the Shepherds to appear and shew cause why letters of guardianship should not issue. The inquisition was had, and report made to the judge. This was on the 28th or 29th of June. We then consulted the judge, who gave us his opinion and advice.

Q. by Mr. HOAR. Did you consult him yourself, Dr. Walton?

A. We all asked questions, and were very particular in our legal inquiries. Mr. Parker was very minute in his inquiries about the effect of the will under which the annuity arose, as he had seen it and knew the facts more particularly. Indeed he had an extract from the will with him. The first time we went to the judge we detained him about this business from two and a half to three hours; and the last time about two hours, when I left before the business was completed, in consequence of news that my son at Cambridge was sick. The judge knew more than we did about it, because he had seen the will.

Q. Were you present when any money was paid?

A. I have no recollection of any money being paid while I was there. I presume I left before that. In fact I recollect it so happened that we had not all together money enough to pay the legal expenses.

Q. Do I understand you to say that you considered yourselves as applying to the Respondent as counsel, or as judge?

A. As counsel certainly, I had no thought that the judge was bound to give us an opinion. We applied for his advice for the benefit of the family, wholly independent of his character and office as judge.

Q. by Mr. WEBSTER. Should you, or should you not, have taken out the guardianship if you had been advised that you could not secure the annuity?

A. I rather think we should, on account of some other property—real estate belonging to the family. One object with us was to secure the town from the expense of supporting the family, and another was to protect the woman who had been cruelly treated, and prevent her husband from wasting the estate.

Q. She had applied to you for that purpose, had she?

A. She had.

Cross examined.

Q. by Mr. DUTTON. Was the guardianship granted the first time you went to the judge?

A. The guardianship was taken out on the 29th June; at least the papers were making out when I left.

Q. You say Lemuel Parker had an extract of the will; did you see it?

A. He told me he had; but I did not see it.

Q. The whole object of taking out that letter of guardianship was to secure the annuity, was it?

A. Yes; we were told that in that way the property of the spendthrift might be controlled, and secured to his family.

Q. Was any thing said about the advice being given as counsel or judge?

A. No—nothing was said by either party as to that. But when we went to him, we expected to pay him for his services. His probate business was generally done in a different room.

Q. Where was this business transacted?

A. The whole business done the first time was in his house; the second time at his law office.

Q. Did the judge actually advise you?

A. He told us what course to take.

Q. What was the advice?

A. He told us the first time, that the overseers must be in session, that there must be an inquisition held, to ascertain whether the Shepherds required a guardian or not?

Q. You went twice then to see him merely about this probate business, did you?

A. The second time we went down, (that is Buttrick and myself as the guardian's bondsmen) we two had some talk with the judge about another business; that was some business about a pensioner.

Q. Did you expect to pay for his opinion?

A. I did expect that he would charge a reasonable compensation. We had been in the habit of consulting and conversing with him about paupers; he used always to give his advice; sometimes gratis; but we always expected to pay.

Q. Did you pay him any other fee at this time than that mentioned as paid for the business of the Shepherds?

A. I did not pay *that*, I left before the business was settled.

Q. The time however you say was partly occupied about this business of the pensioner, was it?

A. I was there about two hours, and that was principally taken up about the business of the Shepherds.

Q. by Mr. LELAND. The reason of your consulting the judge was, that you did not know whether the wife of Shepherd could control this annuity; was it?

A. We did not understand the matter at all till the woman explained it to us. The annuity was left to her by the will, and paid by the trustee in regular quarterly payments; but sometimes it was paid to one of the family, and sometimes to another; which we wished to prevent; in order that it might go into her own hands, or be spent for her use.

Q. Who did you suppose would have the annuity when a guardian was appointed?

A. Why that was the question we put to the judge; whether the guardian could appropriate this annuity; because then he could see to the application of it, and prevent its being wasted. The judge thought he could.

Q. by Mr. SHAW. You say you expected something would be paid for this advice; who did you expect was to pay for it?

A. We expected if a guardian should be appointed he would pay it out of the spendthrift's estate; because it was in fact for the benefit of him and his family; otherwise we expected it would be paid out of the town treasury. The expense of the first visit was charged to the town.

Q. by Mr. HOAR. After the judge had examined the extract of the will, was any question proposed about the property's being secured to the wife personally?

A. I do not recollect the particular questions put.

WILLIAM BUTTRICK sworn.

Mr. HOAR. State whether or not you were present at the consultation mentioned, and generally, (in order to save the time of

the court) whether you agree to Dr. Walton's account of it.

Witness. I was present at the time, and recollect all that Dr. Walton has testified.

Q. by Mr. FAY. Do you recollect whether any charge was made to the town? or were the overseers paid for their services out of the estate?

A. The fees of counsel were paid by the guardian, but as for the services of the overseers, I do not recollect that any charge was made for them to the town. I do not remember that I was paid for it by the town, or by any one.

Dr. *Walton* was called again, and asked the same question. He said that he was paid by the town. He made a charge of $1, for going to Groton, and the time spent there.

JOHN HEARD, sworn.

Q. by Mr. HOAR. You are the register of probate for the county of Suffolk, are you?

A. I am.

Q. What are the usual fees paid in your office on granting administration in a case not litigated?

A. From three to four dollars, most usually $3,90.

Mr. DUTTON. Are you asking what are the legal fees?

Mr. HOAR. No—the law should tell us that; our inquiry is what are the usual fees.

Mr. DUTTON. Then we object to the examination of this witness. If you mean to inquire of him what illegal fees he is accustomed to take, we object that his testimony is not pertinent. The question before us is, not what are the fees usually taken in the county of Suffolk; but what are the fees, usually taken in the county of Middlesex, and whether they are or are not conformable to law. It is no justification of the Respondent that illegal fees are taken elsewhere. What the fees ought to be, is a thing settled by statute, not by usage. We deny that the courts of probate have any discretion in the matter. The Respondent, as well as every other judge of probate in the Commonwealth, was bound to take legal fees only.

Mr. WEBSTER. Will the honourable managers be good enough to inform us what legal fees are? The difficulty is that they charge the taking of illegal fees, without saying what are legal fees.

Mr. DUTTON. I have not the book by me, but we refer you to the fee-bill.

The counsel for the Respondent handed the statute book to the Managers; and Mr. Dutton read several extracts from the fee bill, as follows: "for granting administration, where there is no litigation, fifty cents, and in other cases one dollar, &c."

Mr. HOAR. If that is the law, and the whole law, we then ask, whether, in the opinion of the honourable Managers, the Respondent ought, or ought not, to charge any thing for necessary services not enumerated in the statute?

Mr. DUTTON. That is a question we are not bound to answer.

Mr. WEBSTER. True;—the honourable managers are not bound to answer; they are not upon trial; they are not impeached. But it is a very plain question Mr. President;—and their case must suffer, at least I apprehend it must suffer from a refusal to answer it. We come here, may it please the honourable court, as lawyers;—as mere lawyers; with no extravagant pretensions—but with the ordinary knowledge of professional men. Our law books have taught us that there can be no allegation for taking illegal fees, unless it be alleged either that no fee at all was due, or what the legal fee was, and what the excess taken. The honourable Managers are bound to state the law and the excess. They have stated neither. This whole prosecution goes upon the ground, that here has been a considerable sum charged; what for, to be sure, we know not; whether right or wrong we know not; but we mean to know—and we accuse you, Sir, of charging it wantonly, corruptly, and against the law; you are to answer that charge—you are to justify your whole official conduct; you are to come in, and show us what the law is; and whether you have conformed in every particular—ever since you have been in office, to that law. We the Managers have put forth on a voyage of discovery. We have resolved to try a grand experiment on the subject of probate fees. We summon clerks and judges from all parts of the Commonwealth. We say here have been twenty thousand dollars illegally charged in your several offices. Show you the legality of every item. Give us an account of your whole administration from the time you first came into office. Show you that you have never committed an error for the last twenty years. This is the kind of accusation which has been brought against the Respondent.

Never in a single instance, Sir, have the honourable Managers pointed out what sums the Respondent should have taken. They have not stated it in the articles. They have not declared it in the course of the trial. They have presented us with no view of the law—they have not intimated what they thought was the law, until we have at last drawn them into the fee-bill. You have seen, Mr. President, with what reluctance they have appealed to that, and after all that has been said and done, we have yet to learn what the honourable gentlemen consider the crime in this case. We have yet to learn what they consider the law to be which they say the Respondent has violated.

It is evident enough that they do not con-

sider the fifty cents in the fee bill as the only legal charge in the case. What then is the legal charge? Where is the precise limit of the law which the Respondent has overstepped?

PRESIDENT. The remarks of counsel do not seem to be exactly in order.

Mr. WEBSTER. I believe Mr. President I am not far from the point.

PRESIDENT. The question, as I understand it, is on the admissibility of evidence as to the usage of this county.

Mr. WEBSTER. I have strayed then Sir, only to get upon the turnpike.—This is a charge of corruption. If there be no law, there has been no excess; there can have been no corruption. If the law be a mere matter of usage, and not of statutory provision, then we must be allowed to inquire into that usage. We have a right to go into any county we please, to make that inquiry; for the usage of one county is as good as the usage of another county. Nothing has been charged against the Respondent,—nothing that I can discern, but either extortion or bribery. Now it is admitted that with regard to many of these items there is no settled rule of law. The charge must mean therefore, if it means any thing, that the Respondent has transgressed the usage; that he has taken more than the customary fees in such and such cases. We ask therefore if we may not be allowed to compare usage with usage. If we may not inquire whether the Respondent is justified in his alleged misconduct, by the usage of all the other judges of probate in this Commonwealth, or whether he stands alone—without countenance—without excuse—an open, wilful, gross, extortionous magistrate.

Mr. HOAR. There is a case in our reports of the indictment of a sheriff for taking illegal fees. [Commonwealth *vs.* Shed, Mass. Term Reports, 1st vol. p. 227.] The indictment there set forth what the legal fees were for levying an execution, and alleged the excess taken. The counsel offered to show that a charge of 30 cents over and above the poundage was not in the fee bill. The defendant offered, and was allowed to show a usage, which had obtained since the passing of the fee bill, in relation to that charge. The court there decided, that though this excess might be recoverable in a civil action, notwithstanding the usage, yet the usage was good evidence to rebut the charge of corruption; and the taking in conformity to that usage could not be held to support a criminal prosecution; and the defendant was acquitted upon that ground. I know not how far the decision of other courts are rules for the direction of this honourable court. But the justices of the supreme judicial court have declared this to be the law of the Commonwealth; and I cannot but think their opinion will have great weight with your honours.

Mr. SHAW. The question is whether, the Respondent shall be allowed to go into the usage of one county, to justify excessive fees taken in another. But we ask whether usage in any county is legal evidence to rebut the charge of illegality? The Respondent means to introduce this evidence either to show that fees not allowed by law have been so long taken as to have become legal or else for some purpose that I cannot comprehend. If our allegation, as has been contended, imputes no crime, it needs no defence. There is an end of it. There is no necessity of introducing evidence of usage, or of any thing else. But having shown that the Respondent has taken certain specific sums, and alleged that these are more than the legal fees, the Respondent says no, they are not; for although true it is they are not justified by law, yet they are sanctioned by usage; which usage we now offer to show. Now *we* hold that where the statute requires a certain duty, and affixes a certain fee as the legal compensation for that duty, no usage can vary it. The law must be construed in the negative. It means to say, not that every person shall charge so much, but that no person shall charge more. It is enough for us to show that the statute has fixed a fee for certain services, and that the Respondent has taken other and greater fees, for those services. But we go somewhat further. We show that the Respondent has taken in certain cases, not only larger fees than the law allows, but larger than his own usage justifies. Besides, these allegations are, that under the pretence of holding probate courts, at times and places not authorized by law, he has taken fees which he should not have taken. We are maintained if we show the taking of any fees at these pretended courts. For if they were courts not established nor allowed by law, any fee there taken was an illegal fee. Suppose it to have been the usage in other counties to have taken as large, or larger fees for similar services,—is that any justification of the Respondent? Does that make the law to have been the less violated? Is it proper to introduce such evidence? Is proof of any usage whatever, pertinent to the cause?

Mr. HOAR. I believe, Mr. President, the Hon. Manager has misunderstood the ground we have taken. The Court must perceive, that if the testimony we offer is unnecessary, it is not our fault; for we profess ourselves entirely unable, with the best exertion of our poor abilities, to understand the exact meaning of these articles. We can not, with all the attention we have been able to bestow upon them, discover the precise ground of this prosecution. Is it that the Respondent ought not at a regular Probate Court to have taken any fees for papers and services not mentioned in the fee-bill? We have put the question and the Hon. Gen-

tlemen decline telling us whether it be so or not. Do they mean to say that the usual fees taken in the county of Middlesex are illegal? They have themselves shown the usage of that county; and all we want at present is an opportunity to counteract their testimony by showing the usage of other counties. We wish to show that the charges complained of are not peculiar to the county of Middlesex. Will they say that the usage of all the regular Probate Courts is illegal? If so, we know not what to answer. We know not, for we have no means of knowing, what are the legal fees. The Hon. Managers have furnished us with no means of ascertaining. We cannot tell where we are to meet the Hon. Managers. We cannot discover or conjecture, what ground they mean to take. We only know what they have proved, and we wish to meet their evidence, so far as we can at present perceive its bearing, with similar evidence. Here is a charge of maladministration and corruption in office by the taking of illegal fees. Do they mean to say that the Courts were illegally holden? If so, it has been argued, and perhaps justly, that the taking of any fee was illegal. But we cannot discover and the Hon. Managers have not condescended to tell us, wherein the illegality of these Courts consists. We assert and believe that these special Probate Courts were, for aught we can see, as legally holden as any other Probate Courts. It may turn out otherwise; but so we all think after a very diligent examination. Were the fees taken excessive then? Do they prove corruption? If they mean to say that there was an excess above law, we ask whether the Respondent has, or has not, a right to take any compensation for services not enumerated in the fee-bill, and which are not regulated by law? I believe we shall not be answered in the negative. We must at least be allowed to consider it a doubtful question; and if so, we may surely be permitted to inquire what has been the uniform practice in other counties? What is the construction which other Judges of Probate have put upon the law. If they have put a different construction upon it from the Respondent, it would go to show that he has at least been mistaken in his notion of the law; but if their construction should happen to have been the same with his, it is surely proper evidence to rebut the charge of wilful corruption.

PRESIDENT. The question proposed is this. What are the usual fees for granting administration in the county of Suffolk.—Shall that question be put to the witness?

It was decided by yeas and nays, as follows:

Yeas—Mess. Clark, Doolittle, Rantoul, Sullivan, Bigelow, Welles, Brooks Lyman—8.

Nays—Mess. Bourne, Thomas, Ruggles, Moseley, Whittemore, Eastman, Allen, Reynolds, Tufts, Dwight, Parker, Gardner, Hyde, Hunnewell, Pickman, Bartlett, Varnum—17.

Q. by Mr. HOAR. Is it usual for the judge or register of Probate in the county of Suffolk to receive any compensation for services not enumerated in the fee-bill, in relation to the taking out of administration papers?

Mr. SHAW. We object to that question. It is so precisely similar to the last, may it please the Court, that we presume it cannot be necessary to go into any argument on the subject. The Court have already decided it.

Mr. WEBSTER. I cannot silently acquiesce, sir, in the silent decision of this Hon. Court. It is the misfortune of the Respondent that he is before a Court which does not assign the reasons of its judgments. You do not tell us the ground of your decisions. We cannot discern them. We must be guided therefore by the feeble lights of our own minds—the professional habits we have formed—our books—and our practice before inferior tribunals.—We perceive a difference in the questions. We cannot tell whether this last is involved in that which by a silent vote this Court has already decided. We are bound to propose it. It is a duty to our client to propose it. And we shall continue to propose it in some shape, or other, until the decisions of the Court shall have covered the whole field of inquiry; until our ingenuity in devising forms and modes of interrogation shall have been exhausted—or until we have been convinced by the Hon. Managers that all evidence of usage is to be shut out of the case. We do this with the more confidence as there are many members of this Hon. Court who have had experience in the practice of judicial tribunals. We have not, and we shall not hear from any gentleman here present that this Court is not bound by the same laws with those inferior tribunals. Its forms of proceeding may vary. Its constitution may vary. But the same rules of evidence—substantially the same rules—must prevail here as elsewhere. The question is if this be pertinent evidence to meet that which has been adduced on the other side? We hold that the whole progress of the case has been such as not only justifies the introduction of this evidence, but makes it necessary. The whole examination of the Register of Middlesex makes it necessary. Not a question has been put to him by the Hon. Managers which does not make the introduction of this evidence necessary. The whole train of their inquiry has been, what is the usage in your county? If this is not evidence, it should not have been introduced. If it be evidence, then we also have a right to introduce it. If the Respondent is to be

convicted on the ground of usage—if evidence of one usage is to be brought up against him, then evidence of another usage must be received which is in his favor. Usage must be opposed to usage. If he is accused of having violated the usage of Middlesex, I say if there be a better usage in the county of Suffolk, he is entitled to show it. Usage is the practical construction of the whole law—the law of this Commonwealth—the law by which the Respondent is to stand or to fall. We have not one law for Middlesex, and another law for Suffolk. It is pertinent evidence then to show what has been the uniform construction of the law in this county. Why suppose, Mr. President, one of the judges of the Supreme Judicial Court were here on his trial as well he might be, for an unsound opinion—an erroneous judgment—charged with a corrupt decision—or wilful misconstruction of some particular statute. Would it not be competent for him to show that other judges had so construed that statute, that other judges had given similar opinions—pronounced similar judgments? Might he not prove, that though wrong, he was not wilfully wrong, because other men as well, or better informed than himself, had so thought and so acted under that law? If he could not, lamentable indeed is the situation of our judges! Who would be found to take an office of high responsibility—of extreme difficulty—requiring the nicest discrimination that the human mind is capable of—where even the least imperfection of judgment admits of no excuse— where every honest error is a crime. It is no answer to us to say that one wrong, cannot justify another wrong. You are not called upon to pronounce judgment on the Respondent's opinion of the law. The question is not whether his construction of it has been in all instances exactly right—whether it might not have been better—but whether it has in any instance been wrong, plainly and grossly wrong; so plainly and grossly wrong that it could have proceeded from nothing short of wilful blindness, or utter depravity and corruption of heart. There must have been a moral turpitude on the part of the Respondent to justify this charge. And I assert—I insist—that he has a right to show that other men in the same exalted station—as good judges as he—as good judges as *his* judges—have so construed the law as he has done. He has a right to show any thing which will justify the possible honesty—the possible purity of his motives. What is the charge here brought against him? It is of a corrupt and shameful usage—a wilful, wanton misconstruction of the law. He says I have done only what others have done. I have construed the law as I found it, according to the best of my judgment, so help me God! I call on all those around me—I appeal to every Judge of Probate in every county in the Commonwealth—I go back to the first origin of Courts, and invoke every judicial officer that ever sat upon the bench, to bear me out in this usage—in this construction of the law. You must hear him. You cannot say this is no justification. I maintain we are fair, we are honest. We are firm—we are not to be shaken in this position. We stand right in Court; in this Court; in any Court; but more especially in the highly criminal Court which I am now addressing. We can defend this man—we do defend him from the charge of wilful corruption, if we show any thing that will account for his conduct consistently with an honest motive—with any thing but a corrupt motive. It is a case too plain for argument. We have cited a decision of the Supreme Judicial Court. You are not bound by its decisions. But you are not above the law. You are not better judges of the law. You allow its decisions to be made. Why? Not because you are not a superior Court. I admit it. You may be co-ordinate—you may be supreme. But the constitution has appointed that Court to pronounce the law. Its decisions are the law of this Commonwealth. And if that law prevails any where, it must prevail here. It is proper for us to show that the construction of the statutes for two hundred years—from the time that the name of a court was first known in this country--has been to take reasonable compensations for services not named in the statute. I say almost from the time of the first settlement—for though the present statute has no great antiquity on its head, it does, in its principal enactments at least, go back, certainly as far as the Provincial Charter.

The PRESIDENT suggested whether it would not be better to vary the question thus, so as to embrace the whole point of dispute; have you observed the practice of the Courts of Probate in this Commonwealth for many years; and, if you have, what is that practice in relation to the taking of fees for services not enumerated in the fee-bill?

Mr. WEBSTER and Mr. HOAR agreed to this modification. Mr. KING said the Managers had the same objections to the question in its modified shape as before; and prayed the deliberate judgment of the Court whether it should be put.

Mr. DWIGHT moved, that the Court withdraw for the purpose of deliberating on the admissibility of this evidence.

The whole Court withdrew accordingly at a quarter past five, with the exception of Mr. Varnum, who remained in the court room.

The Court returned at half past six, and gave their opinion on the question, shall the witness be asked, &c. as follows:

Yeas—Mess. Thomas, Clark, Doolittle, Rantoul, Sullivan, Bigelow, Lyman, Hunnewell, Bartlett, Welles, Brooks—11.

Nays—Mess. Bourne, Ruggles, Moseley Whittemore, Eastman, Allen, Tufts, Reynolds, Parker, Dwight, Gardner, Pickman, Hyde, Varnum—14.

Mr. DUTTON. If it would be proper for me to make the suggestion, I would observe that I have been requested on the part of the Managers to move the Court for an adjournment, which we have reason to think would be agreeable to all parties; having been much exhausted by a very long and laborious session.

The President asked the Respondent's counsel if they assented to the suggestion of the Managers.

Mr. WEBSTER. We entirely concur with them, sir, in a wish for adjournment; especially after the late solemn decision of this Hon. Court; which has, without affectation, entirely surprized us.

The Court was adjourned to 9 o'clock the next morning.

SENATE.

FRIDAY, APRIL 20.

COURT OF IMPEACHMENT.

Mr. Varnum on the part of the Senate, and Mr. Coolidge on the part of the House of Representatives, delivered the usual messages.

The court was opened at a quarter past 9 o'clock.

Mr. GRAY of Boston, took his seat among the Managers, having been elected by the House of Representatives, in the place of Mr. Baylies.

The counsel for the Respondent proceeded in their defence.

Mr. HOAR. The Respondent, by the decision of this honourable court yesterday, has met with very considerable embarrassment with regard to the course he is to take in the introduction of evidence in his defence. As the court has not furnished the reasons of their decision, as we do not know whether they disapprove of the form of the question put, or the substance of the evidence we wish to introduce, as we have heard the honourable Managers allude to the rules of this honourable court, of which we know nothing, but with which they being public men, are probably better acquainted, we shall be obliged to submit several propositions for the purpose of obtaining some further instruction. In the mean time we will offer some evidence, which we suppose will not be objected to, in relation to some of the last articles.

PRESIDENT. Are you not furnished with a copy of the rules which the court have adopted for the conduct of this impeachment?

Mr. HOAR. We have not been furnished with any rules of evidence.

Evidence on the part of the Respondent on the sixth article.

BENJAMIN CHAMPNEY sworn.

Q. by Mr. HOAR. Where do you live?

A. I live in New Ipswich, in N. Hampshire.

Q. You are a lawyer there?

A. Yes.

Q. Have you had any concern with an estate in Groton, formerly owned by Mary Trowbridge and her sister?

A. In 1801, Francis Champney, husband of Mary Trowbridge's sister, moved to New-Ipswich. At that time I took a lease of Francis Champney, for his life, of one half of the Trowbridge estate, which he held in right of his wife. The estate belonged to her and Mary Trowbridge as parceners, and heirs of Nehemiah Trowbridge. Afterwards there was a question between the sisters about the rent. In 1804 the rent was demanded. Francis Champney was very poor and was supported by his father, and the estate had become valuable. I thought something ought to be done to secure the rent. There were frequent conversations about it in the family. There was a fear that the creditors of Francis Champney would get the estate. The object was to secure the property for the support of Francis Champney's wife.

Q. Were there any difficulties between the sisters?

A. Yes, there were various difficulties between the two families.

Q. Did you have any interviews with the Respondent as agent of Mary Trowbridge?

A. About Dec. 1804, Judge Prescott as attorney for Mary Trowbridge, negotiated with me on the subject of the estate.

Q. Did you ever converse with him on the subject at New Ipswich?

A. Yes.

Q. How many times?

A. I do not recollect seeing him there but once.

Q. Did you ever transact business with him as her attorney, after he was judge of probate?

A. I do not recollect that I ever did after that.

Q. Should you have remembered it?

A. I should, because I should think it improper. I recollect I avoided conversing with him on that subject on that account.

Mr. HOAR produced a paper which the witness identified. Mr. HOAR said he should show by this paper that the decision of the Respondent, respecting this estate, was not as judge of probate. He reads the paper, as follows, viz:—

The committee appointed to appraise all the real estate whereof Nehemiah Trowbridge, late of Groton, died seized, have attended the business,

and appraised the land with the buildings thereon, at the sum of $2500; and upon full investigation, and impartial view of the premises, find that said estate cannot be divided among the children and widow of said deceased, without prejudice and injury to the whole—therefore report that the said estate be set to *Mary*, the youngest daughter of the said deceased, and for her to pay unto her sister one third of the amount of the inventory in a suitable time. One third of amount of the inventory to be devoted to the use and living of the widow in lieu of her thirds, and after her decease *Mary* is to pay the one half to the order of her sister, with interest after said widow's decease.

OLIVER PRESCOTT.
SAMUEL LAWRANCE.
WALLIS LITTLE.

Sept. 12, 1805.

To Mrs. ABIGAIL CHAMPNEY.

[The paper produced by the Managers corresponding in substance with the foregoing, bearing the same date, and signed by the same appraisers began as follows:—"We the subscribers, a committee appointed by the Hon. James Prescott, Esq. Judge of Probate for the County of Middlesex, to appraise all the real estate whereof Nehemiah Trowbridge," &c. and concluded—"and that we will sign and prepare a report agreeably to the above statement, as soon as can be done conveniently." It was not directed to any person.]

Mr. HOAR read likewise the lease from Francis Champney to Benjamin Champney, of his life estate, dated Aug. 18, 1801.

Q. Did you not converse with the Respondent as agent of Mary Trowbridge before 1804?

A. I did before 1804, and I saw him once on the business at New Ipswich; but never after he was appointed judge.

Cross examined.

Q. by the Managers. Have you always lived in New-Ipswich?

A. I have lived there since 1791. I moved from Groton.

Q. Do you know that the Respondent went to New-Ipswich expressly on this business?

A. I presume he did. I understood him so. I recollect Francis Champney said to me that brother Prescott was engaged for Loring, and he was afraid there would be some difficulty.

Q. Was he not on the way to or from some court?

A. I do not know that he was.

Q. When was it?

A. I cannot say.

Q. Was it after the letter you wrote Dec. 29th, 1804, to Mr. Loring?

A. It was before.

Q. Did you see him after his appointment as judge?

A. I believe I did.

Q. Did you not go to Groton to see him on this subject?

A. No. I think I attended a Court of Common Pleas at Concord in June, 1805, and saw the judge, but it was on a melancholy occasion, when the judge had just lost a child; I was at Groton also on the death of a sister; but I did not see the judge at those times to converse with him on this business.

Q. What was the object of this negociation?

A. It was understood that the creditors of Francis Champney were seeking this property. The object was to prevent their getting it.

Q. Were you present when the release was executed at Groton?

A. Previous to my going to Groton I had received a deed from Francis Champney and wife of a moiety of the estate, and I gave a deed of it in Jan. 1806 to Loring.

Q. Did you appear before the commissioners as agent to Francis Champney and wife?

A. Yes.

Q. Did the Respondent give you notice of his being appointed Judge of Probate, and that on this account he could proceed no further as agent in this business?

A. I do not remember that I was specially so informed by him.

Q. Was there any thing done different from the common usage, before the Judge of Probate?

Mr. WEBSTER. Tell what was done; not what the usage is.

Witness. We came to a settlement without any decree or interference of the Respondent as Judge of Probate.

Q. Was there any agreement that the Respondent should name commissioners to appraise the estate, notwithstanding he was an agent, before he was appointed judge?

A. I do not recollect that there was.

Q. Before the conclusion of the business was there any agreement as to a division of the property?

A. I do not recollect any.

Q. Did you understand and consider the Respondent the agent of Mary Trowbridge after 1804?

Mr. WEBSTER. We object to the question.

Mr. SHAW. We consider the question proper on account of the Respondent's answer. We state that the Respondent being Judge of Probate, acted still as agent of the party. The excuse alleged is that it was done by consent of parties. What misconduct there is in this is another consideration. The question is to prove the fact stated in the answer of the Respondent.

Mr. WEBSTER. No sir, it is to get the witness' opinion.

Mr. SHAW. No sir, it is a question of fact. We say the appointment of commissioners was made by the Respondent under the form of a decree of Judge of Probate. The question is, was it done by agreement of the parties notwithstanding their knowledge of the Respondent's being the attorney of one of the parties.

Mr. WEBSTER. The gentleman asks one question and argues another. Produce the other party who must have known, and ask him if he had any notice from the Respondent of his ceasing to be agent.

Q. by Mr. SHAW. Had you any notice from Judge Prescott of his discontinuing to be the agent and attorney of Mary Trowbridge?

A. I had no information on the subject. I did not think any thing about it.

Q. Was there any agreement between the parties that notwithstanding the judge being agent, he should appoint appraisers?

A. I do not recollect any.

Q. How far is New Ipswich from Groton?

A. Twenty miles.

Q. by Mr. GRAY. Was there any agreement whatsoever, as to a settlement being made otherwise than according to law?

A. Not as I recollect.

Q. by Mr. WEBSTER. Did you ever treat with the Respondent as attorney of Mary Trowbridge, in any way, after he was appointed Judge of Probate?

A. Not that I recollect.

Q. How was the estate settled, by deed, or judgment of the Court?

A. After the report of the Commissioners, there was a delay, and it was considered how it should be settled, and it was finally done by deed. Francis Champney and wife made a deed to me of her share of the estate, and I gave a deed of it to Loring. There was a fear of the creditors making an attachment, and a caveat was filed in the probate office and the petition for partition was continued one term.

Mr. HOAR reads a release (after proving it by the witness) dated Jan. 6. 1806, signed by Benjamin Champney as attorney of Francis Champney and wife, being an acknowledgement of her having received her share of the estate.

Q. by *Managers*. How many times did you see the Respondent after he was appointed judge, and before this business was concluded?

A. I presume I saw him at the Concord Court.

Q. Did you see him at any other time?

A. I think I saw him at New Ipswich in the summer of 1805.

Q. When was it that you saw him at Concord?

A. At the time of the Court in June, 1805. I have a memorandum that his family was at New Ipswich in the summer of 1805. I saw him again at Groton in September.

Q. Had you any conversation with him on this business at either of these times?

A. Not that I recollect.

Q. Is the Respondent related to you?

A. He married my sister.

Q. Who entered the *caveat* you mentioned?

A. I did; it was for the purpose of delay only.

Q. Was there any counsel except yourself, employed for the wife of Francis Champney?

Mr. WEBSTER objects to the question as being irrelevant.

The Managers prayed the judgment of the Court. The yeas and nays were taken as follows, viz:

Yeas—Mess. Bourne, Thomas, Ruggles, Clark, Moseley, Whittemore, Sullivan, Bigelow, Allen, Reynolds, Tufts, Dwight, Parker, Lyman, Gardner, Hyde, Hunnewell, Pickman, Bartlett, Welles, Brooks and Varnum—22.

Nays—Mess. Doolittle, Rantoul and Eastman—3.

So the question was put to the witness.

A. There was no other attorney on the part of Mrs. Champney. Mr. Peabody was an agent appointed by Judge Prescott for the other party.

Mr. HOAR reads the deed of quitclaim from Francis Champney and wife to Benjamin Champney, dated Jan. 2, 1806, and the deed from Benjamin Champney to Loring, dated Jan. 6, 1806. He stated that the lease of the life estate to Benjamin Champney was dated Aug. 18, 1801. He produced also a paper written by the Hon. Timothy Bigelow, signed by Mary Trowbridge, with a blank left for the signatures of the other parties. It was a request to the Judge of Probate to settle the whole estate on Mary Trowbridge, if he should think proper.

Witness identified the paper, and said he thought it best, seeing that paper, to settle by deed instead.

Mr. HOAR repeated that the commission of the Respondent as Judge of Probate was dated Feb. 1, 1805, and that the oaths were administered to him on the 19th.

Mr. HOAR. We shall next introduce evidence that applies perhaps more particularly to the 7th article, but which has a bearing on most of the others, in which he performed special services and received fees for them, to show that it has been the constant practice of the Respondent, where it could be done without great inconvenience to the parties, to send them to some other person to have their papers put into form, and that he has avoided as much as possible preparing them himself.

LOAMMI BALDWIN sworn.

Witness stated that while he kept an attorney's office in Cambridge, from 1803 to 1814, he became a good deal acquainted with the practice of the probate courts, and often conversed with Judge Prescott concerning it. He mentioned that great delays were

occasioned by the suitors coming quite unprepared with their necessary papers, and with accounts very informally stated. I happened to have an office in the same building where the probate courts were usually holden; and the judge asked me if it would be agreeable to me to attend to that business, and occasionally prepare, or correct the papers of suitors in his court; which I agreed to do.

Mr. DUTTON objects to this evidence of general practice, and thinks the testimony ought to be confined to particular cases.

Witness. I cannot now recollect individual cases. But a great many persons applied to me by the direction of the judge, so that I used to make a point of keeping at my office on probate days.

Q. by Mr. HOAR. What kind of business were you accustomed to do for them?

A. I used to take blanks from the probate office, and fill them up as they were wanted. In a number of instances I made out complete sets of administration papers. I used frequently to prepare their bonds, leaving blanks for the names of the sureties, to be afterwards filled up by the judge; and sometimes the judge told me beforehand who they were to be. When the papers were all properly prepared, I used to go into court with the parties, and present them to the judge. This tended to promote the despatch of business, and enabled the parties to get away sooner from attendance on the court.

Q. Did you also sometimes correct accounts?

A. I did; and often had to re-state an account entirely, which had been informally made.

Q. Did the parties come of their own accord? or were they sent to you?

A. They often came of their own accord, in order to get their business through sooner; and were often sent by the judge for the same purpose.

Q. Was the correcting these accounts a tedious business?

A. It often occupied several hours. When the accounts were long it sometimes took me half a day, or more, to examine and arrange the vouchers and make out the account accordingly.

Q. Have you ever known the judge yourself to send parties to a lawyer to get this business done?

A. I often heard him tell suitors that he could not delay the regular business of the court to put their papers and accounts in proper form; that if they wanted to get their business done they had better apply to me, or some other lawyer to put them right. The judge very often came into my office himself with these informal papers, and desired me to put them in order; which I used to do. And I generally found suitors very willing to pay my fee for the sake of getting their business over so much sooner.

Cross examined.

Q. by Mr. SHAW. What was the object of referring suitors to you?

A. It was merely to expedite business; the suitors always preferred paying a small charge of two or three dollars, to waiting till the register could attend to their papers himself.

Q. Was any difference made in the sums paid to the judge, or register, when you prepared the papers?

A. I never understood that there was any difference in the probate fees on that account.

Q. by Mr. HOAR. Was the register rather slow in doing business?

A. The register at that time was Judge Winthrop, who was very old and infirm—had a very methodical set way of doing business—in which he did not choose to be disturbed.

Q. Was it thought therefore to be a saving of expense and trouble to get the business done by others?

A. I thought there was; and suitors seemed to be well satisfied with the arrangement, and paid the additional charge cheerfully.

Q. by the Court. Do you know whether the judge took any less fees in those cases where you prepared the papers, than when they were prepared in court by himself, or the register?

A. I do not know.

Mr. WEBSTER. There is no pretence, may it please the court, that any less fees were taken when the blanks were filled out of the probate office. The object of this testimony is to show, that in a great many cases it was necessary that some person who understood the business should be employed about these papers; that it required considerable labour to prepare them; that this was frequently done out of the office, and paid for; and that sometimes it was done by the judge himself, for which he took the usual fees.

Q. by the Court. What were the papers you prepared in applications for administration?

A. The petition, letter of administration, bond, notice, warrant of appraisal, and decree. I used to take blanks for all these papers occasionally from the register, and keep them in my office, to be filled up when called for.

PRESIDENT. The blanks were always furnished from the probate office, were they?

A. Yes.

Mr. HOAR. With the consent of the honourable Managers, who have had the papers under their inspection, we now offer to

the court three complete sets of papers, analagous to those in the case, with fictitious names, prepared by Mr. Fiske. [The papers were laid upon the clerk's table.]

Q. by the Court. Did you charge fees to the party for preparing letters of administration, bond, order of notice, and decree?

A. I used to fill up all the papers, and charge a fee of two or three dolllars for the whole. When accounts were to be stated I charged more—according to the time; generally about five dollars—or in troublesome cases ten.

Q. by Mr. PEABODY. Did the suitors generally come prepared with their papers, or not?

A. There were a number of gentlemen in different parts of the county, who were accustomed to attend to this business, and prepare the papers beforehand for suitors. But they very often came without any preparation.

Q. Were the fees you charged allowed in their accounts.

A Yes.

Q. Did you ever hear any expressions of dissatisfaction about it?

A. No—I never heard any other than expressions of satisfaction.

Q. by the Court. Was the fee paid to you by the suitors, or e Respondent?

A. By the suitors in ery instance.

Q. by Mr. GRAY. ou say you sometimes filled up the blanks entirely, did you?

A. I did;—sometimes left blanks for the names to be inserted; and at other times when I happened to know the parties I filled them up entirely.

Q. Were the accounts brought you sometimes correct?

A. They were often right except as to mere form, and then I merely filled up the blank forms. Those suitors who had experience in probate business, brought their accounts pretty correct; but most of them were very irregular.

Mr. WEBSTER. Will you state the object of the application to you to prepare these formal papers?

A. The object I believe was merely that the party might get his business despatched the sooner, and go home. At least this was the case with the mere formal papers. But when accounts were to be settled, it was also an object to have them correctly stated; and this was a pretty troublesome business, for which I used to charge five or ten dollars.

Q. by Mr. GRAY. But you took fees even for the mere formal papers, did you?

A. I did.

JOSIAH ADAMS sworn.

Witness stated, that he was a lawyer, and had kept an office several years in Framingham; that probate courts were h lden there twice a year. That he had had considerable connexion with probate business for the same reasons as had been stated by Mr. Baldwin. That he had formerly lived in Concord; but opened an office in Framingham in 1807. That the Respondent's practice, in relation to administration papers and informal accounts, had been uniformly in regard to him as stated by Mr. B. That the judge had always, as far as he knew, avoided doing this kind of business himself, and had preferred sending suitors to him. That he had sometimes had accounts which it took him two or three days to state.

Cross examined.

Q. by Mr. LELAND. When are the probate courts holden in Framingham?

A. Twice a year; in June and September.

Q. Does the judge still continue the practice of sending suitors to you to have their papers prepared?

A. Not for the preparation of the mere formal papers. Since Mr. Fiske has been register they have been made out in the office as fast as they were wanted.

Q. by Mr. SHAW. Were these applications made to you chiefly when the Respondent was much pressed with business?

A. Generally.

Q. How long do the terms continue?

A. Usually three or four days; sometimes as much as five or six.

NATHAN ADAMS sworn.

Witness states, that he lives at Medford; that as long ago as 1805 he began to attend the probate courts there, and had since attended constantly: that he frequently prepared papers for suitors, and did such other services as other witnesses had stated. That the judge frequently referred suitors to him, and to other persons for that business. That he was not a lawyer; but that he had an administration to attend to himself in 1805, by which he had got some insight into the business; that the judge had frequently given him instructions gratis, and that he had seen him do it to others, both in court and out. That he had settled many estates, and had attended to probate business for others regularly since he first settled one in 1805.

No cross examination.

ABNER BARTLETT called.

Witness said that he recollected frequently seeing the judge refer suitors in his court to gentlemen of the bar, for the purpose of facilitating business. That application had been frequently made to him for the preparing of probate papers, both at Medford, and at Woburn, where he had formerly lived. That he left Woburn in 1807.

No cross examination.

NATHAN BARRETT sworn.

Witness lives at Concord, and agrees entirely with the testimony of former witnesses as to the judge's practice.

No cross examination.

The Managers said they would concede all that witnesses could testify, as to the general practice of the Respondent in this respect.

Mr. HOAR then offered to read the deposition of *Nathan Grout*, in evidence on the 12th article.

Mr. KING said, that it was taken *ex-parte*, but the Managers had no objection to its being read.

Mr. HOAR replied, that the Managers had seasonable notice of the taking of the deposition; that the interrogatories proposed by the counsel for the Respondent, had been submitted in writing to the inspection of the Managers, and that they had been requested to add interrogatories of their own.

Mr. HOAR then read the deposition as follows.

Commonwealth of Massachusetts.

Senate of the Commonwealth, sitting as a high court of impeachment, in the matter of the articles of impeachment, presented by the House of Representatives *vs.* James Prescott, Judge of Probate for the county of Middlesex.

Interrogatories proposed to be submitted on behalf of the Respondent, to NATHAN GROUT of Sherburne, a witness to be produced and sworn to testify in this cause.

1. Did you and Alpheus Ware, or either of you, apply to James Prescott, Esq. for advice relative to the property of Jotham Breck, the ward of said Ware, at Framingham, in June 1815? If so, please fully to state the circumstances and manner of such application?

2. Was there at that time any controversy between said Ware and yourself, relative to the account of said Ware's proceedings in his guardianship?

3. Did said Prescott offer his advice to you or said Ware, or propose to give you, or either of you, any directions respecting the affairs of said Breck, before said Prescott was applied to by you for advice?

4. Please to state all other matters and facts within your knowledge relative to the above entitled case; and particularly all the circumstances that transpired, and all the conversation that was had at said time between you and said Ware and said Prescott or any of you.

AUGUSTUS PEABODY,
In behalf of the Attornies of the Respondent.

Boston, April 9, 1821.

Lemuel Shaw, Esq. and others, Managers of the Impeachment against James Prescott, Judge of Probate;

Gentlemen,

Mr. Grout being infirm and probably unable personally to attend at the trial, it is proposed, on behalf of the Respondent, to take his deposition. For that purpose we send you the foregoing interrogatories, which we propose to submit to Mr. Grout, and request you to add cross interrogatories—which we will submit with these. We will have the answers taken by any discreet magistrate in the vicinity, whom you will name. We request you to join in taking this deposition—and at the same time notify you, that if you do not, we shall be obliged to take it *ex parte*.

You can if you please join in taking the deposition, saving all exceptions you may see fit to take to using it before the Senate.

AUGUSTUS PEABODY,
In behalf of the Attornies of the Respondent.

I, NATHAN GROUT, of Sherburne' testify and say, that in the year 1815, I was one of the overseers of the poor of the town of Sherburne, and some time in the month of June in that year, I attended, with the other members of the board of overseers to the examination of the account of Alpheus Ware, as guardian of Jotham Breck, a person *non compos mentis*; the account was examined at Sherburne, and we signified our consent to its allowance, by a certificate written on the account which we subscribed. I did not go to the Probate Court in Framingham, in June in that year, to attend to that account. I had other business in the Probate Court, which induced me to go there. There was no controversy between said Ware and myself relative to that account, nor on any other subject at that court. I had however some consultation with said Ware, on the last day of the sitting of the court, relative to two notes of hand, which said Ware held against two men by the name of Bridges, payable to said Breck. The judge was sitting at the table, where he had been doing the probate business; he was about closing the session, and most of the people, I believe all but Ware and myself, had withdrawn. After Ware and myself had conversed some time, being not more than six feet from the judge, I turned to the judge, as he was sitting at the table, and, supposing we were conversing on a subject in which it was the duty of the Judge of Probate to direct, I began to state to him the circumstances relative to said notes. I had not proceeded far, when Ware interrupted me, and went on to state to the judge the particular circumstances of said notes. The substance of our statement was, that the notes were given for a farm, which said Breck had sold to the Bridges—and as his wife unexpectedly refused to release her claim of dower, the notes were given, to be paid whenever she should relinquish her dower, interest to be paid in the mean time. Our object was to obtain the principal of the Bridges, who were willing to pay if they could be indemnified, and we wished to be advised of means, in which such indemnification could be given. After hearing our statement, and considering the subject a few minutes, the judge advised us to put an article in the warrant for our next town meeting, and have the Treasurer empowered, in behalf of the town, to indemnify the Bridges,

by bond against the claim of dower. This advice was followed, and one of said notes has, as I have since been informed, been principally paid. The judge then told me, he must have five dollars for his advice. I refused to pay him, saying I supposed he had done no more than his duty as Judge of Probate, and if I paid him, it might be from my own pocket, as the other members of the board of overseers might refuse to pay me. The account of Ware abovementioned lay on the table before him; the judge said his fees on that account amounted to but forty cents, and he ought to be paid for his advice, and asked if I was willing that Ware should pay him and have it allowed in the account. I told him I considered it his duty as judge, and that I was not willing. He appeared to be much dissatisfied, and said he should remember me so as not to be taken in again. I went very soon from the hall, and the judge followed me down the stairs, leaving Ware behind, as I supposed. He again claimed the money, and after some little conversation, I told him, to prevent difficulty, I would pay him three dollars; but he said he should not take less than the sum he had claimed.

Question by *Alpheus Ware.* Do you not remember that I had also a note signed by myself and payable to said Breck, which was in the same situation as the notes against the Bridges, and which were included in the subject on which we asked advice?

Answer. I recollect that you were indebted to the estate of Breck, but do not recollect the particulars.

NATHAN GROUT.

Commonwealth of Massachusetts.

MIDDLESEX, ss.

On the fourteenth day of April in the year of our Lord eighteen hundred and twenty one, the aforesaid deponent was examined and cautioned, and sworn agreeable to law to the deposition aforesaid by him subscribed, taken at the request of James Prescott, Esq. Judge of Probate for the county of Middlesex, and to be used on his trial before the Senate of said Commonwealth, which will be sitting as a Court of Impeachment in the Senate Chamber, on the eighteenth day of April instant, on the articles of Impeachment presented against him by the House of Representatives; and the Managers on the part of the House of Representatives were not notified and did not attend. And the said deponent being so sick and infirm as to be unable to travel and attend at the trial, is the cause of taking this deposition.—And I further certify that said Alpheus Ware did attend and was permitted to put any interrogatories he thought fit.

CALVIN SANGER,
Justice of the Peace.

ROYAL M'INTOSH sworn.

Mr. HOAR. Our object, may it please the Court, in bringing forward this witness, is of an unpleasant character. We are extremely sorry to be obliged to call in question the veracity of any witness who has appeared upon the stand. But in this instance we esteem it necessary, to do away some of the colouring, which has been given to this article by the testimony of Mr. Ware. We mean to show by this witness, that a personal misunderstanding existed between the Respondent and Ware, attended with violent animosity on the part of the latter. It will appear by the witness, that Ware had formerly employed the Respondent as counsel, and that the Respondent had been obliged to sue for his fees. He had taken out an execution against him. The witness after this met Ware in Boston, who employed him to carry a sum of money to the Respondent to stop the execution. A $20 bill which was thus carried turned out to be counterfeit, and was returned upon Ware's hands; at which Ware was angry and a quarrel arose.

Mr. DUTTON. If the witness is called to testify to a general misunderstanding, be it so; that is proper evidence; but I object to the introduction of all these particulars, as wholly irrelevant to the case.

Q. by Mr. HOAR. Do you know of any animosity on the part of Ware to the Respondent?

A. I have heard Ware express a great deal of anger against him frequently. I do not recollect in particular the words that he used, except that I have heard him say he would try and get him indicted.

Q. Did you carry money to the Respondent at the request of Ware?

Mr. SHAW. We object to that question.

Mr. HOAR. May it please your Honors, our object is simply to show the occasion of the quarrel. We do not wish to prove that the bill was counterfeit; we will admit, if the Hon. Managers please, that it was a perfectly good bill, and that the Respondent was under a mistake. But we wish the Court to be made acquainted with the violence of Ware's animosity, and the slightness of the occasion.

Mr. SHAW. We have no objection to any question as to Ware's general veracity, or to general evidence against his credibility in this particular case; but we do object to the introduction of particular facts, which we have never heard of, and which we have no means to meet. Such testimony would not be admissible, according to the general rules of evidence, in a court of law.

PRESIDENT. The question is—Did you carry money to the Respondent at the request of Ware? Shall this question be put to the witness?

It was decided by yeas and nays as follows:

Yea—Mr. Bourne—1.

Nays—Messrs. Thomas, Ruggles, Clark, &c.—24.

Q. by Mr. SHAW. Did you ever hear Ware use threatening language against the

Respondent? If you did, state what it was.

A. I heard him say that he could prove that the Respondent had that bill by him above a year, and tried to pass it; for which he calculated to get him indicted.

Q. by Mr. HOAR. Did he mean the same bill which you carried to the Respondent from Ware?

A. I have no doubt it was.

PRESIDENT. The opinion of the Court cannot be mistaken on this point, though the reasons of its decisions are not assigned. We have no objection to the admission of evidence as to the general hostility of Ware, but this particular transaction must not be inquired into.

Mr. HOAR. I believe the fact was drawn out by the gentleman on the other side.

Mr. SHAW. The witness misunderstood our question then; it was as to the general threats, and not as to any particular conversation.

Mr. HOAR. State any language which you have heard Ware use at any time importing dislike, or anger, towards the Respondent.

Witness. I heard him say he thought he should be able to get Prescott indicted.

Q. Did he say this angrily?

A. Yes, he seemed to be angry.

Q. Have you frequently heard him talk so?

A. No, only this time.

Q. by Mr. DUTTON. When was this time?

A. I believe it was the 2d of this month.

Mr. HOAR. If the Managers mean to ask when this animosity commenced, I would inquire of the witness, whether he has not at any former time heard him make use of angry expressions?

A. I have heard him use threatnings and hard words against the Respondent at other times.

Q. by Mr. WEBSTER. What language did he use? What did he say he would do with him?

A. I can't recollect the exact words, but he seemed to be angry about the judge's having sued him.

Q. When did you first hear him hold this language?

A. It was about a year ago that the first of these conversations took place—and twice since that I have heard him talk about it; once in July or August last and then again in this present month.

Q. And what did you hear him say was the cause of this anger?

A. It came from his having been sued by the judge.

Q. by Mr. HOAR. Was there any other cause?

Mr. DUTTON. We object to that question. You are not to go into the cause of the anger. We have nothing to do with that.

PRESIDENT. Both parties seem to agree as to what the rules of law are, and both seem to be trying to get over them. If you both waive the law, it is very well.

Mr. HOAR. May we not be permitted to show the cause of Ware's animosity against the Respondent?

PRESIDENT. The line is very clear. Any general hostility may be shown, but not the particular facts from which it was derived.

Mr. HOAR. We shall take the direction of your honour, without putting the honourable court to the trouble of a vote.

Cross examined.

Q. by Mr. LELAND. When was the first time you heard him talk about indicting the Respondent?

A. The second of this present month.

Q. by Mr. DUTTON. How long have you known Ware?

A. Five or six years.

Q. Where do you live?

A. I live in Sherburne.

Q. Does Ware hold the office of Colonel in the militia of that place?

Mr. WEBSTER. That surely is not a pertinent question.

Mr. DUTTON. What is his general reputation for veracity?

Mr. WEBSTER. No sir, I must object to these questions.

Mr. DUTTON. Then I must insist it is a question I have a right to ask.

PRESIDENT. What was the question put?

Mr. WEBSTER. The Hon. Manager asks, sir, if Ware was a Colonel in the militia.

Mr. DUTTON. I wished to inquire into Ware's general reputation; but I withdraw the question.

Mr. *Fiske* was called.

Q. by Mr. HOAR. Is this [showing a paper] the statement of the regular fees, according with the original papers in Lakin's case?

A. It is, as far as the papers appearing in the case justify. The whole amount is $24, 67; which includes the following items—the petition for administration, decree, bond, letter of administration, order of notice, warrant of appraisal, oath, triplicate notices; for these the charge is $3,60; $1,65 for the judge, and $1,95 for the register. Then there is the affidavit of notice given, petition to sell personal estate, decree thereon, warrant to the administrator to sell personal estate, blank account for sales made, the inventory, say seven pages, the record and copy thereof; then there is the list of debts, allowance thereof, petition for leave to sell real estate, the judge's certificate thereon, bond to appro-

priate proceeds, oath, certificate of oath, affidavit of notice, account of sales of personal estate, decree thereon, administrator's account, say ten pages, certificate of balance, decree of distribution, copy and recording.

PRESIDENT. Do you mention in your statement the fees provided for by law or by practice, or both ?

Mr. HOAR. Both, your honour.

PRESIDENT. Please to state then how it is with each item.

MR. HOAR. That is the difficulty—to find out what is provided for.

Mr. WEBSTER. We know not, may it please your honour, how that fact is to be proved by a witness. And thus we are constantly embarrassed. The hon. Managers do not choose to state what the law is ; and witnesses cannot prove the law. The Respondent knows not from the honourable Managers of what he is accused ; nor from the Hon. Court by what law he is to be tried. The fees which are exhibited in this statement are made up in part from the statute and in part from the usage, which if not conformable, is at least not contradictory to the statute. We have endeavoured to show such a usage in other counties than the county of Middlesex ; and we have not been permitted to do it. When this species of court was first established in this country, it was a prerogative court. The judge of probate was a surrogate:—He derived his authority from the Ordinary. All the functions of the court—all its habits and modes of procedure were drawn directly from the ecclesiastical courts at home. Long before the existence of any fee-bill, fees were taken for duties in that court, precisely as they were in the English ecclesiastical courts from which it was derived. Such we supposed to have been the usage. Such had always been the usage. And that we supposed to have been continued down to the present time. This goes to make out the legal right of the Respondent to take fees for services not enumerated in the fee-bill. We mean to show, therefore this ancient usage which has existed from time immemorial, as bearing directly on the charge of wilfulness and corruption against the Respondent. We believed this to be a case depending wholly upon usage. On this very statute now in question—this very fee bill—the supreme judicial court in this very state have decided that evidence of usage is admissible. We are entirely at a loss to know what the honourable court consider the question in this case. We wish to follow any indication of opinion that the court shall please to make. If the court will intimate an opinion that the taking of any money for any service not authorized by the statute was illegal, then we give up the case. The Respondent stood convicted eight and forty hours ago. But if on the contrary, the court are of opinion, that he cannot be convicted but on a broken law, then we call upon the honourable Managers to point out that law. If there has been a breach of the law, let it be shown. But if the usage of the Respondent, in common only with all the other judges of probate that ever existed, be allowable, if it be not forbidden by any law, then you cannot condemn him ; and we are at a loss to conjecture upon what possible ground the late silent decision of this honourable court was founded.

PRESIDENT. It was the intention of the court to intimate to the Managers that they must at some time show us what is the law in regard to probate fees.

Mr. WEBSTER. We feel somewhat relieved, sir, by that intimation of the court ; and we apprehend this will be a leading case on the subject.

Mr. HOAR then read over the list of papers in Lakin's case, with Mr. Fiske's statement of the usual fees ; and remarked that the amount of $24,67 was exclusive of the fees paid to the court of common pleas for the license to sell the real estate, and exclusive of either of the guardianship cases. It will be found that the whole sum received by the Respondent, including the $8,75 which he paid into the common pleas, was not $36, but $35,24 ; when according to Mr. Fiske's calculation, supposing he has all the data, it should have been $33,42.

In relation to the 14th article Mr. Hoar read a certificate from Abraham Bigelow, Clerk of the Court of Common Pleas in the county of Middlesex, that at Concord, on the 2nd Tuesday of September, 1816, an action was entered by Samuel Hopkins vs. John Walker and others, and that James Prescott appeared as attorney for the defendants ; that the action was continued two terms, when the death of John Walker, one of the defendants, was suggested on the record, and the action was continued again, and abated at the next term. This Mr. H. said was the case, respecting the entry of which the witness doubted.

Mr. *Fiske* was called again.

Q. by Mr. FAY. I would ask what part of the charge in Lakin's case goes to the judge, and what part to the register, in each item ?

Witness. For the administration charge of $3,60, I have already stated that $1,65 goes to the judge, and $1,95 to the register. This $3,60 is the whole charge for all the papers of administration ; but I cannot state the particular items of which it is composed. The most of the papers are not provided for in the fee-bill. When I came into the office of register, I found such a charge usual, and I followed the usage, but I never could ascertain what part of the sum went to each item.

PRESIDENT. The Court do not wish to interfere with the arrangements of the Hon. Managers; they may choose their own hour; but the Court have expected that they would present some view of the law, and the defence manifestly labours under embarrassment on account of the law's not being stated on the part of the Commonwealth.

Mr. LELAND. May it please the Hon. Court, it has always been our intention to state the law on which we rely. We thought it improper however to do so until all the facts were in the case. If the counsel for the Respondent have gone through their evidence, we will proceed.

Mr. WEBSTER. We can neither tell what our evidence is, or ought to be, until we know what course the Hon. Gentlemen mean to take in regard to the law.

Mr. LELAND. We mean to stand first on constitutional ground—on the simple text of the constitution, which empowers this Hon. Court to try the officers of this Commonwealth for misconduct and maladministration in their several offices. We charge the Respondent with misconduct and maladministration. We prove certain facts; and we say that these facts make out the misconduct and maladministration alleged. In adverting to these facts, with relation to the legal crime contained in them, the mind is naturally brought to view the subject in a double aspect; first with regard to the legality of the Court, and secondly with regard to the amount of fees. The subject of the fees may again be distinguished into those taken by the Respondent for probate services, and those taken by him as counsel. As to that part of the subject which relates to probate fees, we stand upon the fee-bill; believing that the legislature intended to provide for all necessary services such compensation as was thought proper. Here is a duty provided, and a fee fixed by statute. We insist that no other or greater fee can be taken. We do not mean to say that if there be a usage in the county of Middlesex, a usage which existed prior to the Respondent's coming into office, and into which the Respondent has incautiously slipped, that *that* may not take something from his criminality. But if there be such a usage, it is for him to show it. It is enough for us to say the fee-bill is our law; and we give the Hon. Gentlemen notice, that we shall adhere to it. It is enough for us to show, that the fee-bill has been violated. If the Respondent endeavours to justify himself under a usage, the Court must decide how far that excuses the transgression.

Mr. WEBSTER. The learned Manager has been extremely fair—extremely candid in his exposition of the law; as we expected he would be. We exceedingly regret that this exposition was not made at an earlier period. It gives us an entire new view of the Respondent's case. The learned Manager stands on the law;—of course;—we presumed so. He tells us it is enough for him to show a broken law; and if the Respondent can show a justification, it is for him to do so. Though there may have been a breach of the law, yet if there have been an ancient usage, into which the Respondent may have inadvertently slipped, he may show it. So we thought. So we have endeavoured to prove. It was with this view that we undertook yesterday to prove the usage of this county; and of other counties. This was the only course for us. We could not justify the Respondent by his own usage in other cases. We should have met with a severe rebuke from the Hon. Managers if we had undertaken to do so. We could not prove the pre-existing usage of the county of Middlesex. The Respondent's predecessor in office is dead. The highly respectable and venerable man who was his register, is now an ancient man, stricken with the infirmities of age, his mind decayed and broken; we could not call him to establish the ancient usage of that county. We know of no other person whom we could call to testify on that point. We were therefore obliged to show the present usage of other counties. We thought it more reasonable, we thought it would be more satisfactory to the Hon. Managers, to show the usage of any other county, and of all the other counties in the Commonwealth, than to show the usage of the Respondent's own county—a usage which might have been said to have grown up under his own administration. In the case which was cited by one of my learned associates, the usage of a particular county was permitted to be shown. *A fortiori* we thought we might be permitted to show the usage of the whole State. The particular usage to which I refer, is that of taking fees for services not provided for in the statute. Now that this exposition of the law has been given, now that the Hon. Managers have stated the grounds on which they mean to proceed, I wish to know if there is not an entire new field open to our inquiry; and whether the opinion of this Court ought not again to be taken on the admissibility of our evidence. With the leave of the Hon. Court, the Respondent's counsel will retire for a few moments, for the purpose of consultation on the course now to be pursued.

Leave was granted, and the Respondent retired with his counsel for about twenty minutes.

On their return Mr. WEBSTER said, that they were all of opinion that the ground taken by the Hon. Managers presented a new case for the introduction of evidence. He wished to take the opinion of the Court, under this opening, whether it was not com-

petent for the Respondent to show what the general usage had been before and since he came into office, as to the taking of fees for services not mentioned in the fee-bill; and secondly, if the decision of yesterday should be construed to have shut out all inquiry into the amount of fees taken for particular services in other counties, whether the Respondent may not be permitted to show the practice of other counties in regard to the issuing of papers not mentioned in the fee-bill. He added, that the counsel for the Respondent had no wish to go into any argument on these motions, unless specially required to do so.

The *President* directed the counsel for the Respondent to reduce these motions to writing.

Mr. HOAR said that while his colleague was reducing the Respondent's motions to writing, he would take that opportunity to introduce some further evidence on the 8th article. He had considered that article to have been put out of the case by the Hon. Managers, but he now understood it was otherwise.

Josiah Crosby called.

Q. by Mr. HOAR. Did you ever pay Judge Prescott any thing as counsel?

A. I never employed him as counsel. I paid him $2—what for, I cannot exactly say. But it was added by the judge to the foot of my account as "for assistance."

Q. by Mr. FAY. He demanded it of you?

A. I do not know. I paid it to him. It was added to my account.

The counsel for the Respondent read the motions when put into writing, as follows, viz:

1. "And now the counsel for the Respondent move, that, in order to rebut the charge of wilful and corrupt misconduct, they may be permitted to prove, that, at the time of the Respondent's appointment to office, there did exist, and continually since has existed, in the probate offices of the several counties in this Commonwealth, a practice, according to which, in cases of application for administration, certain official papers are prepared and executed, and certain official acts done and performed, which are not particularly enumerated in the statute called the fee-bill, and fees paid therefor, and to show the usual amount of such fees."

2. "And now the counsel for the Respondent move, that, in order to rebut the charge of wilful and corrupt misconduct, they may be permitted to prove, that at the time of the Respondent's appointment to office, there did exist, and continually since has existed in the probate offices of the several counties of this Commonwealth, a practice, according to which, in cases of application for administration, certain official papers are prepared and executed, and certain official acts done and performed, which are not particularly enumerated in the statute of the Commonwealth, commonly called the fee-bill."

Mr. SHAW. Mr. President, the propositions now offered by the learned counsel for the Respondent, seem to be a renewal of the motion which this Hon. Court yesterday decided could not be maintained. We hold, and must hold, that the usage of other counties does not make the Respondent's conduct legal, and that evidence of such usage is not admissible; and I cannot but express surprise at the repeated efforts of the Respondent's counsel to introduce this evidence. We feel sorry for the suggestion which has fallen from the President, that the course pursued by the Managers, in the conduct of the impeachment, has not been such as was expected by the Hon. Court. We were under the direction of the Court; we had no disposition to withhold our grounds. We had supposed it to be the most convenient way shortly to introduce the prosecution by a general opening—to get in the evidence in support of the articles, and in the defence, and then to state our general views of the law.

The evidence now proposed to be introduced by the Respondent's counsel, we consider as inadmissible for several reasons. We consider the fee-bill to be the regular standard by which all officers, and especially judicial officers are to be governed. Where that statute gives such a sum to the judge for granting letters of administration, it is the only fee he can take. One of the grounds on which the learned counsel attempt to support their motions, is, that where there are certain services necessary, which are not provided for by the statute, the judge may lawfully take a reasonable compensation for performing them. But there is another view of the case. If to some services the statute has affixed fees, and for others which are necessary, no fees are provided, it may well be supposed that the legislature intended that these services should be performed without particular compensation; and when an office is created, and certain fees allowed for certain services, that then the aggregate of these fees is to be the compensation, and the officer must perform the other services, or any new services, without additional compensation. But supposing it otherwise, then such fees only as are usual must be taken, and the usage must be of that county only in which they are taken. The whole argument yesterday and to day goes on the ground, that the statute refers only to the papers mentioned in it. But we go farther, and show that the Respondent has in every one of these cases, charged more than, sitting in his own county, he has usually done; and we say that this departure from his own usage, is a proof of a corrupt motive.

There is also another ground on which we support this prosecution. I shall confine my remarks to the first article, although they will apply to some of the others. All the fees mentioned in the first article, were taken at special courts. If we show these courts to be illegal, taking any fees at all is of course illegal; and more especially taking addition-

al fees. In this view it becomes necessary to inquire into the nature and constitution of probate courts. The Respondent professes profound astonishment, that the legality of the special courts holden by him has been questioned. It is my intention to go into the history of probate courts, in this Commonwealth, and I may as well cite authorities now, as at any other stage of the proceedings. We consider the office of the judge of probate as one of the highest dignity and importance. It is an office of great responsibility. It requires a higher degree of purity and integrity than any other court. It is different from courts of common law. In those courts there are parties, attornies, jurors present, to watch the judge as well as each other, and it is impossible for him to act improperly without publicity. But the judge of probate exercises a paternal jurisdiction. He has the care of the important rights of widows and orphans, and of those whom the loss of reason has rendered incapable of protecting themselves. I do not agree to the distinction, as to the amicable and contentious jurisdiction of the judge of probate. There is no such distinction. All cases before him affect different parties, but in almost every act done *ex parte* the judge alone represents the absent party. The distinction between the amicable and contentious jurisdiction was borrowed from the ecclesiastical courts of Great Britain, and is not applicable here. There the jurisdiction between party and party was usually delegated by the bishop to persons acquainted with the civil law. A different person attended to the amicable jurisdiction, which embraced things only of voluntary or spiritual jurisdiction. [Mr. S. cites 4 *Co. Inst.* 337. respecting the court of Audience.]

Mr. WEBSTER. That is not a court for granting administration on estates.

Mr. SHAW. That is true; I cited the passage to illustrate the distinction between amicable and contentious jurisdiction. In the laws of this Commonwealth, we find the attention of our ancestors was very early turned to the subject of probate courts. In the year 1639 provision is made, "that there be records kept of all wills, administrations and inventories," *Anc. Charters*, 43. By a law of 1649, the county courts are to exercise probate jurisdiction. This statute enacts penalties, if any executor nominated in any will, shall not, at the next court of the county, which shall be above thirty days after the decease of the party, make probate, &c. or shall not leave the same to be recorded by the recorder or clerk of that county court, &c. *ibid.* 204. We hold that the presence of a register, or recorder, or clerk, is necessary to constitute a court. The very idea of a court implies that a record should be kept. I am not going into the distinction of courts of record, and courts not of record, but several statutes both in England and here, have provided that records be kept in courts of probate, and pointed out the way; a register, recorder or clerk is essential; a probate court cannot exist without one. In 1652, it is provided that it shall be lawful for any *two magistrates*, with the *recorder*, or clerk of the county court, *meeting together*, to allow of any will, &c. grant administration, &c. and the recorder or clerk shall inform the rest of the magistrates of the county, at the next county court, of such will proved, or administration granted, and shall record the same. *Ibid.* 204. In May, 1635, an additional law provides, that the magistrates of each county court shall have full power and authority "as the ordinary in England," to summon executors to account, &c. *ibid* 205. To show the nature of this jurisdiction, here is a direct reference to the ordinary in England. In October of the same year, another law was passed, with more ample and specific provisions, containing the same clause, "as the ordinary in England." *ibid.* 206. Both the last laws allow an appeal to the court of assistants, and a trial by jury in matters of fact. Such was the state of this court under the Colony laws, until the charter of William and Mary. By the charter itself the governor and council are to exercise probate jurisdiction. There are several acts passed soon after the charter, which recognize the existence of courts of probate. Probably the business was done by a sort of surrogate, but no doubt the courts were organized something as they are now, except that an appeal was so be made to the governor and council. Under our present constitution likewise, an appeal lay to the governor and council, until the legislature transferred the appellate jurisdiction to the supreme court.

With regard to holding probate courts at fixed times, numerous laws have been passed on the subject, from 1639 to the present day. The province law of 1719, says that the judges of probate "shall have and hold certain fixed days for the making and publishing their orders and decrees," &c. *ibid.* 427. This provision was considered to be of so much importance, that a similar one was inserted in the constitution; *Ch. 3. Art. 4.*— which is soon after repeated in the statute of of March 10, 1784. 1 *Mass. Laws*, 137.

With respect to the necessity of the register's being present at probate courts, I would refer to the act for establishing probate courts, passed March 12, 1784. 1 *Mass. Laws*, 155. The second section provides that there shall be a suitable person appointed register, who shall be sworn, &c. "and in case of the death, sickness, or necessary absence of the register, it shall and may be lawful for the judge of probate to nominate and appoint some meet person to officiate as a reg-

ister, to be sworn as aforesaid, until the standing register shall be able to attend his duty or till a new one shall be appointed," &c. By a subsequent statute, registers of probate are required to give bonds "for keeping up seasonably and in good order the records of the same court." Stat. Feb. 16, 1787. Sec. 2. *ibid.* 360.

Various statutes have been passed for fixing the times and places for holding probate courts in the different counties in the Commonwealth. The law of Mar. 7, 1806, for fixing the times for the county of Middlesex, is referred to by the Respondent in his answer, and he relies for his defence on the construction, which is to be given to that part of it, which provides, that when it shall appear for the general benefit of individuals, the judge may appoint other times and places, &c. by giving public notice thereof or notifying all concerned. By the statute of Feb. 24, 1818, the last general act on the subject of probate courts, the provision of the constitution is re-enacted, that the judges of probate shall have certain "fixed day" &c. This act went into operation from and after the 1st July, 1818. It is alleged somewhere in the Respondent's answer, that the court of probate is a court always open. B the constitution and the laws say, that these courts shall be holden at fixed times and places, or at times fixed by the judge and made public through the county. It is no matter whether they are called *terms*, or not; but they must be fixed times. This last statute enacts also that "all orders and decrees of judges of probate, shall be made in writing and duly recorded." We consider the presence of the register or recording officer essential to constitute the court. The law considers it so essential, as to provide that if he is accidentally absent, the judge may appoint a temporary register. The necessity of a register is here implied in the strongest manner. It is of the utmost importance to have true and correct records in the probate office. The whole property of the community, both real and personal, passes through that office. The register is to make the record, and it is his duty to know and see how the business is done. The Respondent says simply that the special courts were holden for the convenience of the parties. Is this sufficient to bring the case within the statute, if no register was present? We say that in the case of Tarbell, for instance, there was no court, and if the title to the real estate sold under the license obtained by him were to come in question in a suit at law, we should contend that there was no court and that the sale was void. On this subject, I will read a passage in bishop Gibson's Code of Ecclesiastical Law.

One of the canons of 1603 declares;—

"No Chancellor, &c. or any other person using ecclesiastical jurisdiction whoever, shall speed any judicial act either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf, to write or speed the same, under pain of suspension." Cod. Jur. Eccles. 996.*

It is not my intention, at present, to comment at large on the danger from the irregularities of such a practice. It is sufficient now for us to say, that the proceedings at the Respondent's office in Groton were not had at a probate court, that he had no right to take any fees there as judge, and that in so doing he is guilty of maladministration in office.

Mr. WEBSTER. If there was no court, then there were no fees taken by the Respondent as judge.

Mr. SHAW. He took them as fees of office.

Mr. WEBSTER. How could he take office fees if not acting in an official character?

Mr. SHAW. The fees were unlawfully taken and under color of office. The Respondent professed to act as judge of probate. He certifies as such. To legalize the court, it is necessary to show, either public notice, or notice to all concerned. The statute, after mentioning particular occasions for holding special courts, goes on in more general terms. We understand that the statute provides for cases of necessity, and that the more general words mean some important emergency; and we should suppose that no court would be holden under the statute without notice to the register, and all parties interested; nay, public notice; because there may be parties not known.—Suppose while a court is holding in private at Groton, and a letter of administration is granted, a will is filed in the register's office transferring the property—how is it to be known who is interested? The constitution and the whole course of the statutes show that fixed times and places are required to guard against irregularities of this kind. Now shall proof of usage be gone into, to show that the fees taken at these irregular courts were legal? There is no case of extortion charged, in which it is not proved that the Respondent has taken a larger sum, than he himself has usually taken at the regular probate courts in his own county. In the Respondent's answer to the first article, he states that the $5,58 is two dollars more than the regular fees of the regular probate

* "This," the bishop observes in a note, "is according to the rule of the ancient Canon Law: *Quoniam contra falsam assertionem iniqui judicis, innocens litigator quandoque non potest veram negationem probare, &c. statuimus ut tam in Ordinario Judicio quam in Extraordinario, Judex semper adhibeat aut publicam, &c. personam, &c. aut, &c. qui fideliter universa Judicii acta conscribant, &c. ut si super processu Judicis fuerit suborta contentia, per hoc possit veritas declarari;*" &c.

court; and however small the excess may be, it is evidence of corruption. If there is any charge for taking the usual fee of the county, I am not aware of it, and no usage of other counties can have a direct or indirect tendency to prove the innocence of this party. The evidence now proposed to be offered is therefore inadmissible.

Mr. Webster rose to reply, but the court, on motion of Mr. Varnum, adjourned at 20 minutes past 1, to half past 3 in the afternoon.

AFTERNOON.

The usual messages between the two Houses were communicated by Mr. Brooks on the part of the Senate, and Mr. Wade on the part of the House of Representatives.

The Court was opened at 25 minutes before 4 o'clock.

Mr. DUTTON. I wish to make a few remarks, Mr. President, in relation to the admission of this evidence, before the learned counsel for the Respondent makes his reply to the objections which have been already urged. The Managers yesterday objected to the introduction of this testimony, that it was not pertinent—that it was not relevant. It has been intimated that we have changed the ground of yesterday. The learned gentlemen have misapprehended us. We have neither changed, nor surrendered, any part of the ground we then assumed. We still maintain all the objections we then urged; and we think the present motion is liable to the same objections as the one offered yesterday, and that it should meet with the same result. It was contended yesterday, by the counsel for the Respondent, that the point in this case had been decided by the Supreme Judicial Court, in the case of the Commonwealth vs. Shed, 1. *Mass. Term Rep.* 229. It is there said, "It being agreed by the counsel on both sides, that the usage in this county (Middlesex) had been uniform in taxing that sum in the fees of officers who collected executions," the court said, "that as it respected that part of the sum received by the defendant, the fact would not evince a corrupt intention, and therefore would not bring his case within the statute," &c. The point was not whether they should introduce evidence to show the usage; both parties agreed that the "thirty cents" had been uniformly taken. The court did not decide that evidence of the usage should have been admitted, if the parties had not agreed that there was such a usage; but the judge charged the jury, that this being admitted, they might consider it as going to rebut the presumption of corruption. The present is a different case. Here there is no agreement. Were this an indictment for taking the $3,60 for granting administration, the question might arise, whether testimony of the usage of his own county, should be admitted, to rebut the presumption of a corrupt intention. We only said, in the morning, that the usage of his own county might be shown. It was never intimated that evidence of the practice of other counties could be admitted. No such thing. We have not charged the Respondent in any case with taking merely the $3,60 according to his own usage—we have charged that he took more in every case, than the usage of his county would justify. Suppose the practice in Middlesex had been uniform, and the Respondent had fallen into the custom which he found prevalent; in that case it would have been proper to inquire if the presumption of corruption might not be rebutted by showing this custom. In the case cited, the agreement was, that the usage was uniform in the county where it occurred; but, in the present, the Respondent himself maintains that there is no usage, no uniformity. What use is there then in attempting to prove a usage? We have heard of the misconstruction of statutes; the ground assumed is, that there is no law—that every judge must make a law—that every one must make a compensation for himself—that there is no statute in the case. The question is, whether this evidence is pertinent to the case before the court. We contend that it is not—that it does not make out their case. The Respondent cannot justify his illegal practices by the usage of another court.

Mr. WEBSTER. Happily the motion before the Hon. Court is in writing. Nothing is easier than to understand it; it needs but to be read. I do not intend to make any answer to the several incidental topics introduced this morning by the Hon. Managers. I shall forbear at present to say a word on the general question of the legality of these special courts. I shall come directly to the point. As the articles charge the Respondent with taking corruptly too great fees, and, as the learned gentlemen have shown that certain services, not mentioned in the fee-bill, have always been performed at the probate court in Middlesex, and fees taken for the same, they have themselves placed the case upon the ground of usage. This is a part of the case proved by them. They maintain their charges on showing the Middlesex usage. *We* have proved no custom of Middlesex. How does it appear that the sums taken for granting letters of administration were too much, but by comparing them with the $3,60? They set up a usage to convict the Respondent. They say you have taken more than the usage of the county allows. Now if they can prove a usage to convict him, the question is, whether we may not show a usage on the other side to acquit him. I cannot see why, if the usage of Middlesex is set up, that of other counties may not be; if the particular

usage of his county, *a fortiori* the general usage of the whole Commonwealth. We do not choose to stand upon the usage of the county of Middlesex, and allow the Hon. Managers to say to the Respondent, you are proving your own law—it grew up under you. The question is this, is it competent for the Respondent, in order to rebut the presumption of acting corruptly, to show that other judges of probate have done the same thing—to show that when he came into office, there was a similar usage established, not as to the amount, but in principle, in other counties. I say we may prove the usage of other counties. This is strictly legal. I contend that the authority cited is in point. There are other authorities. The whole analogy of the law is in favor of this position. In criminal actions, there are many cases where the crime is implied by law in the act itself, such as murder and arson. There is another class of cases in which the whole foundation of offence is in the intent—which is to be proved—as perjury, bribery and extortion. Take the case of perjury for instance;—no one commits it who does not swear falsely and wilfully to a material fact. The charge therefore must state that he swore falsely—in a court holden according to law—that issue was joined—that the fact was material—and that he knew he was swearing falsely. Either of these averments the party may rebut, and without proof of all of them he is acquitted. In all cases there must be an averment of the facts that constitute the crime; and if the crime consists in the intent, that must be shown to be corrupt by the facts and circumstances attending the transaction. It is not enough to aver that an act was done wilfully and corruptly, but the facts must be stated, with an averment of the corrupt intent. But if the facts stated are on the face of them indifferent, putting in the words *corruptly* and *wilfully* merely does not make the charge substantial. No case ever existed, in which the admission of the facts admitted the "wilfully and corruptly," as stated in the forms, or in which any thing could be proved that was not stated. The books of common law do not instruct us as to any such case. If it were so, there would be an end of all motions in arrest of judgment, an end of all cases of demurrer. It happens however that in the case of impeachment, there has been a decision in the highest court of impeachment in the country from which we have derived this mode of trial, in which this very point was determined. I refer to the trial of Warren Hastings. It was said by the Managers in that case, that the word "corruptly" would permit them to show facts not charged; but the doctrine did not pass current. With your Honors' leave, I will read a passage from the report of the trial.

PRESIDENT. Do you read it as an authority, or by way of argument? If you offer it as authority, I must take the sense of the Court upon its admission.

Mr. WEBSTER. I read it as I read decisions of the English courts of common law before our common law tribunals.

PRESIDENT. The English decisions made since the revolution are not binding here as authorities.

Mr. WEBSTER. I do not read them as such. I read them as I should in ordinary courts of justice, as proof of what other learned men have thought on similar occasions.

Mr. W. reads—

"Mr. Law objected to the production of any evidence of cruelties which were not in charge," &c.

"Mr. Burke contended that for all the ends for which the Managers wanted to prove acts of cruelty, the Commons had sufficiently charged them. The charge stated that cruelty was a necessary consequence of the new system introduced by Mr. Hastings"; &c. "The charge further stated that Mr. Hastings himself was aware that oppression must necessarily arise from a system that should adopt the letting of lands for *one year;* and that notwithstanding this his own opinion he had established the very system of which he knew *oppression* must be a *necessary* consequence."

"After some further argument on this subject, the counsel persisting in their objection to the evidence required, and the Managers persisting in their requisition for the production of it, the Lords withdrew to the chamber of parliament to take into consideration the argument on both sides."

"In less than half an hour their Lordships returned to Westminster-hall, and then the Lord Chancellor informed the parties concerned, that the House had resolved—That it was not competent to give evidence of the cruelties of Deby Sing, the same not being charged in the article then under consideration." *Trial of Hastings, Part 3, p.* 54.

Again "Mr. Anstruther maintained that as the charge stated that Mr. Hastings had acted *corruptly* in abolishing the provincial boards, and substituting in their stead a general committee of revenue, the Managers were at liberty to give in evidence every circumstance which could prove *corrupt* motives for the measure."

"The Lord Chancellor observed that if an act, in its nature *indifferent* or *harmless*, was stated as the ground of a *criminal* charge, the tacking of the word *corrupt* to it, could not open a door for the admission of evidence of facts not stated in the charge." *Ibid. p* 57.

The Managers in the case cited were not satisfied with the observation of the Lord Chancellor—an argument was had—the Lords withdrew—they put the question of the admissibility of the evidence to the judges—and the next day decided against the Managers. Now, sir, the Managers in this case have proved, not the substantive charge, for we admit that, but in addition they claim the right to go into incidental circumstances. We say to them, if you will not adhere to what is within your paper, go to all that is without your paper, to prove the Respondent corrupt; and they say in return, that the Re-

spondent shall go to nothing to rebut the presumption of corruption. If they may go to facts extraneous to the charge, to convict, why not we to acquit? In every case of bribery, extortion, perjury—every case where the intention constitutes the crime, every circumstance may be admitted that goes to rebut the presumption of corruption. The case cited from our own Reports is directly and positively an authority on the same statute which the Respondent is charged with having violated, that the usage may be proved.

Mr. DUTTON. The question never arose before the Court, whether the usage might be proved; but being in the case by the admission of the parties, the Court then gave effect to it of course, as they would to other facts, proved in evidence, though they might not have admitted it to be proved, if any objection had been made.

Mr. WEBSTER. The gentleman says that the evidence of the usage was in the case by agreement of parties, and because of this agreement the judge instructs the jury that the evidence of the usage was decisive, but that the Court would not or might not have admitted the usage to be proved, if it had not been in the case by agreement. I would ask, was it ever heard that evidence of facts, which were improper to be in the case, was admitted, because the parties agreed to admit it? that the judges of the Supreme Court could give weight to what was not a material fact in the case? The parties agree only as to the form of getting in the evidence. If it had no bearing on the case, they have no right to agree to its admission, and the court does not regard their agreement; or if the evidence gets in, it has no effect on the case. The court would never make it the basis of their judgment. I say, here is a solemn decision of the Supreme Court, that an existing usage is a material fact to go to the jury, to show the absence of a criminal intention in taking illegal fees. The fact was agreed, because it was clear and undoubted. Does a fact have more weight because it is admitted, than if it is proved? [Mr. W. reads from the case.] "The fact would not evince a corrupt intention." What fact? that of taking the thirty cents. Judge Sewall told the jury, that if they believed the defendant thought he had a right to take the excess charged, although he had not a strict legal right, they must acquit—that unless it were *wilfully* and *corruptly* demanded and received, it was not within the statute. If a man may not show an honest mistake in judgment, unfortunate must be the condition of judges disagreeing. The question is the same, of taking illegal fees, and of giving a wrong judgment. If a judge is impeached, as well he may be, for a wilful misconstruction of a statute, is he not to be admitted to give in evidence whatever shows that he believed his construction to be right? If a wrong judgment is to convict a judge, then every judgment reversed must expose one or the other of the judges to a prosecution. If we must look to the correctness of the legal opinion, then whenever the judges of the Supreme Court divide, one or more of them must be impeached. May there not be such a case as an honest error? And what can be better proof of honest error, than that other men have committed the same act? In the trial of Judge Chase, the question of conformity to a usage frequently came up; it was asserted on the one side and denied on the other. One of the articles related to the adjourning of the court. There was no statute authorising it, and the lawyers were inquired of as to the usage, not in one county, but of such courts generally. A part of the examination of Chief Justice Marshall was in relation to this usage. The whole of the fifth article in Judge Chase's impeachment charges the issuing a *capias* where a *summons* should have gone out. Evidence to prove usage was introduced, and on the question of usage alone was this article argued and determined. A friend has furnished me with the case of Lord Chancellor Macclesfield. He was impeached for extortion in selling the office of the six clerks in chancery. He endeavoured to defend himself by showing that other chancellors had done the same. Usage was relied upon, and he was permitted to go into evidence to prove it; but he failed to make out the usage, and was convicted. *(Macclesfield's Trial, p.* 170.) In the trial of Lord Melville also, who was impeached for making private use of certain moneys placed under his control as treasurer of the navy, the usages of the office were shown; though it appeared in the trial that the money had been used not by himself, but by his clerk without his knowledge. *(Annual Reg.* 1806.)

I have said that there may be mistake, and yet no corruption. The very forms of proceedings in our courts of law show that the act complained of must be done wilfully. Indictments are bad on general demurrer, unless the act is so stated. In all charges for extortion, the offence must be laid to be done wilfully. If it is not laid to be done *extorsively*, which implies wilfulness, the indictment is bad; and the act must be proved to be so done, because the crime is in the malicious intent. Instead therefore of its being true, that the Hon. Managers need only state bare facts, and then prove others which are not charged, they must set forth facts, which are criminal in themselves, and then allege that they were done by the Respondent with a corrupt intent. If the Respondent can show that they were not wilful, he is then acquitted.

For these reasons we have felt it our duty to ask the judgment of this Hon. Court on the two propositions which we have offered for their consideration. They are not precisely the same, although if the first motion shall be allowed, there will be no occasion for a decision on the second.

Mr. DUTTON. I agree with the learned gentleman, that when the fact is in the case, it makes no difference as to its effect, whether it comes in by agreement or by being proved; but it is a very different question, whether it should be admitted at all, if it is objected to.

Mr. WEBSTER. Our motion is not to the form, but the substance of the evidence.

Mr. DUTTON. In the case in our own Reports, the court did not inquire how the fact came into the case, but when it was in, they allowed it to have its effect. The authorities cited by the gentleman respecting usage, do not support him in his position. In Judge Chase's trial the only question was, what was the usage, not what was the law, as it is in the present case. The question depended entirely on the usage. In lord Macclesfield's case the charge was, that he went beyond the usage; that he took two thousand pounds, where his predecessors had been accustomed to take only one.

Mr. WEBSTER. The fifth article in Judge Chase's trial charges him with a violation of a statute of the United States, in issuing a *capias* where he should have issued a summons. There was nothing said in the article of any usage. The word usage was not in it.

Mr. DUTTON. I deny that there was any such statute of the United States.

Mr. HOAR. I am desirous, Mr. President, of some further explanation on this subject, as I apprehend that there is a mistake between the counsel. I wish the learned Manager to state, whether he considers it a principle of law in any court, that any fact is to have any weight, being in the case, the admission of which if not in would be refused. I wish them to say whether there is any case, where evidence which will have any weight if admitted into the case, can be rejected if offered in proper form. There is no question here, your Honors will observe, as to form, for we shall introdnce the evidence in such form as your Honors shall direct.

Mr. SHAW. I would make a single remark, Mr. President, not for the purpose of having the last word, but to bring back the case to the point where it was when the question was started. We said we put the case on the excess taken above the usage set up. It is true we asked the register what was the common charge for administration papers in Middlesex, and he said it was $3,60. We did not prove it as usage. The Respondent in his answer stated this sum to be the common charge. Admitting then, according to his construction, that he had a right to demand this amount, all the evidence went to show that he had violated the law which he had prescribed to himself.

The question was taken whether the Respondent's counsel should be permitted to go into the inquiry proposed in the first of the motions submitted in writing, in the forenoon, and determined in the negative.

Yeas—Messrs. Thomas, Clark, Doolittle, Rantoul, Sullivan, Bigelow, Lyman, Hunnewell, Welles and Brooks—10.

Nays—Messrs. Bourne, Ruggles, Moseley, Whittemore, Eastman, Allen, Reynolds, Tufts, Dwight, Parker, Gardner, Hyde, Pickman, Bartlett and Varnum—15.

The question was then taken upon the second motion and decided in the negative—yeas 10—nays 15. The yeas and nays were the same as upon the first motion. After a pause of a quarter of an hour, the President asked the Respondent's counsel if they were ready to proceed.

Mr. HOAR. In order to rebut the presumption of corruption, we propose to call a witness to prove that the predecessor of the Respondent was in the practice of holding such special courts as have been holden by the Respondent.

Mr. SHAW. We recollect the astonishment expressed by the Respondent in his answer at the construction we put upon the statute of 1806. That statute was made since the Respondent came into office. He justifies his conduct by the plain, unambiguous text of the written law. Now his counsel wish to prove a usage to contradict this statute. We object to the testimony.

Mr. WEBSTER. We pray the judgment of the court. As to the illegal courts, we had supposed that the Hon. Managers brought forward the charge from having overlooked the statute of 1806. Something was said of the unambiguous text of the written law. The learned gentleman will find in our answer an opinion intimated, which as lawyers we are ready to defend, that the Probate Court in Middlesex is a court always open. That independent of any statute, the Judges of Probate may hold a court when and where they please, giving notice to the parties concerned. The statute only requires that there should be some fixed courts; but it does not prohibit holding others. We repeat, the Probate court is always open. This argument we shall go into by and by. We want, at present, to show that the practice of holding special courts prevailed even before the statute, for the purpose of rebutting the presumption of a corrupt intention.

Mr. HOAR. We hope to be permitted also to prove something more than is con-

tained in the present motion. We hope to prove that such courts were holden—that no register was present—that acts were done not mentioned in the fee-bill—and that something more than the usual fees was charged. I mention the whole evidence proposing one thing at a time for the decision of this Honorable Court. I take this course, not desiring to give trouble to the Court by causing them to make numerous decisions, but fearing lest some one part of the evidence proposed might be objectionable in the mind of some member of the court.

The motion having been reduced to writing as follows :—"The counsel for the Respondent now move, that in order to rebut the charge of wilful and corrupt maladministration, they may be permitted to prove that the immediate predecessor of this Respondent was in the habit of holding Probate courts, on special occasions, giving notice to the parties concerned, and in the manner in which such courts have been holden by the Respondent"—the question of granting it was taken and decided in the affirmative.

Yeas—-Messrs. Thomas, Clark, Moseley, Doolittle, Sullivan, Eastman, Bigelow, Allen, Tufts, Dwight, Parker, Lyman, Gardner, Hunnewell, Pickman, Bartlett, Welles and Brooks—18.

Nays—Messrs. Bourne, Ruggles, Rantoul, Whittemore, Reynolds, Hyde and Varnum—7.

OLIVER PRESCOTT sworn.

Witness. The late Judge Prescott was my father. He was judge of probate very many years, until his death. It was his custom, when it was represented to him that an estate was liable to suffer injury or waste by delaying till a regular probate court, and sometimes when it would put the heirs to great inconvenience to go to a distant part of the county to attend a regular court, to issue a citation to the parties to appear at a special probate court. He would grant letters of administration and guardianship, warrants of appraisal, and do other necessary business at these courts. Where he was knowing that all the parties interested were present, he would not issue a formal citation. He was well acquainted with the county. It was customary with him, when the register was not present, to take a duplicate of papers to be recorded. I have heard him say to suitors, that he charged more than at the regular Probate Courts, on account of the extra trouble. Whether it was always so I cannot say ; but I know it was common. I have often, a great many times, assisted in making out accounts, and in doing other business, and received compensation for it. I never heard any complaint of this practice of holding special courts ; it was considered as a very great favor. He would only hold them when injury would arise from delay, or where there would be a saving of travel.

Mr. HOAR shows the witness the report of the appraisers of the Trowbridge estate, and asks him to state the facts relating to it.

Witness. The paper is in my handwriting. I was one of the appraisers. I do not recollect all the circumstances. It strikes me there was an understanding that our appraisement was to be final ; that the parties were to abide by it. Whether we acted by the agreement of parties, or whether a warrant issued from the judge I do not recollect.

Q. Was there not an agreement of the parties, and was not this the reason of the report's being directed to the party ?

A. I think it probable that was the reason.

Q. Did you live at Groton at the time, and was there much conversation between the sisters about dividing the estate ?

A. I lived at Groton. I recollect there was a good deal of talk between the sisters. James Prescott was attorney to one, I think to Mary. There was a talk a year or two beforehand of petitioning my father in his life time to divide the estate.

Cross examined.

Q. by Mr. Gray. Did you say that a citation issued appointing the time for a private court ?

A. When a time was appointed, citations were usually issued, but where the parties were neighbours, and the judge knew that all concerned were present, no citation issued, and of course no day was appointed.

Q. Was the Register present at the private courts ?

A. No.

Q. Was he notified ?

A. No.

Q. by a Manager. Were you appointed Register *pro tempore* ?

A. I never acted as Register, but I sometimes assisted parties about their papers.

Q. How long did this practice of holding special courts continue ? When did your father die ?

A. It continued up to the fall of 1804, the time of my father's death.

Q. You say you have an impression that your report was to be final—have you any paper or document that shows this ?

A. No. It is only five minutes since it was first mentioned to me that my testimony was wanted about this transaction. I did not know why I was summoned till five minutes ago.

Q. Did you recollect any thing about the transaction, before you saw the paper which was just shown you ?

A. I recollected before, that I was one

of the appraisers, but I recollect few of the circumstances of the transaction.

Q. Do you recollect being substituted for an appraiser who declined serving?

A. I do not.

Q. Do you recollect whether you were appointed by the Judge of Probate, or by agreement of the parties?

A. I think it was by agreement of the parties. They assented however; whether they agreed originally or not I cannot say.

Q. Did you receive any fees for writing?

A. When there was nothing but the formal business, the judge generally did his own writing. When I assisted in drawing accounts I never charged or took any thing from the suitors, but the Register generally received for my services what he thought proper, and paid it over to me, saying there is your fee for what you have done. I am speaking of the regular courts. I do not recollect that at private courts I ever received a cent.

Q. by Mr. HOAR. Has any body asked you about this case before to day?

A. I have heard nothing of these questions till I came here.

Q. by the Court. Did Judge Oliver Prescott take more or greater fees at those special courts than at the regular courts?

A. I have heard my father sometimes say he took something additional for making a duplicate copy, and that he paid the register the same as if he was present. I do not know that he took any thing for other additional trouble. I took this to be his invariable custom; but whether it was done always I do not know.

Q. by the Court. Did he permit inventories to be returned, and accounts to be settled at these private courts?

A. No. He only granted letters of administration and of guardianship, and warrants of appraisement.

Q. by Mr. NEWCOMB. Were wills ever proved at them?

A. No, I believe not. No business of that importance. He never held special courts, unless required by the situation of the estate, or unless it was very inconvenient to the parties to go to a regular court. He held them for granting letters of administration or guardianship and warrants of appraisal; I do not recollect any thing else.

Q. by the Court. Do you recollect the amount of fees charged by your father for granting administration?

A. I do not recollect, I had nothing to do with the fees.

Q. Do you recollect the amount of fees for the duplicates?

A. No.

Mr. WEBSTER. We have now laid before this Hon. Court, all the evidence on the part of the Respondent. We suppose all the evidence is in likewise on the part of government. The counsel for the Respondent have no particular course which they wish to pursue. We know not what is the course expected to be taken by the Hon. Managers, but we suppose they will proceed to comment on the evidence. It is probable that in the further progress of the cause, it may be necessary for us to submit certain specific motions. This will however depend on the course taken by the Hon. Managers.

Mr. DUTTON. I will now offer a few remarks, Mr. President, on some of the charges in the articles, indicating the course which we propose to pursue. It was immaterial to us at what time the opening on the law should be made. We have endeavoured to adopt the course of other trials of this kind. We intended to make a general opening and offer our evidence, and then to hear the general opening and evidence on the part of the Respondent. We were well aware of the propriety of apprizing the counsel for the Respondent of the legal ground on which we mean to stand, and it was proposed to do this after the whole evidence was laid before the court. This has already been done at great extent by my learned colleague, with regard to two classes of charges, those of taking illegal fees and holding illegal courts. I will make a very few remarks on the third class; which respects the Respondent's acting as counsel in cases in which he had or might be called upon to determine as a judge.

I will consider first, what is the rule prescribed by the constitution to be applied to the Respondent in this case. The words are "misconduct and maladministration in office." We shall endeavor to show the true import of these words. We shall contend that they are of much broader import and larger meaning, than any other words applied to an offence. Bribery, extortion, &c. are specific offences. The words misconduct and maladministration in office include every thing of the nature of an offence—bribery, extortion, as well as other offences for which an indictment would not lie at common law; and the Respondent may be impeached and condemned for acts for which he could not be indicted.

I will proceed to examine the law in relation to this part of the charge. I will refer to the Province law of 1727, *Anc. Charters*, 451. which enacts "that no judge of the probate of wills, &c. shall be allowed or admitted to have a voice in judging or determining, nor shall he be admitted to plead or act as an attorney, in any civil action whatsoever, which may depend on, or have any relation to any sentence or decree made or passed by him in his office aforesaid." The next statute was in 1784, 1 *Mass. Laws*, 187. which was a re-enactment of the former provision. The only other act on this subject

was passed Feb. 24, 1818. After re-enacting in broader terms the provision in the former statutes, it goes on to provide that a Judge of Probate shall not "be of counsel or attorney in any civil action for or against any executor, administrator or guardian, as such, within the county in which said judge shall reside."

For the meaning of the word "action," I cite *Cooper's Justinian, Book* 4. *tit.* 6.—*Vinnii Comment. ad loc. eund.—Heinecc. Elementa Jur. civ. sec. ord. Inst. Lib.* 4. *tit.* 6. —*Co. Lit.* 385.

Upon the construction of these statutes and authorities we expect to make it appear, that the Respondent has given advice to executors and administrators in civil actions, and that he has acted as counsel in cases which have come before him as judge. All together they will amount to misconduct and maladministration in office. This is sufficient to apprize the counsel on the other side of the grounds on which we rely.

Mr. DUTTON made a few other remarks on the authorities cited, which will appear more at large in his closing argument.

Mr. HOAR. Will the Hon. Manager inform us in what articles the Respondent has given advice as counsel.

Mr. DUTTON. From the sixth to the fifteenth. In the eighth he gave advice to an administrator. We are not bound however to state particularly, or to go into the argument upon the facts. We reserve that for the close of the case.

Mr. WEBSTER observed that it was usual for Managers to apply the evidence after it was all in, and sometimes after the evidence for the government only was gone through.

Mr. LELAND rose for this purpose, but upon motion of Mr. Allen, the court adjourned to 9 o'clock to-morrow morning.

IN SENATE.

SATURDAY, APRIL 21.

COURT OF IMPEACHMENT.

The usual messages between the two Houses were delivered by Mr. Bartlett on the part of the Senate, and Mr. Hoyt on the part of the House of Representatives.

The Court was opened at a few minutes past 9 o'clock.

Mr. LELAND addressed the Court in substance as follows:

Mr. President,

In performing the part assigned me on this occasion, I ask the attention of the Honorable Court, while I present a summary view of the facts proved and admitted in the case, and lay down such legal principles, as are supposed to be a proper foundation of the prosecution under consideration. I shall state, in very general terms, the law applicable to this subject, and examine the several articles of charge separately in their order, with a view of ascertaining, without confusion, what is proved, and whether the facts proved, constitute any offence.

The Respondent is accused of misconduct and maladministration in his office; and the accusation stands upon the basis of constitutional law. It is provided by the constitution that "the Senate shall be a Court with full authority to hear and determine all impeachments, made by the House of Representatives, against any officer or officers of the Commonwealth for misconduct and mal-admtnistration in their offices." The important question in this enquiry is, what are misconduct and maladministration in office? Whatever facts are necessary to constitute such offences, it is considered, must be alleged with such circumstances of certainty, as to enable the Respondent to know how to answer them; But we deny, that in cases of impeachment, all that technical nicety is required which is necessary in indictments. A violation of any known law of the land, either statute or common, in discharging official duties, or by color of office, disregarding injunctions of duty, and acting contrary to the obligations of the oath of office, are clearly acts of misconduct and maladministsation. And, I take the rule applicable to cases of impeachment to be, that that which is necessary to be proved, must be stated, with the circumstances of time and place. And generality is no objection, provided the allegations shew a breach of duty or law. I beg the attention of the court, while I examine the first article of charge. There are three causes of complaint set forth in this article;—1st, That the Respondent undertook to act as Judge of a Probate Court holden illegally; 2d, That while acting at such illegal court, he, by color of his office demanded and received more fees than he was entitled to by law; 3d, That he refused, upon the request of a person paying him fees, to give a statement of the items.

To the first division of the article the Respondent answers and says, that there is a statute of the commonwealth authorizing special Probate Courts to be holden in the county of Middlesex, and that he, in holding the court mentioned in this article, conformed to the provisions of that statute. And he also intimates, that independent of the statute, a Court of Probate, being a court always open, was legally holden at the time mentioned in this article. To the second branch of this article the Respondent answers, in substance, that the fee bill provides compensation for a part only of the services performed by him, and for those unprovided for he has charged a reasonable compensation. And that these charges are

justified not only by usage of the Probate Court in the county of Middlesex, but in the different counties in the Commonwealth. To the last part of this article he answers with a general denial of the charge against him.

The first part of the article may not, in itself, contain sufficient matter to amount to misconduct or maladministration in office, but as its connection with the other part has an important bearing in the case, it is thought proper to enquire whether the court was legally holden or not. The facts relating to that part of the subject are—That the court was holden at the office of the Respondent in Groton—The register was not notified nor present—The administrator was neither the widow nor next of kin—The widow and next of kin, declined taking administration, and requested the person to be appointed, who in fact was appointed—No formal notice was given that a special court was to be holden, but the widow and next of kin were either present at the court, or were previously apprized, that a court would be holden that day for granting the administration.

Upon these facts we contend that the court was not holden according to law. The statute of March 7th, 1806, by which the Respondent assumes to establish the legality of his court, provides for holding probate courts for the county of Middlesex at fixed times and places; and in the second section, there is the following provision:—"That when the said times and places shall be found to interfere with the terms or sessions of other courts, or when the judge of said courts of probate, for the time being, shall be prevented by reason of sickness, inevitable casualty, or other cause, from holding the same, at the time prefixed therefor, or when it shall appear to him to be for the general benefit, or the interest of individuals, he shall be, and is hereby fully authorised and empowered, to appoint such other times and places for holding said courts as he shall deem expedient, by giving public notice thereof, or notifying all concerned." The constitution directs, that the Legislature shall from time to time appoint fixed times or places for holding probate court; and it is believed that in obeying the constitutional injunction, the Legislature did not contemplate giving authority to have probate courts holden otherwise than at fixed times and places. The fair interpretation of the section of the act which has been cited is, that the judge of the probate court may, in certain special cases, fix the times and places of holding courts, by giving previous public notice, or by giving notice to all persons who may have any concern in such court. This is obviously a grant of legislative power to judges of probate, and being an extraordinary grant, can by no rule of interpretation be enlarged beyond the clear and obvious meaning of the terms, taken in all their connexions, in which it is given. In order to establish the legality of the court in question, it must appear that the time and place of holding it were appointed by public notice, or by giving notice to all concerned. The evidence in the case negatives both facts.—There is no pretence that public notice was given, and the only evidence of notice, at all, is that the widow and next of kin were either at the court, or had previously declined the administration, and requested that Tarbell might be appointed. This is by no means evidence that any person was notified of the time and place that a special court would be holden. Again; when administration is about to be granted to some one, other than the widow or next of kin, who are all the persons concerned? There is no one who has any stronger claim to the administration than another. All stand upon an equal footing. If one claims it, the others may object, and assign reasons against its being given him; and the judge must dicide the matter between them. In a case like the present, no notice could be given to all concerned, in any other manner than by making it public. The register was not notified of the time and place of holding the court, nor was he present. Is the register concerned in the time and place of holding probate courts? He is the recording officer of the court; and is under oath to perform the duties of his office faithfully. Nay, more, he is also under bonds for the due execution of the duties of his office faithfully. Nay, more, he is also under bonds for the due execution of the duties of his office.—How can he record the doings of the court, when he is not present? How can he record, upon his oath, what he did not see? Must he, under the most solemn sanction, make public record of things whose truth he has no means of knowing? It is not so.—It cannot be. The register is a constituent part of the court, and I maintain, with confidence, that no court could be lawfully holden without him. He is an officer provided for by the constitution; and a statute of the commonwealth now in force enacts, that in case of the death, sickness or necessary absence of the register, the Judge of Probate may appoint some meet person to officate as register, being sworn, until the standing register shall be able to attend his duty, or a new one be appointed. Courts of Probate have all the essential properties of the common law courts of record. Their proceedings are recorded, and their records are preserved, as perpetual memorials of the transactions before them. They would be conclusive evidence of the matters therein contained, and no averment against them

could be sustained in a court of law. If the principles here laid down be sound, the inference seems inevitable, that the Probate Court mentioned in the first article of charge was not holden according to law. But it is suggested, in the Respondent's answer, that Probate Courts may, for certain purposes, be considered as courts always open for the transaction of businesss. The ecclesiastical courts of England, which have jurisdiction of Probate matters, may have the power claimed by the Respondent for our Probate Courts. It is true these courts have the same general jurisdiction of Probate matters; but their powers and duties are defined and limited by different rules. The courts of England are governed by usage; ours by the constitution and statutes of the Commonwealth; and whatever the law in this State might have been under the Provincial Government, since the adoption of the constitution, it is contended, that Probate Courts can be holden no otherwise, than at fixed times and places. They are here new tribunals, originating in the constitution, and having all their powers given by statute, in pursuance of constitutional injunction. If Probate Courts are always open for the transaction of business, the constitutional provision for their being holden at fixed times and places is absurd. Let us test this doctrine. By the Respondent's rule, the standing law of the land provides that these courts are, at all times and places, open to suitors. The constitution directs, that provision shall be made by the Legislature, for holding them at fixed times and places.—One provision is inconsistent with the other, and which shall stand? If any such law as the Respondent supposes, was ever in force, the adoption of the repugnant provisions of the constitution annulled it. From this view of the subject, I apprehend it is apparent, that the legality of the court mentioned in the first article can neither be defended by statute nor common law.

The illegality of the court might or might not be misconduct in office, according to the intention of the judge holding it. If it was mere mistake, it would not amount to official misconduct; but the effect of holding such courts seems to have been, to swell the amount of compensation to the judge.

That part of the first article which accuses the Respondent of taking illegal fees, will now be considered. The facts proved in relation to this part of the subject, by the Probate records, the testimony of Abel Tarbell and Isaac Fiske the register, are, that Abel Tarbell was appointed administrator upon the estate of Nathaniel Lakin by the Respondent in the manner stated in the first article—that at the time administration was granted, he received from the Respondent, a letter of administration, a warrant of appraisement, and an order of notice, for which he paid the Respondent $5,58—that he called at the Respondent's office six or seven times afterwards, for the purpose of transacting the business in relation to the settlement of this estate, and paid the Respondent for his services as Judge of Probate the further sum of $32,07 and all these sums were afterwards allowed in his administration account by the Respondent—that for the papers first issued there would have been charged at a regular Probate Court $3,60, and for the other services $24,60. It is usual to charge the same fees, whether all the papers are made at the Probate office or not. The judge takes copies of such papers as are issued at special courts, and delivers them to the register, to be recorded. By a statute of this Commonwealth, establishing and regulating the fees of the several officers, commonly called the fee-bill, it is declared, that for granting administration, where there is no litigation, the Judge of Probate shall receive fifty cents; and in other cases, one dollar; for a warrant to appraise or divide estates, thirty cents. For writing a bond and letter of administration the register shall receive forty cents; for writing a warrant to appraise the estate of a person deceased, twenty cents; for recording any matter, at the rate of twelve cents each page, and the same for a copy of any paper. And the same statute provides severe penalties against any person who shall wilfully and corruptly demand and receive any greater fee or fees for any of the services mentioned in the act, than are therein allowed. We contend the fee-bill contains the rule by which the Respondent's compensation is to be measured. This is a fixed and known law, and the only rule we are under any necessity of applying to this part of the case. If there is any other rule, it is the duty of the Respondent to show it. Let us compare the facts in the case with the fee-bill, and see how the matter stands. Suppose the papers first issued to be equal to four pages—the legal charge for recording would be forty-eight cents. As there was no controversy, the judge could charge for granting administration fifty cents only, and for the warrant of appraisement, thirty cents. For the register, in addition to the fees for recording, forty cents for writing the bond and letter; and for writing the warrant of appraisement, twenty cents. All these items together amount to $1,88. The Respondent having taken $5,58 must stand convicted of a violation of law, unless he can show some other rule, besides the fee-bill, to regulate his fees. In examining this branch of the subject, I wish to call the attention of the Honorable Court particularly to the first papers issued, for which 5,58 were taken. Not that the character of this transac-

tion is materially different from others, in which the Respondent had concern, but solely, because I am more fully prepared to show its real character. The Respondent attempts to justify or excuse himself by showing that certain papers and services, for which no compensation is provided in the fee-bill, are necessary to be furnished and performed at the time of granting administration, in order to the correct proceedings of the court, and to enable the administrator understandingly to execute his trust. These are a memorial from the person claiming the administration, decree thereon, notices and record. These, we apprehend, are only parts of the same services for which compensation is allowed by the fee-bill. What is granting administration? It can be no less than receiving the application of the person claiming it, passing a decree granting it, and directing the Register to make out the papers required by law.—What papers are required by law? A letter of administration, and a bond. The letter of administration may direct the administrator to give notice, as well as to return an inventory. The petition to the judge and notices are papers which it is the right and duty of the party to furnish. They are merely formal papers, and almost any man could make them. But it appears by the evidence in the case that fees are charged for them whether they are obtained at the office or not. This is obviously an abuse. It seems to stand thus; it is ordered by the Judge of Probate, that all applications for administration shall be made in writing; and it is also ordered that the same fees shall be paid at the Probate Office, where the application is drawn by the party, as when it is made at the office! Is this a practice to be justified? The copies of the papers taken at special courts are unnecessary. If the register is absent, the judge should appoint one to act in his place, according to the provisions of the statute.—The conclusion from these principles, facts and circumstances, is that for certain services rendered by the Respondent, as judge of Probate, he demanded and received $5,53; that by the fee-bill he could take for these services $1,38 only; and by a usage in the county of Middlesex, apparently established by himself, he could take $3,60 only.—So he has violated both the law and his own usage. I have not had time to compare the other items of fees in this article with the provisions of the fee-bill. I presume they would be found to vary from them as much as those which have been compared. It appears that he took $32,07 for such services as by his own usage he should have performed for $24,60.

The remaining part of the first article charges the Respondent with a direct violation of a statute of the Commonwealth; and the only question for the consideration of the court, is whether the evidence is sufficient to make good the charge. According to my minutes, Tarbell swears that he demanded of the Respondent, at the time he paid his fees, a statement of the items or particulars, and that the Respondent declined giving it. It is true that upon cross examination the witness was less positive in his statement; but in any view of his testimony, he asked for some account of the fees, and whatever it was, the Respondent refused to give it. Now, I humbly submit, that a case of misconduct and maladministration in office in the first article, is sufficiently charged and fully proved. Much of what has been said upon the first article, will apply to several others; and I shall treat those of the same class with much brevity.

The second article, in some particulars, is different from the first. The allegations in it are, that the Respondent, at an illegal court, appointed one Lemuel Parker guardian over three persons, and issued warrants to appraise the estates of the wards, for which he demanded and received thirty two dollars and ten cents. The evidence produced in the case in behalf of the prosecution, proves all the allegations, except the amount of money received by the Respondent. It is doubtful whether the sum was $29,10, or $26,10. The Respondent attempts to show by the testimony of John Walton and William Buttrick, that part of the sum taken by him was for advice as an attorney. There is no evidence that advice was asked or desired by the guardian or his wards; but the overseers of the poor of Pepperell consulted the Respondent, if any body did. Now I ask by what rule they could take legal advice at the expense of the guardian, or his wards, without the knowledge or consent of either of them. The whole transaction looks like a contrivance got up for the purpose of giving a new colour to an old affair. I apprehend the honourable Court will believe that the money taken was taken by the Respondent as judge of probate. If so, how does the matter stand? It is admitted that no express provision can be found in the fee-bill for services of this sort. There is a fee established for letters of guardianship in the case of minors, but not in case of spendthrifts, nor persons *non compotes mentis*. It is doubtful whether the Respondent could legally demand any compensation for these services; but, perhaps, by rules of analogy, he might have taken the same sum as is established by law in the case of minors. At any rate, if he had so done, it could hardly have been considered criminal. The fee allowed by law for appointing a guardian over a minor, is one dollar; for a warrant of appraisement fifty cents, and for recording

it about eighteen cents. Therefore one dollar and sixty eight cents only could be legally taken in that case. But it appears by the testimony of Fiske the register, that the sum of $19,80 is usually taken in Middlesex at the probate office, for services like those rendered by the Respondent in this case. This sum being divided into three parts, would give $6,60 for each letter of guardianship and warrant of appraisement. Then the matter appears to stand thus; by law, he could take for these services $5,04—by usage $19,80—and he actually took $26,10 or $29,10.

The allegations in the third article are all substantially proved. The Respondent, however, will probably contend that the evidence shows that part of the money received by him, was for professional advice. Upon the cross-examination of Benjamin Dix, he stated that while he was transacting the business with the Respondent, as judge of probate, he told him that he had been sued at the court of common pleas in Boston; and the Respondent advised him, that unless he should procure some one to answer to the action, judgment would be rendered against him. It is utterly impossible, considering the sort of service, and the time of rendering it, to believe that either the Respondent or the witness expected, at the time, that it was to be paid for. I should suppose the witness was as competent to give such advice as the Respondent. The information given was no more than almost any person in the Commonwealth could have given as well as he. Concluding then, as I must, that the allegations in this article are proved, it results that the Respondent has demanded and received fees which are neither justified by law nor usage.

Unless the Court shall find something in the evidence to satisfy them, that some part of the money mentioned in the 4th and 5th articles was received by the Respondent for professional services, the allegations are fully proved. The evidence on which the Respondent must rely to satisfy the Court that the whole sums were not received as fees of office, is of the same doubtful character as that offered upon the former articles—that while he was acting as a judge, he could assume at once the character of a counsellor; and with equal facility charge from counsellor to judge. It is impossible to transact business with a judge of probate without asking him questions, and how easy it is for him afterwards to say that he answered the questions either in the capacity of judge or of attorney. The same conclusion results from an accurate view of the facts and circumstances of these articles, as has been drawn from the examination of the preceding ones. The five first articles are of the same general character; and it is contended that facts constituting misconduct and maladministration in office, are alleged and proved in many, if not all of them.

The sixth article, charges the Respondent with an offence, to use his own language, of great importance, and of a most grave character. And the only question arising in relation to it is, whether it be sufficiently made out in proof. Jonathan Loring testifies, that he, as the agent of Mary Trowbridge, applied to the Respondent when he was judge of probate, and according to the best of his recollection, in December, 1804, for his assistance in obtaining the assignment of the whole of a certain real estate, of which the said Mary, and his sister were seized as coparceners, to be made to the said Mary. The Respondent consented to give the assistance asked; but at the same time, said he should charge fees as counsel as well as judge. The Resdondent received a petition and appointed appraisers. The appraisers assigned the whole estate to the said Mary; but no final decree of the judge was passed upon the report of the appraisers. A deed of conveyance was made which superseded the necessity of such decree. He paid the Respondent $50 as fees for counsel, and the usual probate fees besides. It appears by a reference to the papers in the probate office, that the application by Loring in behalf of Mary Trowbridge, was made March 13th, 1805; and it also appears by the commission of the Respondent that he was appointed judge of probate Feb. 1st, 1805.

Has this evidence weight and character enough to maintain the accusation herein advanced against the Respondent? The witness must be under a mistake, either as to the time of making application to the Respondent, or in the fact that he was judge of probate. In which is the mistake most likely to be? That an application, of the sort testified to by the witness was made, on the 13th of March, 1805, is proved by testimony not to be contradicted. The recorded papers of the probate office show all the subsequent proceedings to have been such as the witness has stated. He swears that he presented the petition at the time of his first application, and that the Respondent then told him he should charge fees as counsel, as well as judge. It is obvious to any one, who has attended to the subject, that witnesses will narrate ancient facts with great accuracy, but when you require them to fix dates, they cannot avoid falling into errors. The witness is not positive as to the precise time, and that being a circumstance in which mistakes are so very likely to happen, his want of accurate recollection evinces no disregard to truth. But in the other facts, to wit, that the Respondent said, he should charge fees as counsel as well as judge, and

that he did act in a double capacity, and did receive fees for services in both characters, he cannot be mistaken. If they are untrue, it is downright wickedness in the witness to state them. But there is no necessity for supposing wickedness in the witness. All the collateral circumstances in the case confirm the belief, that he has narrated all the material facts correctly, and is mistaken only in fixing with precision the date. I see nothing in the testimony of Benjamin Champney which should impair the force of that of Loring. Every thing both of them have stated, may be true. There is no repugnance between them. Nor does the Respondent's case derive any more aid from the testimony of Oliver Prescott. His recollection is very imperfect; and his statements vague and uncertain; and upon an interpretation the most favorable to the Respondent, his testimony contradicts no part of that given by Loring. The Court are not, without urgent necessity, to suppose any part of the evidence false. It is their duty to reconcile the testimony of the different witnesses, if it can be done. Upon the hypothesis that the Respondent is guilty of the offence imputed to him, all the testimony is capable of reconciliation. But upon the supposition of his innocence, it cannot be reconciled.

The accusation in the seventh article, is proved in the manner and form therein stated. The question then would seem to be, does it contain an offenee of misconduct or maladminis-tration in office sufficiently charged. The Respondent is accused of giving advice, as an attorney, to a guardian, for a pecuniary reward; and afterwards, of allowing, as judge of probate, an account of guardianship, in which the sums paid him for counsel were items of charge. It is not known that there was any statute in force in this Commonwealth, at the time of this transaction, prohibiting such practices. It was an offence. if any, against the common law. The common law is a system of salutary rules, pervading free states, and protecting the sound morality of the whole community. Its influence, though secret, is powerful and benign. It is the source of public and private confidence; the guardian protector of general justice, and the wholesome preserver of the good order and tranquillity of the state. Its principles are recorded in the understanding of every thinking being; and they cannot be misunderstood. One principle of this system, universally recognized, is, that no person shall be judge in a case in which he has an interest. Unless it were so, all confidence in the administration of justice would, at once, be destroyed. Now let us examine the facts in this case, and see whether they do not show a practice, which is pregnant with incalculable mischief. When the Respondent permitted himself to be consulted, as an attorney, by the guardian, he could not but foresee, that he must, in all human probability, at the settlement of the guardian's account, be called upon, as judge, to decide upon the propriety and justice of his own charges. This was voluntarily putting himself in a situation to act as judge in a case in which he had an interest. It is the duty of the judge of probate in passing upon an account exhibited for allowance, to inquire into the fitness, propriety and justice of every item. When there are items for money paid him for services rendered in another capacity, it is impossible, in the nature of things, for him as judge of probate, to say, that the services were unnecessary, or that the charges were unreasonably high. The guardian has no motive of interest to object to the allowance of unreasonable charges. The judge is supposed by the law, to be the real protector of the ward's interest. But if he can make such charges as an attorney, as interest may suggest, and afterwards, under the same impulse, allow them as judge, it requires no uncommon sagacity to see, that the guardian will also look a little to his private interest, and inasmuch as he shall have been liberal to the judge at the expense of his ward, the judge will be liberal to him at the expense of justice, as well as of his ward. I will not spend time in pursuing the inquiry any further. In whatever light this practice is considered, it leads to the same result. It is against sound morality; consequently a violation of the common law of the land.

The eighth, ninth, tenth and eleventh articles contain accusations of nearly the same character as the seventh; and as far as the allegations are proved, they will require the same decision of the court. The evidence adduced in support of the eighth and eleventh articles, is believed to be sufficient to warrant a conviction. The account, in the hand writing of the Respondent, produced in relation to the eighth article, shews that the $2 were paid for assistance. The charge is that the money was received by the Respondent for advice and assistance. And, although the witness cannot say positively for what service it was paid, yet his testimony, in connection with the account, shows that it was received as in the article of accusation is alleged. I will not dwell upon the evidence applicable to the eleventh article, but only observe, that it appears fully to support the charge. The evidence fails of making out any offence in the ninth and tenth articles.

I will now call the attention of the Honorable Court to the twelfth article. The matters set forth in this article are abundantly proved, if the testimony of Alpheus Ware is to be credited. And what is there to impair the credit of his testimony? For

aught that appears, he is a man of respectability of character. His manner of testifying evinces no want of intelligence or candor. It is said, there is a conflict in some material facts between his testimony, and that contained in the deposition of Nathan Grout. I do not so understand the evidence. It is true that Ware states some things which Grout does not; and most of them, such as Grout could not know. In all the material occurrences happening in the presence of both of them, there is a most perfect concurrence in their testimony. But it is also said that Ware has feelings of hostility towards the Respondent; and that he has within a short period threatened to get him indicted. These circumstances being proved are to have all the weight to which they are entitled. And that in my view is very little. His feelings of resentment may have been excited by just cause. The Respondent might deserve to be indicted. The causes of ill will can never be shown to invalidate one's testimony. The effects only can be listened to. The evidence resulting from the testimony of Ware then being unshaken and unimpaired, the accusation in this article is fully made out in proof. Then what is it? What offence? I will describe it; and the court may give it a name. A judge of an honorable court of this Commonwealth, while sitting upon the seat of justice, stooped to listen to the private conversation of persons within his hearing; voluntarily offered his advice in a matter in controversy between them; afterwards demanded pay for it; left his seat, and followed one of the parties down stairs, to persuade him to pay him $5. After a fruitless effort to obtain payment of the one, he induced the other to accompany him into a private room. Here, to overcome the objections urged against the payment, he fraudulently altered an account which had been settled and sworn to. This transaction shows such prostration of dignity, and such degradation of character, that I have no name to give it. And whatever name the court shall please to give it, one thing certainly must be true, that it can be nothing less than misconduct and maladministration in office.

It is doubtful whether the charge in the thirteenth article is sufficiently proved.—The material allegations in the fourteenth and fifteenth articles are proved or admitted. They are in principle no way distinguishable from the seventh; and what has been said in relation to that, will apply with the same force to these. I have now, Mr. President, in discharging the duty assigned me, passed the several articles in review; presented a brief summary of the facts, and stated such general principles of law as I supposed to be applicable to the subject. I have purposely omitted many things which might well have been said; I shall be followed by two of my learned associates, who after hearing what is to be said in behalf of the Respondent, will examine the subject more minutely, and supply such omissions as I have made.

Mr. WEBSTER said, with the leave of the Court and the Hon. Managers, he would ask a single question of one of the witnesses. Leave was granted, and *Dr. Oliver Prescott* was called again to the stand.

Q. by Mr. WEBSTER. When did you first know of the Respondent's being retained as counsel for Mary Trowbridge?

A. My father died in Nov. 1804. Before that I knew of consultations between Loring and the Respondent. I recollect the summer before my father's death being in the Respondent's office, where there were two rooms. While I was in the outer room, Loring came from the inner, in company with the Respondent. Loring went away, and James Prescott then said Loring wants me to act about the division of the Trowbridge estate.

The Managers objected to any account of the conversation as given by the Respondent, when Loring was not present; and the witness was dismissed.

Mr. SHAW. I beg leave to cite the following passage from 1st Coke's Inst. 368. b. "Extortion, in his proper sense, is a great misprision, by wresting, or unlawfully taking, by any officer, by colour of his office, any money, or valuable thing, of or from any man, either that is not due, or more than is due, or before it be due." Lord Coke then cites the statute of Westminster 1st, Ch. 26. whereby it was provided, that no officer of the king "should take any reward for doing of his office, but only that which the king alloweth him, upon pain that he shall render double to the party, and be punished at the king's pleasure. And this was the ancient common law, and was punishable by fine and imprisonment; but the statute added the aforesaid penalty." He then states, that, by colour of later statutes, permitting fees in certain cases, the king's officers did usually offend; although (the former act yet being in force,) they could not lawfully take any thing, but where and so far as these later statutes expressly allowed; and he refers to the case of Shurley vs. Packer decided in the 13th of James, and the statutes of 21 Hen. 8. cap. 5, and 19 Hen. 7. cap. 8. He then concludes, "of this crime it is said, that it is no other than robbery; and another saith, that it is more odious than robbery; for robbery is apparent, and hath the face of a crime; but extortion puts on the visure of virtue, for expedition of justice, and the like; and it is ever accompanied with the grievous sin of perjury. But largely extortion is taken for any oppression by extort power, or by colour or pretence of right;

and so Littleton taketh it in this place.—*Extortio* is derived from the verb *extorqueo*," &c.

I would also cite from 4th Coke's Inst. 336, the case of Neale vs. Rowse, on an information for extortion upon the st. 21 Hen. 8. "The point in question upon the information was, if the probate be not written upon the testament itself, but upon the transcript ingrossed, whether the taking of a fee by the defendant for the ingrossing were within the said statute." It was decided, that such a fee ought not to be exacted, as such a construction would defeat the intent of the statute. It is our object to show, that where the statute has annexed a fee to a general duty, it is not for the officer to take several fees, for different parts of that duty. And I further beg leave to cite the case of the King vs. Loggen and another, 1 Strange 73. "Indictment against defendants for extortion, setting forth that the defendant, Dr. Loggen, being Chancellor, and the other defendant register of the bishop of Sarum, did force one Thomas Hollier, executor of the will of Mary Alston, to prove the said will in the said bishop's court, *ubi* they *benè sciebant* that the said will had before been proved in the prerogative court of Canterbury, and by reason thereof they *extorsivè exigebant* of the said Thomas Hollier 40 s. On not guilty pleaded there was a verdict for the king generally." The defendants moved in arrest of judgment. "It was urged for Dr. L. that in this case he acted as a judge and therefore was not indictable for an errour of judgment. Sed per Parker C. J. In this case he did not act as a judge between party and party; but was only to determine whether he should have such fees or not; and that rule extends only to judges in courts of record, and not to ministerial officers, as was resolved in the case of Ashby vs. White."

Mr. WEBSTER. Does the learned gentleman mean to contend that the taking of fees in this case was not an official act?

Mr. SHAW. It was a ministerial and not a judicial act. The case I was reading goes on to say, "The exceptions to the indictment were many. 1. For that it only alleged that the defendants *benè sciebant* that the will had been proved before, &c. whereas they should have shown that it appeared judicially before them." This exception was overruled. 3. "For that the indictment had not alleged what was the just fee; so *non constat* that the defendants were guilty of extortion. *Sed per Parker*, it matters not whether 40s. was the usual fee for probate, since in this case the defendants had no title to any fee at all," &c. &c.

Mr. DUTTON. To the point that extortion is punishable at common law, I refer the Court to 2 Rolle's Rep. 263, the case of Smith v. Mall.

Mr. HOAR. In introducing our remarks upon the facts, and the law which must support the present impeachment, if it is supported at all, the Respondent and his counsel feel deeply impresed with the circumstances under which he is called here to answer, and occurrences which have taken place long previous to his trial. We hope that these circumstances and occurrences have not escaped the attention of this Honorable Court. It is a matter of public notoriety, that as soon as these articles of impeachment, containing two or three charges at least of a very gross nature, made by authority of the House of Representatives, were presented to this Court, they were published in the newspapers throughout the country, and read and commented on by every person in the community. Perhaps this is not improper. It is perhaps an incident of which he has no right to complain. But it must tend by the effect produced on the public mind—by the discussion excited—the statements brought forward in relation to the case, and analagous cases, some of them having colour of truth, yet capable of a satisfactory explanation, and others totally groundless—the publications in the papers of this town, going of course throughout the Commonwealth, in addition to the weight of authority under which the charges were made, to produce an impression almost irresistible by evidence or by argument. [He reads from a Boston paper of Feb. 9th, the following paragraph, copied from a Worcester paper.

WORCESTER, FEB 7.—We understand that the expense of settling an estate in Middlesex county, exceeds by four times the amount of settling an estate of the same value in Worcester county.]

It is a well known provision of the bill of rights—of that instrument by which you are empowered to judge, and our client is required to answer, that the party accused of any offence shall have the "right to meet the witnesses against him, face to face," that he may have an opportunity of explaining their testimony if he can, and of having all the evidence which is to produce an effect against him, openly exhibited on oath. Yet in relation to the circumstances alluded to, what is the fact? Are not statements made in presence of the judges, have they not heard conversations, the effect of which it is very difficult to counteract? In a court of common law, if a juror had been so situated it would be a sufficient reason for his being withdrawn. I need not argue before this Honorable Court, that the party has a right to be judged solely on the evidence now produced on oath. It will be admitted—there is no queston as to the theory, but the difficulty is in practice. It is when there are small chasms in the evidence to be filled up—when the proofs of a corrupt intention ad-

mit of a doubt, that these stories, these popular impressions produce an effect. It is notorious that judgments have been rendered—verdicts have been given, founded on illegal evidence. I make these remarks confident of support from intelligent minds, who know the difficulty of laying their previous impressions out of the case. It is those men who know little why they draw certain conclusions, that will consider these circumstances of little consequence, but they who know the operations of their own minds and are in the habit of enquiring why it is that they come to certain results, will best appreciate these remarks, and will feel the difficulties of the case. The Respondent does however appeal with confidence to each member of this honorable body, to examine the evidence of each charge and to lay out of it every thing that is not legally proved. He feels satisfied that chasms will not be supplied, nor the judgment influenced by out of door rumours. If it is possible to give such a construction to the acts of the Respondent, as to make them consistent with purity and uprightness of intention, you will make such construction, and he will be entitled to acquittal. Suppose that any member of the court, taking the facts as proved, should think them right, and within the limits of law, and every other member should think them wrong ; I maintain that this circumstance would show that the Respondent is entitled to acquittal from every member ; for the honorable member who thinks him correct, must be either incapable of judging, or corrupt—or it is a case in which honorable men may differ. There would be evidence to the Court, furnished from their own body, that it is a case in which judicious and honest men may mistake the law, if it is a mistake, and therefore the presumption of a corrupt intention—the proof of guilt would fail.

We shall agree with the Managers in many of the general principles which they have laid down—that this Senate for example is a court, for the trial of all cases of impeachment and maladministration, and that the terms misconduct and maladministration are more extensive than almost any others. It is true that under these terms are included several crimes which have been enumerated, and proof of either would be sufficient to remove the Respondent from office. We maintain however that some crime must be alleged and proved, and that it must be of sufficient magnitude to justify a removal from office, or the Respondent must be acquitted. We cannot agree that the articles are to be taken in the lump, and if the court thinks on the whole he ought to be removed, that he is to be convicted. If so, what is the value of the provision of the bill of rights cited by my colleague, by which no subject is bound to answer for any crime or offence " until the same is fully and plainly, substantially and formally described to him." If this clause authorizes one thing to be charged, and another to be proved, I do not know what the words mean—they might as well be out of the constitution as in it—they are wholly useless in practice. It has been alleged not to be necessary to set forth definitely and distinctly any crime or offence for which the party would be liable to punishment. What is the oath that this Honorable Court have prescribed to themselves? It is that they shall try the Respondent " according to law." What law? The oath means nothing, if it authorizes you to judge him according to what on the whole you think right. There must be a law imposing a duty on the Respondent—requiring the performanee of certain acts, or enjoining on him to avoid certain acts, and it must be shown that he has violated that law. Whether it be a requisition of the statute or the common law, if it be shown that he has intentionally, wilfully, and corruptly violated it, the offence is clearly and fully stated, and the charge if supported by proof is sufficient. But unless the facts to be proved are substantially and formally alleged, and the proof corresponds with the allegations, he is entitled to acquittal, or the provision of the constitution which has been cited, and every principle of every other court of justice will be disregarded and violated. If a different course may be adopted—if it may be alleged that the Respondent has been guilty of misconduct, and some facts stated which the majority of the court may think wrong, though no specific violation of the law is pointed out, it will amount to an *ex post facto* law, adopted by a single branch of the Legislature. But I do not fear that absurdities like these will be supported by this court. I believe that the principles which I have stated are perfectly defensible, and will be recognized by the court. If the article itself, taken as it stands, charges no crime, that alone is a sufficient ground for acquittal, and if a crime has been sufficiently alleged. and the proof fails, it is another ground of acquittal, but not clearer than the first.

I will now ask the attention of the Honorable Court, for a short time, to the articles separately, in their order, and to the facts proved. I shall also, as I proceed, glance slightly at the principles of law applicable to the several articles. The first article alleges that the Respondent has been guilty of misconduct and maladministration in office in attempting to hold an illegal court. I have felt, I confess a degree of disappointment in being called upon to make any defence at all to this charge. It may be that I shall be disappointed again—that your

Honours may think this charge important. As the Managers have made it the subject of an argument, it may not be proper to pass it over without remark, though my own impression is, that no one can undertake to support the position of a wilful and corrupt violation of the law in holding these courts, and that it does not require any argument to justify the course that has been pursued by the Respondent. It is proved and admitted that he held the court at the place and time mentioned, and that the day mentioned is not a day named in the statute for holding the probate courts for the county of Middlesex. I will call the attention of the court to the statute of Mar. 7th, 1806, which has been read and commented on by the Managers. Sec. 1. enacts that the court of probate for the county of Middlesex shall be holden at the several times and places mentioned; and Sec. 2. enacts among other things, that "when it shall appear to him [the judge] to be for the general benefit, or the interest of individuals, he shall be, and is hereby fully authorized and empowered to appoint such other times or places for holding such courts as he shall deem expedient, by giving public notice thereof, or notifying all concerned." I do not know any language to illustrate this statute, if it does not mean that when a party applies, and the judge shall think from his statement, that it will be for his interest, and that of all concerned, to hold a special court, he has a right to hold such court, giving the notice required by the law. If it does not mean this, I know not what it does mean. The Hon. Managers say that the law has not been complied with because the register did not attend, and was not notified, and that as a party concerned, he ought to have been notified. This is a new definition of the word *party*, and if the register is a party, I suppose the judge is a party. The manifest intention of the statute was that all persons interested in the estate should be notified. If this was done, all that is required was done. What are the facts proved? The witness for the government states, not only that the widow and next of kin were notified, but that the court was holden at the time and place mentioned at their request, and that they attended. As far as respects this point, there is an end of the question. It would be a waste of time to argue further that the judge is always entitled to hold a special court when all concerned are notified, if he thinks it for the interest of the parties, and of this he alone is to judge. My associates will probably consider the question more at large, whether it is necessary for the register to be present, to constitute a court. I will merely ask if when a judge of the supreme court pronounces a judgment, certifies papers, and sends them to a distant county to be recorded he is violating his duty—if when the judge dismisses the clerk for a day as sometimes happens, what is there adjudicated, is done *coram non judice*, and therefore void. I do not mean to go into this subject, but I will ask the attention of the court to one remark. It was admitted by one at least of the Managers, when we were endeavouring to introduce evidence of usage in other counties, that if it was shown that there had been a usage in the same county it was admissible as evidence. It happens that we have evidence of the practice of the preceding judge of holding special probate courts, by notifying the parties concerned, and without the presence of the register. This was before the statute that expressly authorizes the practice, and yet no complaint was ever made. The predecessor of the Respondent held the office almost from the revolution. All the provisions of the old statutes are affirmative. They have no negative clauses. The courts shall have certain fixed days, is the language of the old statutes, of the constitution, and of one or two laws passed since the adoption of the constitution. If the understanding of the constitution were, that there should be courts on no other days, this statute is unconstitutional when it provides that there may be other days. It would be remarkable if this court should adjudge that to be a wilful violation of the law and of the constitution, which is in conformity with the construction which this body, sitting as a legislature, has put upon the same words in the constitution. It is manifest to my view that this construction of the constitution and of the law is correct; although there may be arguments which might be used among your Honors, sitting in another capacity, in favor of their sitting only on fixed days, and at certain places; but until the legislature shall provide that the courts shall be exclusively so holden, it is of the last importance to the Respondent that your Honours should not think he has been guilty of corrupt and wilful misconduct, when he acted according to the express words of the statute, and the understanding of every person who shall examine it. If his construction of this statute is not only wrong but so plainly wrong as to be proof of a corrupt intent, there is an end of the defence. The argument of the managers is in that case undoubtedly good that the fees were unlawfully taken.

There is another, and an insulated charge contained in this article—that the Respondent refused to deliver to the administrator an account of the items of the fees paid by him. I did suppose when I heard the evidence in support of this charge that the charge would be relinquished, and we should hear no more about it. When the question was asked the witness, did you you ask the

judge to give you a specification of the items he said that he did. But on the cross examination when the only proper question was put to him, will you state what was the question you put to the judge? The witness answered, "I cannot say whether I asked him for a receipt, or for a voucher—I cannot recollect." When enquired of if he asked for a specification, he said yes, believing undoubtedly that a specification of items and a receipt were the same thing.—He did undoubtedly ask for a receipt because he wanted a voucher and the judge told him that it was not necessary, for the sum paid would be allowed in his account without it. But when questioned more particularly if he asked for a specification of items, or used any language of that precise import, he cannot say that he did, yet the Managers ask you to say on your oaths that he did, and to depend on this testimony for the proof of it. I fear I have trespassed too long in taking so much time on this charge. The remaining charge in the first article is that the Respondent received other and greater fees than he was by law allowed to receive. We state first that there is no crime charged in the article in relation to this item—nothing charged in such terms that the Respondent is bound by law to meet it. I do not say that the Managers are holden to the strict technical forms of an indictment, but if there be any rule, it is, that whatever is necessary to be proved, must be alleged. Circumstances which are mere matter of form we do not insist on—but we do say, that in this and in all the other articles, whatever is necessary to be proved is necessary to be stated in the impeachment. As to the Managers I know they had a great difficulty to contend with. They were under the same embarrassments that the Respondent's counsel are—they could not state what the legal fees were. After the luminous statements of two or three of the Managers, if the court have understood what they consider the legal fees in the case, they have been more fortunate than I have. I have listened with great attention, and begged for an explanation, yet remain ignorant of their views respecting the law. Will you convict the Respondent, not only of having broken the law, but of having wilfully and corruptly disregarded it, when no one can tell what the law is? I do hold that until intelligent and learned men can sit down and frame articles in the common form, showing what the legal fees are, and in what respects the law has been departed from, this Honorable Court will not condemn the Respondent for having wilfully and corruptly transgressed this law. I am satisfied that I should be perfectly safe in leaving this question here, without going into a more minute consideration of the facts.—Suppose the sums paid to be the largest, and the services rendered the smallest, if these rules be observed the Respondent is perfectly safe. But he chooses to show not only that he is legally innocent, but that he has not done wrong in a moral point of view—he wishes to guard his reputation as well as his office, and the former not less anxiously than the latter. The fee-bill provides for certain services, but both before and since the passing of the statute certain other services equally onerous, have been imposed upon the judge, for which no fee has been by law provided. For a letter of administration, administration bond, recording, &c. the fee-bill makes a provision. No one has a right to go beyond this positive provision. The statute in making provision for certain services does not say that the judge shall have no compensation for other services.—There having been other services rendered before the passing of this statute, and fees having been received for them before, and nothing said of those services in the fee-bill, the fees stand precisely on the same footing as they did before. We say it is right, proper, and honest to take for these services a fair and equitable compensation. Facts might be supposed of extravagant fees being demanded for these extra services, which would show corruption in the judge. But we are prepared to show that no such facts have been proved in this case. The Managers say that no fees can be taken for services not named in the fee-bill. They stand on this ground. Let us examine this doctrine. We will take any of these cases. Take for example, the second article which relates to a case of guardianship. In relation to guardians to minors provision is made by the statute; but before the statute was passed, there was a process for granting guardianship over spendthrifts—forms were to be gone through—notice was to be given to the selectmen—an inquisition was to be taken—the papers are generally prepared by the judge or some person in the probate office—the papers required by the statute are numerous. When a man is charged with wanting intellect to take care of his property or with being so idle as to require being put under guardianship, and deprived of some of the rights of a citizen, an investigation is to be had and labour performed. I agree with the Honorable Managers that there is a jurisdiction given to the judge of probate that is exceedingly important—there is none which has a more important jurisdiction except that which goes to the life of the individual—it has the power of declaring a man so far degraded and debased as to require that the power shall be taken from him of managing his own estate. Now it is difficult to suppose any reason why when the Legislature have provided,

that for certain services certain fees shall be taken, and have required that certain other services of this important nature shall be performed for which no fee is provided, it is not lawful to take a fee for the service so required, bearing a proportion to the fees which are provided. But it is said that no fees are to be taken except those enumerated in the fee-bill. Is the law so? or is it so clearly so that having taken such fees is evidence of corruption? The question to be decided by this court is whether taking these fees is evidence of corruption, though we do not quit the ground that the taking of them is strictly legal. If the taking of such fees is prohibited to this Respondent, it is prohibited to all the officers mentioned in this statute. Let me ask your attention to some other officers. Justices of the peace for example are entitled to receive seventeen cents for the acknowledgment of a deed. Suppose a person who is confined by sickness has occasion to make an acknowledgment of a deed, and a magistrate is sent for to a distance of five or ten miles, and he takes a reasonable compensation for his time and labour. There is nothing in the fee-bill to authorize such compensation, and by the doctrine set up, if he takes it, he not only takes what he has no right to take, but does an act which proves him corrupt and subjects him to impeachment and removal from office. If I thought this corruption, I should be afraid to say it. I should be afraid that many of those whom I very much respect would think I was using language very unsuitable if I were to tell them that in every instance in which they had taken fees of this description, they had been guilty of wilful and corrupt misconduct, and maladministration in office. I can hardly bring my mind to argue on this subject. Suppose the case in which parties agree that a deposition shall be taken by a certain magistrate —he is required to go a distance of 5 or 10 miles to meet the deponent. It is the duty of the magistrate to go and perform the service, and it is no violation of moral right to take a fair and equitable compensation. I appeal to your Honors knowledge of common transactions, whether this is not often done, and to your common sense whether it is not right. Take the case of a sheriff, into whose hands a writ is put requiring him to attach goods in a store. He is put to expense in removing the goods, and on the writ the expenses are charged as fees. No provision is made for this in the fee-bill.— Yet gentlemen say that though sometimes sheriffs render services for a very small compensation, yet for others they get a good compensation, and on the whole they choose to take the office. But charges of this description are every day made and sanctioned by the courts. It is the settled practice of our courts, and every lawyer knows it and conforms to it. Mr. President, is corruption universal in this Commonwealth? Have we no such thing as purity in the administration of our laws? If it be true that taking fees not provided for in the fee-bill furnishes evidence of corruption, if the Managers are right in their position, it will bring us to a conclusion not very palatable to the magistrates in this State. Yet this is the principle on which my client is to be convicted. I cannot but be confident that the point urged by the Managers is one which will not be received with approbation by any member of the Court. I maintain not merely that it is not evidence of corruption, but that it is strictly legal and right, to take a fair and reasonable compensation, except in the case where the compensation is provided in the statute. Where provision is made, to exceed the fee provided is undoubtedly punishable. The register for the county of Middlesex when on the stand said that he could not distinguish, in the items which make the charge of three dollars and fifty cents for granting administration, those which are allowed by the law, from those which are not. He found the practice in the office when he came into it, of charging that sum. Neither the witness nor his predecessor in office are in fault for this. It is the fault of the law, and when your Honours in another capacity will render the law more clear, there will be reason, not only for my client, but for the county, to rejoice.

But it will be argued that there is a usage in Middlesex, to take for granting administration, not five dollars and fifty eight cents, which the Respondent is charged in this article with taking, but three dollars and sixty cents. The Respondent and his counsel designed to show what was the usage in other counties. This purpose was resisted by the Managers, and successfully. The Respondent was not permitted to show as he might have done, that in all the counties of the Commonwealth the same course was pursued—not that precisely the same papers were used or the same amount of fees charged, but that in some counties a considerably larger sum is taken, and in others a considerably less. The Managers having proved the usage in Middlesex, furnishing the only pretext for criminality, opposed the proof of usage in other counties by way of defence. One or two of the Managers admitted, that if a usage in Middlesex under any other judge, similar to that adopted by the Respondent, could be proved, it might furnish a presumption to rebut the supposition of corruption. In consequence of this intimation we produced the testimony of Dr. Prescott to prove a similar practice under the administration of his father, the preceding judge of probate, of holding special courts, and of

charging something extra for the extra services. This evidence of usage does not seem to be more satisfactory to the Managers than the usage of other courts. No person ever suspected the late judge of probate of being a dishonest man. If there was ever a person in that county who went off the stage with the reputation of incorruptible integrity, and with the public gratitude, it was he. Yet his successor in office is charged with acting corruptly for following precisely the same course of practice which he adopted.

If the ground that any excess above what is allowed in the fee-bill is a violation of the law, is abandoned, the course of the Managers must be to contend that the excess above that sum is so great as to show that the Respondent acted with a corrupt intent. The question to be tried is not whether he took more than a reasonable compensation, but whether he took such an excess as to prove a corrupt intent. In this case he took as a fee for all the services in granting administration, five dollars and sixty eight cents—not two dollars more than they maintain would have been the proper sum. Before condemning him for this extra charge of fees, it is proper to consider the extra trouble to which he was subjected. He was obliged not only to leave his ordinary business, and to perform the labour usually performed by the Register, but to prepare duplicate papers, that the proceedings might be duly recorded. It is said that this was an unnecessary labour, because the original papers might be retained until they were recorded. To what beneficial purpose would the administration be granted, and the papers made at a special court, if they were to be retained in the possession of the judge until the next stated probate court, or until they could be recorded? The practice of making an extra charge for the extra trouble of transacting business at these special probate courts has not only been proved to be conformable with the usage of the county under the administration of the preceding judge, but if it is fully examined, I am satisfied that it will be proved to be right and reasonable. Or at least I may ask, if it is not right, is it so glaringly wrong as to furnish evidence of wilful and corrupt misconduct? The sum taken for extra trouble was one dollar and ninety eight cents. It was a very moderate compensation for the trouble, and it has been proved that it was the practice of the Respondent to avoid holding such courts as much as possible, and to require suitors to go to the regular probate courts, notwithstanding the extra compensation which he demanded when he held such courts. At the five other special courts, stated in the other articles to have been holden, the excess beyond the common fees for extra trouble, is in no instance greater, if so great as in the first. But if the receipt of five dollars fifty eight cents, for granting administration, under the circumstances stated in the first article, be evidence of a corrupt intent, your Honors have it, and may have it in abundance. It is a course which the Respondent has uniformly pursued, and will continue to pursue, until he learns that it is wrong.

The usual hour of adjournment having arrived, on motion of Mr. Pickman it was ordered that when the Court adjourn, it adjourn to Monday at 10 o'clock.

On motion of Mr. Varnum, the Senate adjourned.

IN SENATE.

MONDAY, APRIL 23.

COURT OF IMPEACHMENT.

Mr. Hunnewell on the part of the Senate, and Mr. J. Russell on the part of the House of Representatives, delivered the usual messages between the two Houses.

The Court was opened at 10 minutes past 10 o'clock.

Mr. HOAR proceeded in his argument:

Mr. President, I should be ungrateful for the indulgence shown me by this honorable Court on Saturday, if I did not endeavour to occupy as little time as is consistent with the duty I owe to my client. The Court will however recollect that here are fifteen trials in one, and it will be impossible for me, without neglecting some of them, to be as concise as I should desire, both on my own account and out of regard to this honorable Court.

In the second article, to which I now call your Honors' attention, the Respondent is charged with having granted on the 20th day of June, 1818, at his office in Groton, and not at any probate court, letters of guardianship over three persons, one of them a spendthrift and the two others, *non compotes mentis*, and with having taken other and greater fees than are by law allowed therefor, viz. $32,10. With regard to that part of the charge which relates to holding special courts, I have already observed, that the principles applicable to the first article will apply to the four succeeding articles. I have submitted all my remarks on that subject. I said then, that I should not attempt to answer to all points raised by the Hon. Managers, except in a general manner, and that I should leave the rest for my Hon. Colleagues who are to follow me. It is urged by the Hon. Managers that if the court be illegal, taking any fee, even a single cent, is illegal. It is true, if holding the court was illegal, and so plainly illegal as to show a corrupt misconstruction of the law, taking any fee whatever was ill gal and corrupt. But we

say it is necessary that the Respondent should be charged with a specific offence, that is, it must be stated (for it must be proved,) that the law allows a certain sum, and that the Respondent has taken a certain other sum, more than the law allows. It is not so stated in these articles, and could not be; for the fee-bill provides no compensation for issuing letters of guardianship, while another statute imposes it as a duty on the Respondent to grant them. The first point of the Hon. Managers is, that although he is bound to perform the service, yet he has no right to charge a fee, for that the law intended that he should perform some services without any compensation. I should like to know the reason on which such a law is grounded. I mentioned some cases on Saturday, in which services are to be performed, but no compensation is provided by the statute. In regard to one case which I then mentioned, that of justices of the peace travelling to take depositions, I find provision *is* made for their compensation. I might mention several cases, however, where no provision is made for the compensation of services required to be performed; such are some of the services of Justices of the quorum, in relation to the liberation of poor debtors from prison; yet these services have been constantly performed, and fees have been as constantly received for them. Not only do officers construe the fee-bill in the same manner as the Respondent has done, but as I observed, there are numerous instances in which the Supreme Court allow a compensation to officers for services not provided for in the fee-bill. In cases where it was intended that fees should not be taken, the Legislature have said so.—Now all provision for the fees of the judge of probate being positive, that is, that certain fees shall be allowed in certain cases, how is it that this strained construction should be contended for? I cannot perceive the force of the reasoning. Just glancing at the fee-bill, I observe the following prohibition in the part respecting the register's fees;—"And no fee shall be demanded by the register of probate, for taking from the files in his office, or transporting to the place of the sitting of the probate court, such papers as are necessary in the settlement of any estate or account in the said Court." Now if a similar provision that the register should take stated fees for stated services excluded his right to take any fees for other services not stated; if this contained by its own vigor enough to subject the register to impeachment for taking such fees; then I would ask, what was the necessity for this express prohibitory clause? So under the allowance to parties and witnesses there are prohibitory clauses;—"no allowance shall be made for travel, to or from the clerk's office to take out a writ," &c. "no plaintiff shall be allowed for more than three day's attendance, when the defendant is defaulted, unless" &c. Thus in cases where it was very likely that improper fees might be taken, the Legislature have prohibited it expressly. How natural is it to suppose that in the same statute, it would also have made prohibitions as to the subject of these articles, if it intended that no charge should be made, but for the services there named? It cannot be that the Hon. Court will draw the conclusion that my client, in giving the same construction to this statute as others have done, has been guilty of misconduct and maladministration in office. It cannot be that they will say the statute is so clear, as to prove that he has not only charged illegal fees, but that he has done it so wilfully as to make his heart corrupt. One of the Hon. Managers seemed to imply that the Respondent might by analogy have taken some fees; that for granting letters of guardianship over spendthrifts or persons *non compotes mentis*, he might take fees equal to those allowed in the analogous case of appointing guardians over minors. This is a virtual abandonment of their whole ground, in relation to the five first articles. There is no correct principle by which the Respondent can be held to have violated any law in receiving the fees which he did. The Hon. Manager said it may be that by analogy he might have taken some fees, but that he has far exceeded what the analogy would justify. I do not understand analogy in any other manner, except that for like services the Respondent should charge like compensation. Now compare the process of appointing a guardian over a spendthrift or person *non compos mentis*, with that of appointing a guardian over a minor; compare the papers and the services in each case, and then see what becomes of the Hon. Manager's conclusion from analogy. The labour in the one case and in the other is as ten to one at least. A minor either presents evidence of preference of one person to be appointed guardian, or he designates the guardian, and the letter of guardianship is granted. There is no disgrace, no stigma affixed to a minor in being put under a guardian. It is not so with a spendthrift. There is every reason why the judge of probate should receive compensation for granting letters of guardianship over spendthrifts. It is one of the most laborious and most arduous duties which he has to perform. Numerous papers are required. He must issue a warrant for an inquisition; upon this there must be a return; then follows a strict investigation into the facts; and all this before the letter of guardianship is granted; so that I am far from exceeding the bounds of truth in saying that the comparative labour in the

two cases is more than ten to one. In our common law courts a minor who becomes a party to an action has a guardian appointed by the Court to defend or prosecute his right. His counsel is named, or any other person on the spot who happens to be willing and able to undertake the charge. It is a business which does not occupy two minutes. And it is much the same with the appointment of guardians to minors in the probate court.

Now what are the facts proved in this case? For the proof seems to be as insufficient as the allegation. No letter of guardianship is produced, or any other paper necessary in the case; but the witness states, that he did apply to the Respondent sometime in the month of May or June, that he informed him that a legacy had been left by her father to John F. Shepherd's wife—that this Shepherd and his two sons were leading irregular lives, and squandering the estate—that he then asked the Respondent what was to be done—that he considered the case and advised the appointment of a guardian, and that in pursuance of this advice a guardian was afterwards appointed to each of these persons. That as for the sum paid he took no receipt, and cannot say whether it was twenty-nine dollars or thirty-two. What were the particular items of the sum which he paid he cannot or does not distinctly say; but he knows that he paid for all the guardianship papers at once. Now the two witnesses who were called on the part of the Respondent are much more full in their testimony on this transaction than Mr. Parker. They state expressly, that the application was for professional advice as to the construction of the will under which the legacy in question arose; and Mr. Parker on reflection thought he might have asked for professional advice. They were anxious to know how the legacy was to be obtained from the trustee; and when obtained how it was to be applied. On both these points their inquiries were numerous and minute. Now then let us again advert to the testimony on the part of the Commonwealth. Mr. Fiske states that the usual fee, at an ordinary probate court, for each of these cases of guardianship, of which there were three, would have been $6,60, including the warrant of inquisition, and all the other usual papers. Suppose the sum actually received by the Respondent in this case had been $100—I ask the attention of the Hon. Court to the principle. The proof must be in support of some specific allegation; it must be that such a sum was taken for the services enumerated in the article.—Otherwise it might only shew that the Respondent had taken extravagant fees as counsel, and that would not be a crime for which he is to be punished by this Hon. Court.—But the Respondent wishes to defend his conduct in a moral point of view, and therefore I would go into the consideration of the facts. According to the evidence then on the part of the Commonwealth, the usual fee at an ordinary Court for these three letters of guardianship would have been $19,80. But this was at a special Court, when no register was present. It was necessary therefore, or at least in such cases it is usual, to take a duplicate copy of the papers in order that they may be recorded. The Respondent was obliged either to act as register himself, or to procure a substitute. Now if two, three, or four dollars were paid for this extra writing it would leave but five or six dollars of the whole excess for counsel fees, and Mr. Parker states that three or four dollars were paid to an assistant for extra writing, and whether this was part of the $29 or not, he does not know. We have a right to assume that it was. At any rate the witness would not have been very likely to forget it, if he had paid three dollars more than the twenty-nine. Unless it is improper then for a judge of Probate to act as counsel in any case, the Respondent has done nothing improper in this. Your Honors know that some of the most respectable men in this Commonwealth, some of its most distinguished citizens, have been judges of probate, and have still continued their professional practice, and given advice to every person who applied for it. I never heard that their reputation suffered for so doing. There is no reason why it should; for they had as good a right to give such advice, as to advise them how to cultivate their farms. The Respondent has done no more than they have done; and it is impossible that this case should in any way concern his official conduct.

I am not aware that there is any thing charged in the third article, which varies it materially in principle from the first. As to the question of the illegality of the Court the facts are precisely as they were before. It is proved, that the Court was holden on a day not fixed by the statute. If it was illegal therefore in the first instance it was in this also; and if on the contrary it was legal in the one case, it was so in the other. It is proved that in this case also a letter of administration was granted, and the same sum taken for it within a few cents as in the first case. Nothing can be said on this point deserving any attention which has not been already said on the same point in the first article. As to the services rendered at the second probate court, the testimony is that the administrator had called frequently on the judge for advice, and had taken directions how all the business should be got through in one day, in order to avoid the attendance of witnesses. On looking at the

papers we find that there were many creditors of the estate; that the whole business of settlement was transacted at this one court; and that the fees charged are in about the same proportion to the services rendered as in the other cases.

In the fourth article it is stated, that a letter of administration on the estate of Simeon Brown was granted to Joseph Butterfield, at an illegal court, for which was taken the illegal sum of six dollars. It is proved that such a letter was issued at the time mentioned, that it was at a court holden on a day not named in the statute, and also that the sum of six dollars was paid at that time by Butterfield to the judge. But for what was it paid? Does it appear that it was paid as the article charges? Why the order of notice should have been mentioned at all in the article, upon the principles of the Hon. Gentlemen who framed it, I do not see; as it is not among the services provided for by statute. But this, and all the other papers which have been enumerated in relation to the first article, were included in this. The witness farther states, that he detained the Respondent on his business two or three hours; that he consulted him concerning certain property in the State of New-York; that he asked advice, which the Respondent gave him, concerning his duties as administrator, of which he was entirely ignorant; that he paid him for the whole the sum of six dollars, which he thought a reasonable charge and was perfectly satisfied. Not even the smallest sum has been proved to have been paid for this letter of administration. We are indeed willing to admit, that out of the six dollars the usual sum was paid for this particular service. But the Hon. Gentlemen have adduced no evidence which goes to the full extent required by law for the purpose of conviction on this article; nothing which shows a corrupt intent on the part of the Respondent.

The fifth article alleges that a letter of administration was granted to the widow of Shobal C. Allen. When—whether one year or thirty years since—does not appear. It does however appear in evidence that such a letter was granted, that for services rendered at that time the sum of five dollars was paid, and that afterwards, in the course of the proceedings on the settlement of the estate, the farther sum of thirty two or three dollars was paid. The sums therefore are about the same, or if there is any difference, they are somewhat lower, than they were in the first article. It is not necessary therefore to make any farther remarks upon this fifth article, which concludes the first set.—In this, and all the preceding, there is either no offence alleged, or if there be a sufficient allegation there is a deficiency of proof. It does not appear from any of them, that the Respondent has done any thing which it was not usual for other magistrates to do, or any thing which upon the plain principles of common sense he had not a right to do.

The sixth article contains a charge of a different character, which if it be proved, if the proof adduced has been satisfactory—such as to leave no doubt upon the mind—I can have no doubt of the result to which your Honors will come. It is an undoubted crime—an unquestionable case of bribery. A case in which the Respondent has acted when he should not have acted, and in which he must have known it was a crime in him to act. A case in which the Respondent must in all human probability have known that a contest was likely to arise, which he would be called upon as Judge to decide. But the Respondent has too much confidence in your Honors' discernment to fear, if there be no other evidence than has been adduced on the part of the Commonwealth, that he shall be convicted upon that—upon Loring's testimony alone. What are the essential facts? Doubtless the point to be established is, that while judge of probate, he engaged to act in this case, which might come before him for judicial decision, as the attorney of Mary Trowbridge. But if on the contrary it should appear that he engaged to act as the attorney of Mary Trowbridge before he was made judge, there was evidently no crime committed, as he had not the spirit of prophecy, and could not possibly have foreseen the death of his predecessor, or that he should succeed him. Now what is the testimony of Mr. Loring? He says, that in the fall of 1804, he applied on the behalf of Mary Trowbridge to the Respondent for advice; that he stated her case to him, and desired to know what was to be done. Loring indeed says that the Respondent was at this time judge of probate; but he likewise says that it was in the fall of 1804:—he is absolutely certain it was as early as the 19th of Dec. in that year; for that he then received a letter on the business, which he produces, and immediately after the receipt of which he went to the judge; at least he has no doubt that he went in a day or two after, or that at farthest it could not have been more than a fortnight. We have produced the records of the Commonwealth, and records do not change, in evidence, to show that the Respondent did not enter upon his office until long after—two months at least after the time mentioned by the witness. This then makes an end of the case. We admit indeed, that if the rest of the case were unexplained, it might seem that the Respondent took very high fees as counsel. But this I really do not suppose to be the question before your Honours. Whether the advice were correct, or not, and the

fees reasonable, or unreasonable, can be of no moment in the case. The Respondent has not I believe been charged with this offence, although he has been charged with almost every thing else. But in order to show that he has not, in my view at least, acted with any degree of impropriety, I would call your Honours' attention for a few moments to the circumstances of the case. Mr. Champney states that he was desirous of securing to the wife of Francis Champney the benefit of a certain estate, belonging to her and her sister Mary Trowbridge. That as early as 1801 a deed was executed by Francis Champney conveying his life interest in this estate—a tenantcy by the curtesy then initiate—to the witness, and that he accordingly took charge of the estate. He recollects that he had repeated conferences with the Respondent as attorney of Mary Trowbridge on this subject, long before he was judge. He particularizes one at New-Ipswich Dates he says he cannot undertake to fix; but he is confident that it was before the Respondent was appointed to his present office, and that after that event he ceased to have any connexion with him as counsel in the case. He does not recollect that the reason was particularly assigned by the judge, but he is confident of the fact that he never met him afterwards in the capacity of counsel for Mary Trowbridge. We go somewhat farther. We adduce the testimony of Dr. Oliver Prescott who states that he was employed as an appraiser and commissioner on the estate, and acted as such. He distinctly recollects that he was informed by the parties that the report of the commissioners was to be final—that it was not to go before the judge. I beg the Court to look at certain evidence in the case, which is not likely to be erroneous, and consider whether it does not in some measure corroborate this statement. I refer to the lease, and other papers which have been produced. [Mr. H. reads the informal report of the commissioners; *vid. ante. p.* 62.] This was a paper produced by the Managers themselves as evidence on the part of the Commonwealth.—On the back of another paper is a calculation of Dr. Prescott as to the value of the estate. A paper similar to the one just read, was directed to Abigail Champney. What could be the purpose for which these two papers were sent to each party, one of them living at Groton, the other at New-Ipswich, unless that it was understood to be agreed that the division of the estate should be made in this manner, without the intervention of a decree of the probate court? As it finally was so settled. There never was any report made, except to the parties. To keep off the creditors the witness entered a *caveat*, as he called it, to the judge of probate that he might do nothing about the business. It was in fact to the commissioners, and not to the judge. It is immaterial however; the object was to secure the benefit of the property to Mrs. Champney, against the creditors of her husband. Here is the whole of the Respondent's conduct in this transaction. It would require more chemistry than I possess to extract any crime out of it. It does not seem to me to contain any the least impropriety of conduct; and as it would be a useless labour for me to create from my own imagination a case of impropriety which might have happened, I must wait to hear what construction is put upon the circumstances of this case by the Hon. Managers in their close. For my own part I do not know, I cannot imagine, a better course, or a different one, than that which was in fact pursued by the Respondent.

The seventh article charges the Respondent with advising one Samuel Whiting in and about the settlement of his accounts as guardian of certain wards, and receiving therefor, and afterwards allowing in the said Whiting's account of guardianship, the sum of fifteen dollars. Your Honours will doubtless recollect, that the Respondent's counsel were perfectly willing to admit this article, and all the offence therein charged; because in their apprehension, if they have been so fortunate as to understand the article, no crime whatever has been alleged in it. The Hon. Managers however would not accept our offer of admission. They chose to prove the article, and under the pretence of proving it, they did prove or endeavor to prove, several facts which are not here alleged; as, for instance, that the Respondent did not give any advice for which he was authorized to make a charge of fifteen dollars—that it was an exorbitant charge to have been made by him even in the capacity of counsel. And upon the first statement of the witness it seemed so. But upon further examination, with a production of the original papers in the case, the evidence assumed a very different aspect. It then appeared, that there were five minors, of whom the witness was guardian—that, in making up his guardianship accounts he had charged the several items indeed rightly, but had put all the accounts into one; so that he had credited the whole amount of their property to all his wards jointly, and charged the whole joint estate with the expenditures of each ward. This account evidently could not be passed; it was necessary that something should be done with it, and some assistance must have been rendered from some quarter or other. Whiting himself said that it was absolutely impossible for him to have put the accounts in proper form without assistance. What then was to be done? Did the Respondent in

rendering that assistance do what he ought not to have done? Should he have passed the account as it was brought to him? Certainly not. Should he have sent the witness to other counsel? We have produced evidence to show that it was the custom of the Respondent to do so; that he avoided this kind of labour himself whenever it was possible; that he even took pains to instruct gentlemen of the bar, and often those also who were not of the bar, in the necessary forms of probate proceedings; purposely that he might get this sort of business off his hands. Messrs. Adams, Wyman, Baldwin, Bartlett, and several others, all stated, that they had been so instructed by the Respondent, that they had taken advantage of those instructions in preparing a great many papers, and doing a great deal of business for suitors in the probate court, and that the judge himself constantly sent suitors to them to have their accounts and papers put in proper form. We should have gone on further to have proved a similar usage on the part of the Respondent throughout the whole county of Middlesex, if the Hon. Managers had not admitted it to be his general practice. Now I would ask, how it has been made to appear, what there is in the case to show, when it is shown that the Respondent has taken so much pains as we have not only proved, but the Hon. Gentlemen themselves have conceded, that he did take to get rid of business of the kind, what is there to show, that he notwithstanding wished, in this particular instance, to do this particular drudgery, and make the charge, which it is alleged that he did make, of fifteen dollars. Will it be contended then that it was the duty of the Respondent, by virtue of his office, as judge of probate, to have performed this service, and therefore that he should have charged no fee for it? The Hon. Managers have shown no such law, and it must clearly be a requisition of the law. Here is an account, a single guardian's account, which the witness testifies it took him not less than two or three days to make out. I altogether deny that it is the duty of the judge of probate to devote his time to this kind of business. It is quite as clear that it is not the duty of the register. It is the business of the register to make out official papers only—those which have been already enumerated as issuing from the probate office, such as letters, warrants, and decrees; and not those which come into it; those which are merely deposited there by other persons to be recorded, such as accounts of administration and guardianship. It might as well be contended that it is the duty of a judge of the supreme judicial court, or a clerk of any common law court, to make out the writ, pleadings, and other formal papers incidental to a suit. If then the Respondent did this service, he did what he was not officially bound to do, and what he had a right to charge for, like any other service no way connected with his office. Did he seek this kind of service? That he did not, has been not only proved, but conceded. Where then is the corruption of the case? But it is a fact that the sum of $15 was charged and received. The first impression produced by the early part of Whiting's testimony, indeed the witness's own impression at first, was, that this $15 was a large sum in regard to the service rendered. But on examining the original papers, the witness acknowledges that he was altogether mistaken—that he had forgotten the proportion of labour bestowed upon them by the Respondent. He perceives that there were five or six accounts in the whole, and that a great part of each stands in the judge's own hand-writing. He says that the business occupied him about two days, that he was obliged to make a number of long calculations, and that whenever he got into any difficulty he went to the judge. For all this labour and service the judge, when the account was completed, charged three dollars to each of the wards who had been benefitted by it. If this be corruption, your Honors will find it at every turn. But if the charge had been a hundred dollars in the whole, instead of fifteen, I do not see that it would have afforded any evidence of corruption as a judge, or that there would have been the slightest foundation for a conviction upon the charge of misconduct and maladministration in office.

As to the eighth article, I did suppose, until I was informed upon inquiry of the Hon. Managers that they still insist upon it, that it had been given up—that it had been made an end of by their own testimony; for on attempting to prove the allegation in this article, how does the evidence turn out? Mr. Crosby is asked, did you receive any directions from the judge concerning the account mentioned in the article? Have you ever advised with him about it? And he answers, no—never. Did you ever pay him the sum of two dollars for his services as counsel? He still answers, no—never. I understand the Hon. Managers mean to submit the case upon this article to the judgment of the Court, this evidence notwithstanding. On what ground indeed I am at a loss to conjecture—unless they mean to rely upon the expression in one of the accounts which was produced, which mentions the sum of two dollars paid for assistance. What for, when, where, to whom, and every other important particular concerning it, does not appear. But I have said enough upon this subject. It were a mere waste of my own time, and of your Honours' time, to make any more remarks

upon this article. The allegation in it is wholly unsupported by the evidence, and it ought to have been, it must be abandoned.

The ninth article is given up by the Managers. With respect to the tenth, I am uncertain whether it is to be argued or not, but it seems that it is not given up. We were willing to admit the article. It contains no crime that we can perceive. The Hon. Managers however chose to offer evidence to prove it, and the evidence was conformable to the allegations. The facts were as follows; Peter Stevens was sued as executor in his own wrong of his father Simon Stevens, and wanted to know if he could avoid a judgment obtained against him, by taking out letters of administration. The Respondent told him he thought he could not. There were but two heirs; they were the only parties interested, and they were both satisfied. The Respondent told Stevens that the expense of taking out a letter of administration would be twenty or thirty dollars and that it would be of no advantage. He advised Stevens not to take out a letter of administration, but told him he would grant one if he wished it. Stevens was satisfied with the advice and followed it, and he paid the Respondent two dollars. The Hon. Managers must maintain that the Respondent could give no advice on any subject to any client without being guilty of a crime, or the article cannot be supported.

The eleventh article charges the Respondent with having given advice in April, 1818, to Josiah Locke as administrator and to his attorney, relative to making out an administration account, in order to rectify a mistake which had been made by the administrator in a previous partial distribution of the estate; and with having received for this advice, and as the counsel of Locke, the sum of five dollars. The facts proved are that there was a decree for the distribution of $8000—that the administrator, who was also one of the heirs, not having the decree with him, or for some other reason, had paid out to others the whole sum, retaining no share for himself. The question then was how to do justice to himself. It is stated that he applied to the Respondent for information. There was no controversy among the heirs; they were perfectly willing that justice should be done, and the only question was how it could be done. I would here ask the Hon. Managers, whether they rely on statutory provision, as prohibiting the Respondent from giving advice in any case to an administrator, or on the common law, for maintaining this charge.

Mr. SHAW. If the counsel means to ask whether we consider the charge as coming within the provision of the statute of 1818, we reply that we do not; that statute was passed but did not go into operation before the facts alleged took place. But we contend that there are other statutes which apply to this case.

Mr. HOAR. I was in hopes to have been saved the trouble of going into a consideration of the statutes on this subject. The Hon. Manager says there were statutes previous to the law of 1818, in operation at this time. The first provision which I find is in the provincial law of 1729. *An. Char.* 451. This statute says that whereas several of the judges of probate are, or may be justices, either of the superior court of judicature, or of the inferior court of common pleas, before whom actions are oftentimes determined that relate to the decree of such judges of probate, it is therefore enacted, that no judge of probate shall have a voice in judging or determining, nor act as attorney in any civil action which may have relation to any sentence or decree passed by him in his office of judge of probate. I did suppose that the Hon. Gentlemen would not contend that this provision could be so strained as to apply to the present case. Such a construction gives rise to this absurdity, that if the Respondent is prohibited by it to act as attorney, he is equally restrained from acting as judge. He could not pass a decree. If the gentlemen contend for one, they must also for the other. The manifest interpretation of this law is that given by the learned compilers of the volume in the marginal note;—"No judge of probate to be judge or attorney in another court in any cause wherein he has passed a decree."—Suppose an appeal from the decree of a judge of probate; the object of the law was that he should not revise his own decision in another court, nor appear as counsel in a case in which he had decided as judge. The next statute was passed soon after the constitution went into operation; when the laws relating to the same subject being scattered in many places, it was thought proper to make selections, and collect them into one law, with such alterations as experience had shown to be expedient. The law of Mar. 10, 1784, is one of this kind, embracing several provisions as to guardians, executors, &c. The 10th section contains the very words of the law of 1727, omitting the preamble. It cannot be successfully contended that judges of probate are prohibited from giving advice in any case; it certainly cannot be argued that these statutes intended to prohibit them from judging in cases before their own court. I am not aware of any other statute to which the Hon. Managers allude.

Mr. DUTTON. We read those statutes and none other.

Mr. HOAR. I do not see then any statute provision on the subject, to prohibit the Respondent from giving the advice mentioned in this article. The point is too clear to

require arguing. The statute of Feb. 1818, was not in operation at the time. This contains the same provision as the two former ones, with the addition of a prohibition to judges of probate as to their acting as counsel for or against any executor, administrator or guardian, as such, in any civil action. It is not necessary to comment on this statute, as there is no charge to which it is applicable. This article then, as it has no statute to support it, must be grounded on the common law; and here again I must confess that I am not aware of any authority by which it can be maintained.

Here let me ask the attention of this Hon. Court to the situation of the judge of probate giving advice. It is not the case of a man applying for advice, alleging a wrong done him, and demanding right. There is no complaint of a contract being made and broken, and no defendant denying. It is not a case were there are contending parties. In the seventh article, for instance, Whiting was a trustee simply, exercising his trust by authority of law under an appointment by the judge of probate. Certain property is entrusted to him to be disposed of. He is desirous to execute the trust faithfully. For this purpose it is necessary that he should observe right forms in transacting the business. The object of this is that the wards when they become of age, and any other person who is interested, may be able to go to the records and see what is done in the case, and whether it is done right. The witness who is the only person appearing, is desirous to have it done right. Some person skilful in the mode of conducting business at the probate court must prepare his papers. The witness himself is unable. The Respondent unwillingly, as it seems from the testimony, undertakes the labour and drudgery of preparing these long accounts. There is no law to make it his duty. If he is willing however to prepare these papers, what principle is there either of law or common sense to prohibit him? What influence can it have on his mind to make him less capable of judging than if some other person had prepared the same papers? One party is as much interested to have them properly made out as another. There are no contending parties. This is not to be compared with, and no way resembles, the case of a judge giving advice to a party contending before him. It is not, for example, at all like Loring's case, as charged in the article. Every person would say that it was not improper to do what was done by the Respondent for Whiting.—There can be no doubt that it was not wrong to prepare the papers. The question then is, whether it is wrong that he should be paid for his services. If it is understood to be the duty of the judge of probate to perform these services, there must be two or more judges in each county. One judge and one register are not enough to execute the duties required of them. It was proper that somebody should prepare these papers, and although the Respondent was not obliged to do it, there was no impropriety in his doing it if he chose; and if it was not improper for him to do it, then it was not improper for him to charge a reasonable compensation. No one will say that a charge of three dollars a piece to each of the wards for the labour which has been exhibited, was exorbitant; on the contrary, it was a very moderate and reasonable compensation.

I now proceed to a consideration of the twelfth article. This contains a charge altogether different in its nature from any one of the others which has been laid before your Honours. The essence of it, that part which, if any, constitutes the criminality of the Respondent's conduct, is perhaps the same as in the others; but in this there are a number of circumstances of so base, so degrading a character, that I am perfectly ready to join with the Hon. Managers and say that if the charge is true, there is no name to give it; I have no name for it; and I have no name for that man who has brought it forward, if the story is false. The Hon. Managers will concede that his conduct is as base, as vile, as imagination can conceive. The article states in substance that in June 1815, at a probate court at Framingham, one Alpheus Ware was present and conversing with another person named Grout, respecting the property belonging to a ward of said Ware—that the Respondent overheard this conversation, and proposed to the parties to give them his advice—he gave advice accordingly, they being willing enough to hear, supposing it to be his duty to give it—that the Respondent however demanded a fee of five dollars for his compensation—first of Grout, who refused to pay, saying that it was only his duty to give the advice—that the Respondent then left the Court, business and suitors, and followed Ware down stairs and demanded the five dollars of him—that Ware refused, alleging that the overseers would object to allowing it to him in his guardianship account, but the Respondent to overcome his objection said that it might be put into his account and allowed and the overseers need know nothing about it—that the money was then paid, placed in the account, and allowed.

There is something in this statement, so strange in itself, so improbable in its nature, that though it is susceptible of proof, yet every member of this Court, before he will believe a charge of conduct so grossly base, will require evidence of the strongest and most irresistible character. Where a charge

of this description is made, the rule which every intelligent man of honest and just feelings pursues in his intercourse with the world, is certainly not less correct here. Any person, before he would believe a story of this kind, would critically inquire, what is the standing of the reporter? Is he a man long known for his habit of telling the truth? Has he no feelings of enmity, no sinister views, no selfish motives? I believe every person does make these inquiries. The general course of the mind is that if either of these questions is not answered in the affirmative, it is a ground for suspending the judgment. There is hesitation, a balancing of doubts at least. If there is enmity, we do not come to the conclusion that the party is to be convicted on this testimony. What are the facts in this case? What is the situation of the witness? Has he no bias? Is he a perfectly fair witness in this trial? It is a well known rule in courts of common law, that if a man charges another with the commission of a crime, and makes himself an accomplice, his testimony is not to convict the person accused, and it is the constant practice to require some other evidence. This is perfectly good law to be applied every where. How stands the witness in this case? Is he a man of incorruptible integrity? Taking his own story, is he not something like an accomplice? He was fully satisfied that this was not a fair charge against his ward, and that he ought not to pay it—that it was altogether a wrong charge; yet when, from his own story, he is told that it should not come out of his pocket—that it should be charged to his ward in the account and be allowed, then he is perfectly willing to pay it. The only difference in point of criminality is, that the Respondent is the first proposer of the project. Here is a black conspiracy between the Respondent and the witness to cheat the ward; only the Respondent first mentions it, and the witness acquiesces. This course the witness says was adopted. Perhaps any honorable, fair-minded man in the situation of the witness, convinced, as he says he was, that the charge ought not to be paid, would be induced to act as the witness says he did. I am mistaken however if it is so; but I very much doubt whether such a a mind as a witness ought to have would consent to pay the demand and charge it to his ward. I do not know that he might not possibly, to avoid importunity, have paid the five dollars, but he would never have charged it to his ward; at least unless my feelings and views are entirely mistaken. Your Honors ought to hesitate before you pronounce judgment on this evidence. But fortunately for the Respondent, the case does not stop here. This is not all, that the witness has sworn he paid the demand, impressed as he was that it was highly improper; it is proved besides that he has a most vindictive and deadly hatred against the Respondent, for some cause, or none. It is sworn that he has threatened to get the Respondent indicted; not on this subject but some other. The Court would not let us go into that; it is enough for us to have shown that there is a vindictive spirit. If I am not altogether mistaken in my views of the rules which would govern a judge, or any other person of fair mind, in making up an opinion on a subject of this kind, they would lead him not to condemn on the credit of such a witness and for such a story. But we have also positive evidence to disprove this story. We have the deposition of Nathan Grout, who states that he attended this probate court on other business—that he had previously assented as overseer to to the allowance of Ware's account—that after the business of the court was nearly done, he himself applied to the Respondent for his advice—that he was stating the circumstances of the case to the Respondent—that Ware interrupted him, and took the story from him, and concluded the statement—that the Respondent went into a consideration of the case and gave advice as to the course to be pursued—that he then told Grout he must pay him five dollars for his advice; which Grout refused because he thought the advice ought to have been given without fee—that the Respondent persisted in his demand, and Grout offered to give him three dollars but the Respondent declined receiving it, and Grout then went away. This deposition directly contradicts one of Ware's statements; it positively denies that the Respondent voluntarily proffered his advice, without being applied to. Not that this is material as to the criminality of the Respondent, (it may be however, though it will at least admit of a question whether there is any crime in giving advice without being asked for it) but it is material as it flatly contradicts Ware's testimony in an important statement, and strips the case of one of the features which give all the appearance of meanness to the transaction. Is it right and reasonable to credit a witness who comes and tells this story, in pursuit of justice as he says, but in pursuit of dark, malignant, cowardly revenge, as we say; whose own conduct has been of the description observed upon; and whose testimony is directly contradicted as to one part, by another unprejudiced witness, who says that the story as far as it relates to transactions in his presence, is not true? Will not this destroy Ware's testimony on other points? We cannot follow him as to the transactions in the lower room, for these are laid where no person was present to disprove them. I cannot believe that your Honours who have

no such feelings as the witness, and who will wait unquestionably for evidence that deserves credit, I cannot believe that you will allow any weight to this testimony. If the Respondent could not give advice in this case and receive compensation for it, then no doubt he is guilty. The statement in Grout's deposition is admitted to be true. Grout asked for advice, the Respondent did give it, and did demand and receive compensation, and the amount was charged in the account, and was allowed. There was no law against all this. Unless your Honors believe the additional circumstances stated by Ware to have taken place in the lower room, which do not contain the essence of the criminality charged, but only serve to present the transaction in a base and odious light, the Respondent has been guilty of no misconduct. Was this a case in which it was proper for a guardian to ask advice? Here was property which it was desirable that the guardian should get under his control; he did not know how and he wanted advice. If this was not a proper case for advice I know not what is. And why should not the Respondent give advice in this case? It was not a case that could by any possibility come before him as judge. I can see no reason why it was not proper for him to give it; and if it was proper for him to give it, why should he not be paid for it, and why should not the guardian pay for it? This is the case, stripped of the odious colouring existing in the mind of the witness. There is nothing in the transaction that is not perfectly fair and right and defensible, nothing but what every honorable man might have done. Some men might have acted differently. Some persons after earning the money by their services, might have said, if these men do not choose to pay what I am justly entitled to from them, let them go; but as far as the law is concerned, there was nothing that was not right and proper in the Respondent's insisting on being paid.

The thirteenth article the Managers have expressly given up. The fourteenth article charges that the Respondent was the counsel of John Walker, administrator of John Walker deceased—that he gave him advice respecting the administration of the estate—that he received as fees for his advice at one time $5, afterwards $15, and at other times other sums amounting to $120—and that as judge of probate he allowed these several sums in the administrator's account. The proof in relation to the $5, is that Walker was attending a probate court—that a question arose between him and another person respecting the board of one of the minor children; they wished the Respondent to decide it as arbitrator—he declined at first, but they urged him, and he said that after the court was over he would attend to it—he did so and charged and received $5. I suppose that as it was a case that could not possibly come before him to decide as judge, it was perfectly proper for him to act in relation to it either as counsel or referee. The second part of the charge relates to advice respecting a license to sell real estate. This was a case in the court of common pleas—one which could not come before himself as judge and never has. The Respondent gave advice; what it was, is not stated; and received, not $15 it seems, but only a part of it. In all this I can see no criminality. In relation to the principal sum of $120, the witness states that his father was a member of a copartnership engaged in purchasing barley and hops and shipping them. A suit was brought against the surviving members of the firm for money received to the use of the plaintiff. It was admitted that if the money was received by any body, it was by the father of the witness, and that if recovered, it would be a fair charge against the estate. The other partners told the witness, that if he did not defend the action, they would be defaulted, and come upon him for their remedy. He agreed to assume the defence and retained the Respondent as his counsel to attend to the cause. The Respondent did so, at different places. The witness says also that there was another suit similar in its nature to the one I have been speaking of—that he is uncertain whether it was ever entered, but if it was, that the Respondent had charge of it. From the certificate which has been read it appears that the action was entered, and continued several terms of the court in the county of Middlesex. As a compensation for all these various services the Respondent has received the sum mentioned of $120. Whether he received little or much for these services, is no question now. The amount is material only so far as it is necessary to determine whether the Respondent acted corruptly in allowing it in the administrator's account. What crime there is in this, I stand here to learn. There is no statute or principle of common law against his appearing as counsel in the case and receiving a compensation for his services, and I can discern no impropriety in his allowing the charge in the administrator's account. It is a custom that is universal, and there is no reason against it

The fifteenth article the Respondent's counsel were willing to admit. But the Hon. Managers refused to accept our admission and attempted to prove the charge; and in this it seems to me they have wholly failed. Your Honors' minutes will determine. The witness, Wood, stated that he applied to the Respondent for advice at Groton as to the estate of Jonas Adams, of whom his sister was executrix—that he received advice and paid ten dollars for it. What that advice

was, whether it was wrong or right does not appear. The Managers introduce papers to show that there was an application to the Respondent for administration *de bonis non*, which was refused—that there was an appeal from this decree, and that it was reversed.—The Managers contend that your Honors are to infer from this that the Respondent gave advice in a case which might come before him and did come before him—that he adjudged on it and that his decision was reversed. The connexion between this testimony and these inferences is invisible to me. The facts exclude the possibility of his being called on to adjudicate in the case. It is only shown that the advice related to the estate's being liable for the support of a poor person. This was wholly a question of individual concern. The whole property belonged to Dorcas Adams the executrix. If the estate was holden for the support of this poor person, the money came out of her pocket; if it was not holden there was so much the more left for her. Look at the records of the supreme court—there it is true the supreme court ordered Dorcas Adams to be notified; but it does not appear that she paid any regard to it; it was no affair of hers. I do not understand the course of reasoning of the Hon. Managers. I do not see how the law can be applied to the facts, so as to furnish the least evidence of criminality.

I have now, Mr. President, submitted all the remarks which I intended to make in relation to this cause. I am sensible that I have severely taxed your Honors' patience and attention, but I have endeavored to be as brief as possible. There are several points of law and fact which I have not touched, but have left intentionally, and shall leave, to the gentlemen who are associated with me in the defence.

Mr. Hoar finished his remarks at 5 minutes before one o'clock; when the court being about to adjourn, Mr. BLAKE requested on account of his feeble health, that he might be permitted to proceed in the observations he had to make, until the usual hour of adjournment. The Court accordingly consented.

Mr. BLAKE then proceeded:—

Mr. President,

Having engaged, a few days since, unfortunately as I now fear, both for my client and myself, (considering the present miserable state of my health) to afford all the little professional assistance in my power, as one of the counsel for the Respondent, I will, with your permission, and that of this Hon. Court, proceed to submit the views which I have taken of the very serious and interesting subject now under consideration.

In the performance of this duty it will be my endeavor, Sir, throughout the whole course of my remarks, to abstain, as far as may be practicable, from a merereiteration of any of the arguments and observations which have already been addressed to you in behalf of the Respondent. It must be obvious, however, that the complete fulfilment of this intention cannot but be attended with very considerable difficulty.

On the first day of the session, there was submitted to this Hon. Court the written plea and answer of the Respondent, containing not only the denial of the charges laid against him, but accompanied also by a pretty full disclosure of the grounds intended to be assumed in his defence, both as to the law and the fact of the case.

In addition to this, there have been presented to the Court, by my learned and very able associate who has just concluded his address, and whose familiar acquaintance with the cause has enabled him to do the most ample justice to it in all its parts, so complete an analysis of the principles of the law, and the matters of fact on which the counsel for the Respondent depend for the maintenance of his defence, that it would seem indeed, as though little, if any thing were remaining, either in the way of argument, or elucidation, to be urged by his colleagues who are to follow him.

Under such circumstances, Sir, it would be difficult for any one, and I am apprehensive it will be absolutely impossible for myself, in the course of the remarks which I have to submit, to refrain from falling into the same course of reasoning which has already been adopted in the defence, or to avoid entirely the repetition of arguments which have already been sufficiently stated and enforced. Having, however, employed much reflection upon the case, I do indulge the humble hope, notwithstanding the discouraging circumstances which have been mentioned, that it may yet be in my power to present some views of the subject, that may be deemed worthy of attention, and which have not hitherto been completely anticipated.

The case which is now on trial, Sir, I consider to be the case of a criminal proseeution, before a court of judicature; and hence, that in this, as in all trials of crimes and offences in such a court, the objects of enquiry and examination, are;—

First, The nature and form of the accusation.

Secondly, The facts which have been established in support of it; and

Thirdly, The principles of the law, which are applicable to both.

With regard to the nature and form of the accusation, as we find it in the articles of impeachment, I shall have occasion, at another stage of the discussion, to entreat the serious attention of this court to some

observations, and references to books of acknowledged authority, which, it would be inconsistent with the course of argument I had proposed to pursue, to bring before your Honors at the present moment.

It will be convenient for me, also, to defer to a future period the remarks I have to make upon the questions of fact which arise in the case. There is, as I think, Sir, a great and most solemn question which presents itself at the very front of this cause, and which in its nature is preliminary to all other considerations. It is the great question of constitutional law, respecting the legal character and jurisdiction of this High and Honorable Court, in relation to the subject of trial by impeachment; the nature of the delinquencies which may be tried and punished, within the proper sphere of its constitutional jurisdiction; and the legal rules and principles, by which its inquiry and decisions in such cases should be governed.

I am not insensible, I assure you, Sir, to the manifest difficulties and embarrassments which must, necessarily, attend the discussion of these great and most interesting questions. Under the constitution and the laws of this Commonwealth, the predicament of counsel who are called to conduct the argument in a case of impeachment, as well as of the Court who are to hear and decide upon it, is obviously attended with many perplexities, which are not experienced in the trial of cases, either civil or criminal, in the courts of ordinary jurisdiction. On the present occasion, Sir, we are under the necessity of proceeding to the discussion of intricate and most interesting principles; principles, which lie at the very foundation of our civil compact, and yet we are destitute of the aid of cases and precedents, which are emphatically denominated the "very law" of the common law judge, in ordinary cases which come before him, and without which he would feel as though seated in the midst of clouds and darkness.

Precedents, Sir, are the very light and life of the judge, in all our courts of inferior jurisdiction; the great fountain from whence he draws most of that wisdom and learning, by which his deliberations are guided, and his decisions are regulated.

It is, however, the misfortune of this Honorable Court, convened as it is for the exercise of its judicial functions, under the constitution of this Commonwealth, that it cannot, as I shall presently attempt to shew, avail itself of much assistance in the course of its deliberations upon the case now on trial, either from the practice in such cases in this Commonwealth, or from the learning and information of other ages and nations.

As to parliamentary usage, which is every thing in England, in regard to the trial by impeachment, we have nothing of this kind to guide, and to direct the course of procedure on the present occasion. Under our present free, and admirable system of government, we have, thank God, no example of an omnipotent parliament; and of course we cannot refer to any parliamentary law or usage, of sufficient authority, to regulate the trial or decision of the great cause now under consideration. It is then, Sir, principally by the light of our own unassisted reason, that we may hope to discover the proper path which ought to be pursued. It is by a critical examination of the theory of our government, and the free and liberal principles upon which it was established; it is by an attentive and scrupulous inspection of the constitution of Massachusetts, in all its parts which have a bearing on the question, and by thus ascertaining its true spirit and intention, in relation to this great subject of impeachment, that this Hon. Court, learned and intelligent as it is, can ever be enabled to make up a decision that will do justice to the citizen, and give honor to the State.

I have already said, and I will here take occasion to repeat the remark, that in this Commonwealth you have no precedents, and no established, legitimate usage, whereon to found your opinions as to the law of impeachment. The constitution of Massachusetts, is now about forty years old; and from my own observation and experience, connected with the information which has been given me by others, I may venture to affirm, with confidence, that never since the period of its adoption to the present day, has there been a single instance of an impeachment, involving any question as to the constitutional powers and duties of this high tribunal, in the decision of such a case. The truth is, Sir, (and the circumstance is one that should fill the bosom of every citizen with unspeakable thankfulness to the great Giver of all blessings) that the streams of justice have been flowing so smoothly and quietly through our land; every department of our government, surrounded as it is by an intelligent, and watchful people, has been accustomed so to feel its dependence upon that people, that scarcely a murmur of complaint has ever been heard among us on the score of injustice or oppression in any act of our civil rulers.

Indeed, since the first formation of our civil compact, its operations throughout, like those in the order of nature, have been "so silent and harmonious, and have come so seldom in contact with us, that we enjoy its blessings, with scarcely the consciousness of being governed; that we are almost insensible to the existence of this superintending power."

It is nevertheless true, that within the

compass of forty long years, three or four solitary instances of trial by impeachment have occurred in this Commonwealth. Of these, two I believe resulted in a conviction ; and I feel myself justified in stating, that in neither of the instances alluded to was there any point of constitutional law, involved in the inquiry. Having had the honor of being myself of counsel for the respondents, (who were justices of the peace) in two of the cases I have referred to, I am enabled to speak with certainty in relation to the nature of those cases ; and I do well remember, that the only inquiry, in these cases, was merely as to the state of facts, without drawing into discussion any contested question as to the law of impeachment. Such I have, also, reason to believe was the nature of the inquiry, in the other cases which have been alluded to.

Thus it is seen, that in the absence of all precedent and usage, it will be the business of this Hon. Court, to consider and to settle, for the first time, in this Commonwealth, the legal and constitutional principles, which, not only now, but in all future time, shall regulate and govern the trial by impeachment.

In this view of the subject, Sir, it would be quite superfluous for me, to remind this honorable and most intelligent Court, many of whose members are from among the most enlightened lawyers and statesmen of our land, of the immense, unspeakable importance of the case upon which it is now called to decide. The subject is, indeed, of infinite moment to the Respondent at your bar, as involving every thing near and dear to him on this side the grave. All this, however, is but the concern of a single, solitary individual, an almost imperceptible part of a whole community ; and it is not to be expected that his welfare or misery, or even his life or death, can be the subject of great public solicitude, or sympathy.

The question however is infinitely interesting in a public point of view ; and upon the manner in which it may eventually be decided, will in my opinion most essentially depend the future character and happiness, of this hitherto, much favored community.

According to the doctrines which were advanced by an Hon. Manager in behalf of the House of Representatives, who opened this prosecution, and which were virtually reiterated by one of his learned associates, at a subsequent period, the great question which first presents itself to view, is no other than this ; whether, in this land of liberty, in this boasted republic, which we speak of, most emphatically, as a government of laws and not of men, there is nevertheless one great department, whose jurisdiction and power in certain most important cases, are absolutely boundless, and beyond the control of any known principle or rule ; whether it could have been the intention of that constitution, which hitherto we have been accustomed to regard, as the most perfect model of government that was ever formed by a free and enlightened people, to invest in one department of that government, the unlimited power of adjudging and condemning, and of inflicting almost the greatest of all earthly punishments, according to its own mere pleasure and discretion.

Sir, I have long entertained the belief, that there had prevailed among a portion of the people of this Commonwealth, many vague and dangerous notions respecting the subject to which I allude. The sentiment has become quite too prevalent in the community, and it has, in fact, been expressed more than once in my hearing, since the commencement of the present trial, that for any petty delinquency, any little aberration from the exact line of official duty, any thing indeed unseemly in the conduct of a civil magistrate, which in the opinion of this Court, may have rendered him unfit to continue in office, whether the delinqnencies complained of were or were not such, as should amount to an offence against any known law of the land, still it would be competent for this Court, in such case, in the plenitude of its great and extraordinary jurisdiction, to condemn and to remove upon the process of impeachment.

What is this, Sir, but to render utterly idle and nugatory that other provision in our constitution, respecting removals upon the address of both Houses, which was obviously intended as a remedy for cases which could not be reached by any other mode ? Contrary to every principle of justice, and every legal rule of construction, this would be in effect, completely to confound the two modes of procedure provided by the constitution in regard to the removal of civil magistrates, and to leave it with the mere naked discretion of the two branches of the Legislature, to adopt the one or the other, as might best suit their own taste or convenience. Mr. President, I had, until this day, entertained the hope and the belief, that sentiments so utterly fallacious, so dangerous and alarming in their tendency, so obviously at variance with every principle of our excellent constitution, had been confined to the more unthinking and less informed portion of our community ; I have however perceived, with no less regret than astonishment, since the commencemenf of this trial, that the errors to which I have adverted, have found their way to much more intelligent and exalted minds. So true is this indeed that more then one of the Hon. Managers, who have had occasion to address you in support of this impeachment, and who are so highly distinguished for their

learning and abilities, have, as I think, pretty clearly evinced in the course of their remarks, that even their cultivated and well disciplined minds are not entirely unaffected by what I had hitherto supposed were but mere common and popular errors and prejudices.

In relation to this particular subject, I deem it to be my duty, Mr. President, before I proceed to state more specifically the precise points of law, and the constitutional grounds on which we shall rely in maintenance of the defence of our client, to notice very briefly and generally some of the observations which fell from the learned Manager, who first addressed you in behalf of the Hon. House of Representatives; observations which appeared to my mind as being fraught with the most alarming and frightful import.

He assured us however in the outset of his remarks (and even this concession, considered as a preamble, and a qualification of the doctrines which were subsequently advanced, did not fail, in some measure to allay our anxiety for the Respondent,) that the Hon. body, of whom he is in part the representative, had not been influenced in their proceedings by any popular out-door rumours; nor, indeed by that general spirit of dissatisfaction which had long been prevalent in the community, with regard to the official conduct of the Respondent, and which, if I rightly understood the sentiment intended to be conveyed by the learned Manager, "had sometimes been considered "as affording, of itself sufficient grounds for "an impeachment," but that they had been governed by a rule and a principle throughout the whole course of their investigation. Indeed Sir! and what is all this but to say, that the grand inquest, or in other words, the grand jury of this Commonwealth, whose presentments relate to the most serious subjects, and are brought before the highest judiciary tribunal in our land, did not inhale from the very air they breathe, the spirit of this prosecution, nor catch it as an infection, by coming in contact with the body of the prosecutor? Really, Sir, I should imagine the Hon. House of Representatives could not feel themselves greatly indebted to their learned Manager for so very dubious, so equivocal a compliment. Surely, Sir, it needed not the eulogium of that Hon. Gentleman, nor of any other, to convince us that, in finding this impeachment, they could not have been influenced by any other consideration than a sense of public duty; and that in the fulfilment of that duty, they must have been regulated by principles which should govern in such a case. We know, and we venerate as highly as does the Hon. Gentleman, or any of his associates, the intelligence and purity and magnanimity of that exalted branch of the government of which I am speaking; we should therefore be among the last to imagine, that when acting as the grand inquest of the Commonwealth, and engaged in the solemn but unwelcome business of arraigning a fellow citizen, hitherto much respected and esteemed in society, they could have permitted their minds to be biassed by any floating rumour, any popular excitement; or be influenced by any other consideration, than the law and the testimony as it appeared before them. The observations, however, of the learned Gentleman, to which I have hitherto adverted, may have been, and probably were, in the course of mere incidental remark, and are not therefore deserving of further animadversion.

But, Sir, there were other sentiments advanced by this Hon. Manager, in the opening of his very eloquent address to you, which are of a much more grave and serious character; and which appeared to me, at the time, as they still do, as being fraught with the most dangerous and frightful import. It was stated by the learned Gentleman, and with a degree of emphasis, which seemed to denote his entire conviction of the truth of the position, that the powers of the House of Representatives, with regard to the presentment, and of this Hon. Court, in respect to the trial of prosecutions by impeachment, were "absolutely transcendent;"—that this Court, as a Court of impeachment, was governed by no common law rule or principle; that it was bound only by its own independent opinions and judgment, and "should take its precedents from no other source." Such, I think, were the sentiments, and if I mistake not, the very words, of the Hon. Gentleman to whom I allude.

And what, Sir, have we here? In the name of God, what is the sort of doctrine which the learned gentleman has laboured to establish? Are sentiments like these fit to be proclaimed in a republic; fit to be pronounced on this solemn occasion, and in this hall, sacredly devoted to the great cause of liberty and law? Are we in the favoured land of freedom, boasting of its equal rights, the purity and excellence of its civil institutions, the ascendency of its laws over the power of men? Or is the government of Massachusetts, hitherto the pride and boast of every one who has enjoyed its protection, suddenly transformed to the image of an autocracy, to the very similitude of the despotisms of Russia and Turkey? God forbid! I trust it will be in my power, hereafter, to demonstrate, that the constitution of Massachusetts is by no means obnoxious to so foul an imputation.

Permit me then to inquire, Sir, who and what, is this transcendent House of Representatives; this high and omnipotent Court

of impeachment, that is elevated above all common law rules and principles, that shall consult no precedents, but shall stand upon its own independent judgment as the only rule of its proceedings. What are these departments in our government, in the palm of whose hand are concentrated these great and preeminent powers; and of whom it may be said, that they hold at the mercy of their own sovereign will and pleasure, the honor, the fortunes, and even the civil rights and privileges, of the whole magistracy of our Commonwealth?

Sir, on recurring to the constitution of Massachusetts, we shall find it contains a few plain and intelligible words, which furnish an easy solution of these questions.—Here we find, that notwithstanding the fancied preeminence and transcendency of any department of our government, they are after all but the mere agents and servants of the people, subject to the same laws, controlled by the same constitutional principles, and standing indeed, except as to the fleeting, transitory honors of their public station, upon the precise footing of equality with the humblest citizen in the community! This high and Hon. Court is but the mere creature of the constitution; from that source, it has derived its existence, and it cannot, will not, presume, on this, or on any occasion, to contravene the high behests of its creator. If then we attentively examine this constitution, which is the great fountain of all the power and authority belonging to any branch of the government, we shall be convinced that no such arbitrary, despotic principle, as that which has been contended for, in relation to the subject of impeachment, or any other subject, is recognized, or even countenanced by any provision in that instrument.

On the contrary it is most apparent, from every view that can be taken of the genius and character of our social compact; from every thing we know as to the great end, and aim of its formation, that it was the intention of the illustrious patriots who framed it, and of the intelligent and high minded people who sanctioned it, that there should be a known rule and a law, by which the conduct, not only of the citizen, but of the magistrate, and every order of our civil rulers, should be regulated and governed;—to the end, as it is emphatically pronounced in the constitution, "that there should be a government of laws and not of men." Indeed, Sir, it is this principle, in which consists the very essence of a free, republican system of government, and by which alone it is distinguishable from that repudiated monarchy which was thrown off at the declaration of independence. It is this same principle which forms the basis of our civil privileges, and without it, all our boasted rights and immunities are but a shadow, a dream!

On recurring to the constitution of Massachusetts, it will he clearly seen, that its framers were sufficiently aware of the inestimable value of the principle alluded to; and accordingly, that they did not fail to give it an application to every order and description of men, whether ruler or subject; unless indeed it shall be established, by the decision of the case now on trial, that this high Court of impeachment is a solitary exception, and exempt from its operation.

I shall not presume to trespass upon the patience of this Hon. Court by entering, at this time, upon an examination of the various constitutional provisions which might be quoted in illustration of the position which has been stated. For the present, I wish only to be indulged in submitting a few general observations in relation to that single department of our government, of which, if I mistake not, the Senate of Massachusetts, when assembled as a court of impeachment, may properly be considered a member; and as being subject therefore, in most respects, to the same rules and principles, as those by which the powers of that department are restrained and controlled.

I refer, Sir, to the judiciary department; and I shall confine my remarks to the highest judiciary tribunal, known to our constitution and laws (excepting only this high court of impeachment which I have now the honor to address) namely, the supreme judicial court of this Commonwealth. The jurisdiction of this court, as to every matter, civil or criminal, arising within the Commonwealth, it is well known, is of very great and almost unlimited extent.

It is moreover a court in the last resort;—and its judgments and decrees are final and irreversible. From a superficial and cursory view of the subject, it would seem indeed, as though every thing dear to the citizen in this sublunary world; his reputation, and honor, his liberty, his property, and even life itself, were committed to the sovereign disposal of the five individuals who compose this high tribunal; five mere mortals, subject to the like passions and infirmities, and frail and fallible, as himself.

But, Sir, a little observation and reflection upon the theory of our government, will be sufficient to shew us, that this is very far indeed from being the true state of the case. Great and extensive as may seem to be the authority of the high judicatory I am speaking of, it will be found on examination, that it is hemmed in on all sides by certain constitutional metes and bounds, that are sufficient to prevent even the possibility of abuse in the exercise of this authority; that it is surrounded in fact by a wall, which it will not, dare not, attempt to surmount.

Do we then find in practice, Sir, that it is the arbitrary will, the displeasure of an in-

dignant judge, elevated as he may be upon his seat of justice, that we are accustomed to hold in fear; or is it the constitution and the law, of which the judge is after all but the humble minister, that strike terror upon the evil doer, and give security and protection to the just and upright man?

I repeat that the judge is but the mere minister of the law. He can neither create nor annul the rule by which the rights of the citizen, even in regard to the most minute concern of life, may be affected. His judgments and decrees are but the promulgation of mere legal conclusions from the premises that were submitted to him.

If an affair of property be the subject of inquiry, it is the law, and not the arbitrary will or discretion of the judge, which is decisive of the question. If the life of any member of the society have become forfeit, it is the law which condemns; and the whole duty of the judge consists, in barely pronouncing its sentence of condemnation.—Such, Sir, is the theory of our government, so far as relates to the administration of public justice under the constitution of Massachusetts; and I feel no small degree of pride and satisfaction in having it in my power to say with confidence, that such has been the intelligence and purity of our civil magistrates, such the consciousness of their responsibility to the people whose rights and interests are committed to their custody, that scarcely an instance has occurred, in which it may be said that their practice has not been in correspondence with this theory.

Much less have we ever heard that any judge of our Courts, professing to be an administrator of public justice, whether in the highest or the most subordinate judicatory of the Commonwealth, has had the boldness, the effrontery to avow, in the language of the Hon. Manager, that "he is not bound by any common law rules and principles"; that "he will be guided by no precedents"!—Never, never, I believe, was it known in this or in any other section of our free and enlightened country, that a judicial officer has had the arrogance to boast of the "transcendency" of his powers; or that he shall be governed by no other rule than his own independent opinions, in making up his adjudications.

No, Sir; under the smiles of that merciful Providence, that has watched over and guided the destinies of this much favored people, we have hitherto been exempt, and I trust in God shall yet continue to be, from the affliction of that most direful scourge, a judge clothed with full discretionary powers; a judge, knowing no superior, and holding at the mercy of his own arbitrary will and pleasure, the lives and fortunes and liberty of the subject.

No, Sir; there has never stalked in this land any such judicial monster as an Empson or a Dudley; nor have we yet adopted for our imitation the Star Chamber doctrine of a court, "holding that for honourable, which pleaseth, and that for just, which profiteth; and becoming both a court of law to determine civil rights, and a court of revenue for enriching the treasury; a court enjoining upon the people that which was not enjoined by the laws, and prohibiting that which was not prohibited."

Very different indeed from all this, is the character of the Massachusetts judiciary. It is not that which profiteth, nor that which is most consonant with the humour of the judge; but it is the constitution and the law, which are the rule of his conduct and his decisions.

Accordingly, Sir, never was it known, and I trust it never will be (unless indeed the extraordinary sentiment which has been proclaimed by an Hon. Manager should seem to give encouragement to such presumption) that any judicatory in our land has been so infatuated by elevation to power, as to imagine itself independent of that rule, or to set up its own private judgment and opinions as the only standard of its decisions. God forbid that the people of Massachusetts should ever be left to endure with composure any such example of effrontery in their magistrates.

But, Sir, my remarks thus far have been confined merely to the consideration of the nature of the office, and the duties of those who are called to preside in our courts of judicature. There are however other proceedings necessary to the due administration of public justice in our country, which are not less deserving of attention; as affording additional illustration of the great principle for which we contend on the present occasion. The judges of our courts are not alone concerned in accomplishing the great purposes of the law.—Although they have much to perform in the progress, yet they have nothing to do at the inception, of a criminal prosecution. Below the seat of judgment, yet on a level with it as regards the great and momentous duty to be fulfilled, there is another tribunal which stands as a rampart between the accuser and the accused, the prisoner and his judge.

The tribunal to which I allude is no other than the grand inquest of the several counties, who, as guardians of the public peace and welfare, are charged with the presentment of crimes committed within their respective precincts. So far as relates to the prosecutions of offenders, this inquest may, very properly, be regarded as a constituent part of the Court; possessing, as to every thing within the appropriate sphere of its jurisdiction, a power as independent, an authority as absolute, as could be pretended by

the highest judicial officer in our land. It is well known to us all, that the grand juries of this Commonwealth are invested with the exclusive power of presentment and indictment for crimes; that it is through this medium and this only, that the voice of the accuser is permitted to reach the bench of justice; that it is through this ordeal that both the aggressor and the agrieved must pass, in order to await the judgment of the law.

Such is the power of our grand juries; yet has it ever been imagined, that in the exercise of this power they were not bound by "any common law rules or principles"?—That, in forming a decision upon any matter submitted to their inquiry, they were at liberty to set up their own private judgment and opinions, in opposition to a known rule of law, and to construe any thing and every thing a crime, which should happen to be offensive to their taste or their feelings? No, Sir, with us it never has been seen, that the intelligent body of citizens, who usually compose this most important branch of our civil authority, have presumed to take upon themselves the high privilege of censors; to regulate and correct the morals and manners of society; or in the plenitude of their power, have they, in any instance felt themselves authorised to disturb by their inquisitions the tranquillity of even the humblest individual in the community, without proceeding on the ground of his having committed some offence against a known and established law of the land.

Whatever loose and incoherent practices in regard to this subject, may have been indulged in any other section of our country, it should be matter of pride and satisfaction to us all, that in this Commonwealth the solemn processes of the law are not permitted to be abused and degraded by any such levities.

Again Sir, in relation to the great principle which is the present subject of our inquiry, it may be useful to consider for a moment the nature of that other great and most important power, which we see employed in the administration of public justice, the trial by jury. This it is, which not only in this, but in the country from whence we are descended, has been emphatically denominated the very bulwark of civil liberty, the great barrier of defence and protection to the subject, against the usurpation and tyranny of arbitrary power. Accordingly we find that the trial by jury is a first and fundamental principle in the constitution of Massachusetts, and more than any thing, I had almost said every thing besides, is essential to the great purposes of its formation.

Such being the high destination of this most renowned and popular branch of our juridical polity, it is certainly not unreasonable to suppose, that if it had been deemed consistent in other respects with the genius and spirit of our system of government, to have confided to any council or body of men whatever, the exercise of large discretionary powers, it is to this tribunal most especially, that such powers would have been entrusted. But, Sir, we do not find this to be the case. The constitution of Massachusetts, ever faithful to the great cause of civil liberty; ever intent upon the accomplishment of its great design of securing the rights of the citizen from the arbitrary will and control of his fellows, has chosen to leave liable even the much favored trial by jury, to the salutary limitations, and restraints of the common law. Accordingly we do not find that this tribunal has ever yet presumed to hold itself up as umpire and arbitrator to determine, according to the dictates of its mere will and pleasure, the various controversies between man and man, between the citizen and his government. So far as I know, the instance has not occurred in which a traverse jury in this Commonwealth has pretended, that, in relation to the trial of crimes, its powers "were transcendent;" that it was not to be influenced by any precedent or authority, but could become a "law unto itself," and adopt no other rule than its own mere will and pleasure, as the basis of its decisions. On the contrary, by the very tenor of their oaths, they are bound to render their verdicts, "according to the law and the evidence" submitted to them; and a decision upon any other grounds, even in relation to the most trifling concern of property, upon which they might be called to determine, would be not less a sacrifice of their honor and conscience, as individuals, than an outrage upon the society of which they were members.

I might proceed, Mr. President, almost to infinitude in the multiplication of examples tending to illustrate the absolute universality of that principle of the constitution and the law of Massachusetts, which requires of every branch and department of the government, the evidence of some legitimate rule and reason, as the grounds of its proceedings. Upon an attentive examination of the whole scope and tenour of our social compact, we cannot but be forcibly impressed by the conviction that a most inexorable jealousy of power must have presided at its formation. It seems indeed to proceed throughout on the principle, (as though it were an axiom in our ethicks) that the possession of power and the propensity to abuse it, were necessarily connected and inseparable.

If then it be perceived that every department of our government has been placed by the constitution in the custody of the law; if it be clear, and it certainly is so, that the

rights of even the humblest individual in the community, are holden sacred and inviolable, and are not to be affected by any other power than "the judgment of his peers, or the law of the land"; if indeed in our system of government we find a fixed rule and a law for every thing besides, how shall it be said that we have not something like a principle and a law in relation to the great subject of trial by impeachment? Permit me to inquire, Sir, is it not most remarkable; is it not indeed absolutely incredible, that the framers of our constitution, who did not omit to make the most ample provision for the security by law of every other description and denomination of citizens, should nevertheless have been so blind and so negligent, as to have left the whole civil magistracy of the Commonwealth—a class in our community, of all others, the most entitled to our veneration and respect—subject to be condemned, and despoiled of their dearest rights and privileges, not by the law of the land, but at the mere will and pleasure, and by a single casting vote of a single branch of our legislature? Sir, in my mind the supposition is monstrous and cannot be endured; and I humbly hope that it may be in my power, in the sequel of the remarks which I shall have the honor to submit to this Hon. Court, to demonstrate its fallacy, and its utter repugnancy to every principle of our excellent constitution.

At half past 1 o'clock Mr. Blake gave way to a motion for an adjournment, and the Court adjourned to half past 3 in the afternoon.

AFTERNOON.

The usual messages between the two Houses were delivered by Mr. Gardner of the Senate, and Mr. Thaxter of the House of Representatives.

The Court being opened, at a quarter before 4 o'clock Mr. BLAKE resumed his argument:—

Thus far, Mr. President, it has been my intention, in the course of the remarks that have been submitted to you, to take some general views merely of the constitutional powers and duties of this Hon. Court, as a court of impeachment; and to repel at once the bold, adventurous doctrines, in relation to this subject, which were advanced by an Hon. Manager, at the opening of the prosecution in behalf of the Commonwealth.

With your permission, I will now proceed to a more particular consideration of this interesting subject; and to state more specifically and distinctly, the legal and constitutional grounds on which we shall rely in the defence of our client.

In relation to the trial by impeachment, there are, Sir, to be found in the constitution of Massachusetts, two provisions, and only two, which seem to have a direct and immediate reference to the subject in question. The first of these is contained, in Chapter 1st, Sect. 3d, Art. 6th, and is in these words, viz:—

"The House of Representatives shall be the grand inquest of this Commonwealth; and all impeachments made by them shall be heard and tried by the Senate."

The other provision will be found in Chapter 1st, Section 2d, Art. 8th, and is thus expressed, viz:—"The Senate shall be a Court, with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices. But previous to the trial of every impeachment, the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence. Their judgment however, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit, under this Commonwealth; but the party so convicted, shall be nevertheless liable to indictment, trial, judgment and punishment, according to the laws of the land."

Here then we find established, by the constitution, a grand inquest for the presentment, and a high court for the trying and determining of the delinquencies in office of the civil magistrate. Here also we see very clearly the nature and extent of the punishment, in such cases, that this high tribunal is empowered to inflict.

So far as relates to these particulars, the language, as well as the intention, of the constitution, seems to be sufficiently plain and intelligible.

But Sir, (and it is owing, as I think, to the introduction of one most unfortunate word which we find in the article of the constitution last recited) there arises here, at the very threshold of this cause, a most serious and interesting question; a question, as to what species and degree of official "misconduct" in a public functionary, ("misconduct," I say, for that is the word to which I have alluded) was intended by the constitution, to be the subject matter of presentment by this grand inquest, and to be tried and punished by this high Court of impeachment.

In relation to this question there has, I know, existed in the community, and even in the minds of the most reflecting and intelligent men, an honest diversity of opinion; and I am quite willing to admit, that the proper elucidation of the subject must necessarily be attended with considerable labor and difficulty.

I will venture however to assume it as a position, whose truth and solidity it will be

my endeavour to establish in the course of my remarks, that the constitutional jurisdiction of this Court, sitting as a court of impeachment, extends to nothing less than certain high crimes and misdemeanors in office ;—That neither a judge, nor any other officer of this government, is liable to be removed from office, or otherwise to be punished, by impeachment, but on conviction of some specific, definable offence against a known, preexisting, law of the land.

In the course of reasoning which I shall adopt in order to establish the truth of this proposition, although my arguments will be principally founded upon what I conceive to be the direct and paramount authority of our own constitution, yet I am not unwilling to admit that there is to be derived no inconsiderable portion of useful light and information, in relation to the great subject of the trial by impeachment, from a reference to the principles relative thereto, as we find them settled, and established (especially in more modern times) in that nation from whence most of our notions of jurisprudence have been derived. The very word, impeachment, which has been adopted into our constitution, being indeed in the code from whence it is derived, a term purely technical, denoting a particular method appointed for the trial of certain crimes, it becomes absolutely necessary that we should go back to its source, in order to ascertain its legal import and signification, and the rules and principles with which it is connected. And here, Sir, I am prepared to agree without the least reserve, that the principles of the English law, in relation to the trial by impeachment, so far as they may be deemed in any degree applicable to our own condition and circumstances, and have not been qualified or restrained by any of the provisions of our own constitution, are deserving of great respect and attention ; and are, indeed, to be received, as possessing almost the force of binding authority, in this Commonwealth. What then do we find, Sir, to be the doctrines of the English law, in regard to this great and extraordinary mode of trial ? What are the particular delinquencies that fall within its scope ; and the legal rules and principles by which the trial and the decision are to be governed ?

In reference to all these questions, I would beg leave, in the first place, to invite the attention of this Court to a few general leading principles, as we find them laid down by an admirable elementary writer of the highest authority. In the Commentaries of Sir William Blackstone, vol. 4. page 259, 260, 261, &c. in his chapter respecting "courts of criminal jurisdiction," he speaks first, (as standing first and foremost in the enumeration) of the high court of parliament ; and of this he says, "that it is the supreme court in the kingdom, not only for the making, but also, for the execution of the laws, by the trial of great and enormous offenders, whether lords or commons, in the method of parliamentary impeachment."—That " an impeachment, before the lords by the commons of Great Britain, in parliament is a prosecution of the already known and established law, and has been, frequently, put in practice ; being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom." [See also Hale's P. C. 150.]

Again at page 260 it is remarked by this author, that " The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords ; who are, in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation."

As to the utility of the trial by impeachment, he adds, that " it has a peculiar propriety in the English constitution ; which has much improved upon the ancient model imported hither from the Continent. For," says he, " though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge ; because their constituents are the parties injured," &c. &c. But before what court shall this impeachment be tried ? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, " that this branch of the legislature," that is the house of commons, " which represents the people, must bring its charge before the other branch which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies. It is proper that the nobility should judge, to insure justice to the accused ; as it is proper that the people should accuse, to insure justice to the commonwealth."

In this connection, Sir, I would beg leave also to read a passage from the work of another elementary writer of equal respectability, and not less acknowledged authority, than that already cited, in which the subject of impeachment is treated with somewhat more particularity, and some additional rules and principles are laid down with regard to the nature and force of this extraordinary method of prosecution, which are deserving of the most serious attention, on the present occasion.

I refer Sir, to the admirable Lectures of Mr. Wooddeson. In vol. 2, page 611 of this work, in treating of the law of impeachment, it is thus laid down ;

"As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments 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 too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of the alleged crimes. The judgment therefore is to be such as is warranted by legal principles or precedents ;—In capital cases, the mere stated sentence is to be specifically pronounced.

Were it necessary for me, Sir, to shew the antiquity, or authenticity of the doctrines here advanced, as to the English law of impeachment, by these great and celebrated commentators, I could readily do this, by referring this Hon. Court, to the authority of much earlier writers, who have been most conspicuous in the juridical history of Great Britain.

It is to be presumed, however, that nothing need be added on the present occasion, to the authority of the great names that have been mentioned.

Such then we perceive, Sir, are some of the doctrines of the English law, in relation to the trial by impeachment; and although, as I shall hereafter attempt to show, there are other and most important rules and principles which are applicable to a case of impeachment, arising under the constitution of Massachusetts, yet I will very cheerfully agree, that the principles which have been quoted shall be considered, to the utmost extent of their applicability, as having the force and authority of law on the present occasion.

With reference, then to the history and the character of the trial by impeachment, as we find it explained in the authorities that have been cited, a most important idea which first presents itself to our mind is, that it was intended, not for the purpose of subjecting the party accused to any degree of rigour or severity, to which he would not have been exposed by the common and ordinary course of trial by jury, but was in fact, designed for the express purpose of affording him additional security and protection. It was intended, not for the purpose of depriving the civil magistrate of that boasted privilege of being heard and adjudged by his peers, which might be claimed as a birthright by the very humblest individual in the realm, but was designed to shield the dignity of his office and station from the influence of those adverse prejudices and suspicions, which are but too commonly indulged by the mass of people in the community, in regard to the character and conduct of those whom they have elevated to power. It is for this reason, and only this, that the honor, the office, the civil rights, of the public functionary, might be lifted above the reach of popular prejudice and exempted from the bias which is likely to be felt by the juror, in the inferior tribunals, in favor of the accusation, where no other than the sovereign people are the accuser, that the wisdom of the English law has confided to a higher and more independent department of its government, the trial of impeachments. For the same reason I may add, though the analogy is but feeble and imperfect, has the constitution of Massachusetts consigned this method of trial to the high tribunal whom I have the honor to address. It is nevertheless to be borne always in mind, that according to the constitution of England, an impeachment, after all, (differing most widely, in this respect from the very questionable proceeding by act of attainder or bill of pains and penalties) "is a prosecution of the already known and established law of the land ;" that it was framed, "not to alter this law, but to carry it into more effectual execution"; that it is, in fact, in the language of one authority that has been quoted, a kind of "bill of indictment," whose trial varies indeed, "in external ceremony," but differs not in essentials, that is, in regard to the rules of evidence, the legal notions and definitions of crimes and punishments, from other criminal prosecutions before the inferior courts of justice.

Thus we see, Sir, what are to be reckoned as being among the leading, fundamental principles of the English law in relation to the trial by impeachment. It is well known to us all that these principles, like every thing else which the wisdom of man in any nation or age has devised for the regulation of civil society, have occasionally been perverted and abused. There is nevertheless afforded us, in the history of certain recent events which have occurred in the country to which I have alluded, the best possible evidence that the wise and salutary principles that have been stated, are too deeply seated in the constitution of that nation, to be again disturbed ; and that to this day they are remaining unshaken, and unimpaired. I allude, Sir, to that most difficult and "distracting" subject, the late trial of the Queen of England. The nature of this memorable prosecution, the difficulties and embarrassments which attended it in its progress, as well as its final result, it is presumed, must be perfectly familiar to the recollection of this Hon. Court. This prosecution, we know, was carried on in that most unusual and extraordinary form, which is sometimes, though

rarely, resorted to by the government of England, in the administration, or the pretended administration of public justice, by the bill of pains and penalties. It is also well known, that according to the principles which have been laid down by the great elementary writers and commentators upon the constitution and laws of Great Britain, in relation to this very questionable mode of procedure, it is considered by them all, as being a sort of prosecution, like the act of attainder, which is only calculated, "*pro re nata*," and can be warranted only, by the presence of some signal exigency, some great necessity or state expediency, demanding imperiously a more prompt and effectual interposition of the civil authority than can be afforded in the common and ordinary course of public justice.

On recurring to the report of this celebrated trial, which is now on the table before me, it will be seen, that at a very early stage of its progress in the House of Lords, an attempt was made, and most strenuously persisted in, by many of the most distinguished members of that illustrious assembly, to quash the bill and thus to arrest at once all further proceedings in that form. The proceeding by bill of pains and penalties was, it seems, opposed on various grounds. The objections of some of the members proceeded on the general grounds, that notwithstanding the few precedents that were to be found in the juridical history of former, and for the most part turbulent times, yet that this mode of prosecution, at all times, and under any imaginable circumstances, was in truth but an engine of violence, injustice and oppression; that it was an infringement upon the dearest rights and privileges of Englishmen; and an outrage upon the fundamental principles of the constitution and the law. By others, who were willing to admit the authority of parliament, in certain extraordinary crises, to resort to this unusual course of procedure, it was nevertheless insisted, that it was warranted only by stern, imperious necessity; by the impendence of some great danger to the welfare of the state, which could not be guarded against by any other means; and that in the case of the Queen, no such cause could be found to exist, sufficient to justify the measure.

Again, it was contended by other members of the House, that if the illustrious personage who was the object of this prosecution, had been guilty of offences against the constitution and laws of the realm, which called for inquiry, and for punishment, she had a right to be heard and tried according to the legitimate forms of proceeding, which are established by the constitution and the law. If her offence were adultery, it was said that a bill of divorce would be the regular and appropriate remedy; or, if the crime had been committed, under such circumstances as to bring the case within the statute of treason, then that the only legitimate course to be pursued, was by indictment or impeachment. On the other hand, it was argued by many of the Lords who were advocates for this form of prosecution, (and it is to the grounds that were assumed, in this part of the discussion, that I desire more especially to draw the attention of this Hon. Court on the present occasion) that inasmuch as the act of adultery, "though one of the greatest offences against the law of God, and the well-being of civil society," was yet not a crime cognizable by the criminal law of England, it could not therefore, be made the subject of indictment. For the same reason also, it was contended, that it could not be visited by the way of impeachment; for that nothing could be the subject of that mode of prosecution, but an offence against some known established law of the land.

I will not weary the patience of this Hon. Court, by quoting from the book which I have in my hand, much of the very able arguments that were urged on either side, on the occasion alluded to, in relation to this great and most interesting question; but will barely refer to some of the observations which were made by one of the most conspicuous members of the high court of impeachment in England, in support of the precise principle, for which the counsel for the Respondent contend in the case now on trial. The question in debate was, whether the then pending bill of pains and penalties should be dismissed, in order that the prosecution might be resumed in the form of impeachment; the remarks, upon this point, to which I would solicit the attention of this Court, are among those which fell from the Earl of Liverpool, and will be found at pages 841, 42, &c. &c. of part 1st of Dolby's Report of the Trial of the Queen; London edition.

In the course of his reply to the various arguments which had been urged against the bill, the noble Earl remarks, "That he was quite willing to allow, that when a bill of this kind was brought forward, it was necessary for those who proposed it, to show some special grounds on which it stood, and to prove that any other course was liable to strong objections. Now, assuming the alleged crime to have been committed; and assuming this for the present only, he would inquire what other course their lordships or the government could have adopted, save that which was now under consideration. From the opinions which had been delivered by the learned judges, it was quite clear that Her Majesty could not be indicted for high treason. He had no difficulty in saying (and there were those about him who knew well

his sentiments on the subject) that if indictment for high treason had been open to the government, that was the course, and the only course that he would have recommended for adoption. But the question as to indictment for high treason had been completely set at rest. Whatever doubt had before existed, had been put an end to by the opinion of the judges. What other course then, save that which they were now considering, could be resorted to, after that solemn decision? There was but one other, that by impeachment, and he wished to call their lordships' attention to the view which he took of that course. In his mind, all the objections which could be urged against a special law might, with equal justice be applied to impeachment. The argument of the learned counsel who had been heard against the bill, came to this; that every offence might be made the subject of impeachment. If that statement were good *de jure*, as well as practically; if a proceeding by impeachment were open, in every case, where a public grievance existed, why was an exception made in favor of bills of pains and penalties?"

Permit me, Mr. President, here to interrupt for a moment the argument of the noble Earl, that I may put the question to this Hon. Court also, that if, under the constitution and law of this Commonwealth, the proceeding by impeachment be open in every case, where some petty delinquency, some trifling aberration from the exact line of official duty, whether amounting or not to a crime in the eye of the law, is imputed to the civil magistrate; why is it that another, and not less effectual remedy for the grievance in all such cases, namely, the removal upon address of the two branches, has been studiously appointed by our constitution, and superadded to this all-searching, all-pervading power of impeachment? I am quite content, Sir, that the answer which was given by the noble lord in parliament in regard to the law of England in such case, should be received as my own answer on the present occasion.

He goes on to remark that, "the reason of exception in favor of bills of pains and penalties and of attainder, was obvious. It was," says he, "simply this, because cases did occasionally arise, to which impeachment would not apply. That was the ground on which bills of pains and penalties, and of attainder must stand or fall. Then assuming this crime to have been committed, it was evidently not high treason, under the statute of Edward III.; and in the next place, it was not a crime by the common law of this country, generally speaking.—But it would be said that the offence in question was a sort of moral abuse, which, like all others, *contra bonos mores*, might be made the subject of impeachment; and it was further argued, that if cases of this nature could not be visited by the way of impeachment, it would go to narrow the rights and privileges of the two houses of parliament. No man was more inclined than he was, to protect them in the exercise of their rights to the fullest possible extent; but he knew not how they could make that a subject of impeachment, which by the law of England was not a crime."

I am aware, Mr. President, that all which I have here quoted is to be regarded but as the expression of an opinion by a single individual; and that as such, notwithstanding the distinguished talents, the exalted station of that individual in the government of which he is a principal member, it is entitled to no more weight in the estimation of this Hon. Court than the opinion of any other intelligent man in our own community, who may have had occasion to exercise the powers of his mind upon the subject in question. But, Sir, upon an examination of the whole scope of reasoning and argument which were so conspicuously displayed upon the occasion alluded to; and with reference more especially to the final decision, which ensued, of the great question to which all this reasoning and argument were applied, I feel myself fully justified in stating, that these principles which were advanced, in relation to the law of impeachment by the distinguished personage I have alluded to, were ultimately sanctioned and adopted by the highest authority of the British empire.

In support of this suggestion I would beg leave to state to this Hon. Court, that after it was virtually agreed, as well by the advocates as the adversaries of the Queen, that the bill of pains and penalties ought on every principle to be dismissed, in case impeachment would lie, for the offences with with she was charged, the final vote on the question was carried by a majority of one hundred and fifteen of the House, in favor of proceeding on the bill.

In this view of the subject Sir, and considering more especially, that on the occasion alluded to, the greatest wisdom and talents and learning of one of the most enlightened nations on the globe, were combined, and concentrated, and brought to bear upon this great question of constitutional law, it would seem to be by no means presumptuous, were I to rely on this decision as affording something like a rule, for the case now on trial.

Upon the whole, Mr. President, I feel myself warranted in stating it as an undeniable position, (and I profess to have devoted no inconsiderable attention to the investigation of this subject) that, for nearly two hundred years, to the present day, the great principle has been recognized in England,

as constituting a part of their law of impeachment, that it is a process which can only be resorted to for the punishment of some great offence against a known, settled law of the land.

Such then, we see, Sir, is the wisdom, the justice, I may say also the benignity (for, even justice, in a monarchy, may be viewed as benignity,) of a government, whose constitution and laws, we have certainly not been accustomed, (to say the least) to regard as a model of perfection, nor as being too much disposed, to favor the purpose of civil liberty, or the rights of the subject, at the expence of power, and prerogative.

It remains then to be considered, whether in this respect the mild and liberal system of laws which has been adopted by the people of Massachusetts, and under which they have lived and prospered for so many years, be not equally favorable to the rights of the citizen, the security of the magistrate, and the maintenance of the principles of justice and of truth.

Whether, in fact, it be consistent with what we know of the patriotism and the sagacity of those enlightened statesmen who were the founders of our constitution, that when forming a government upon the pure basis of a republic, they could have permitted their great minds to have been busied in the adjustment of comparative trifles; in ferreting from the system, each grain and atom of arbitrary power, and yet were so short sighted after all, as to have left in the very midst of their production, a foul principle of despotism, fit only to have a place in the codes of a Caligula or a Nero!

I humbly hope, Sir, it will be in my power to show, in the sequel of my remarks, that neither the constitution of Massachusetts, nor the eminent men who were concerned in its formation, are open to any such imputation.

Thus far Mr. President, my remarks have been principally confined to a consideration of some of the principles which are recognized by the constitution and the law of England in relation to the subject of impeachment.

It is not however, as I think, to the constition and law of that, or any other foreign nation, but to our own constitution and the law of our own land, that we are to look after all, for the principle and the authority by which we are to be guided and governed on the present occasion. I am willing indeed to admit, that in so far as the provisions of the constitution of Massachusetts, in regard to the subject of impeachment, have adopted the technical language of another nation, it is not only proper, but necessary, that we should resort to the codes of that nation, in order to ascertain the legal signication and import of the terms thus employed. It is also very readily admitted, that if there be found in the text of our constitution any thing doubtful or ambiguous, in relation to this subject, we may very properly seek for its explanation by consulting the wisdom and experience, of that country, whence so large a portion of our whole system of jurisprudence was originally derived.

Thus far, Mr. President, but no farther in my humble opinion, is it competent for this Hon. Court, on the trial of an impeachment, to be influenced in its proceedings or its decision, by any other authority on earth than the constitution and law of this Commonwealth.

Heretofore, in the course of my argument, I have had occasion to remark, that the parliamentary usages of Great Britain, which constitute, in reality, the very foundation of their law of impeachment, could not, in my opinion, be received as having any force or applicability, upon the present occasion; to this remark, it might, I think, very properly have been added, that from a reference to those usages, nothing could be obtained which would serve, even in the way of analogy, or example, to assist this Court, in the course of its proceedings. In further illustration of my views on this head, I would, now, beg leave to call the attention of the Court to that clause in the constitution of Massachusetts, which was expressly intended, at its adoption, to define and limit the extent to which the law of England, in relation to the subject of impeachment, or any other subject, should, thereafterwards, be received as authority, in the courts of this Commonwealth. I refer, Sir, to the 6th Chapter of the Constitution, Art. 6th. It is thus; "All the laws which have heretofore been adopted, used and approved, in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution."

Now, Sir, with reference to this most important and salutary provision of our constitution, I would beg to inquire of the Hon. Managers, when was it since the first landing of our forefathers, that the parliamentary law of impeachment, any more than their bill of pains and penalties, or the trial by battle or ordeal, has been adopted and approved and usually practised on in the courts of the colony of Massachusetts?

Without the fear of contradiction, it may, I think, be affirmed, that from the earliest history of the colony, to the present day, not a solitary precedent can be adduced, tending to shew the introduction of this law, among the people of Massachusetts, much less that it had ever been so familiarised by

usage and practice, as to have become a part of the settled law of our land.

But, Sir, notwithstanding the objections that have been urged against the admission of the English law of impeachment, as affording the rule of decision in the case now on trial, I beg it may be distinctly understood that they have not proceeded upon the ground of any possible apprehension we could entertain, that the cause of our client would be in any degree endangered by the circumstance, if this Hon. Court should see fit to adopt that law, as binding to its fullest extent. On the contrary we are entirely willing to admit, that, although the trial by impeachment in England has in former times, been greatly abused, by being employed occasionally as an instrument, in the hands of tyrants, of "injustice and oppression," yet it has at length become settled upon principles, which, in this, as well as in that country, cannot but be acknowledged as being reasonable and just.

It is, however, I repeat, to the constitution of Massachusetts, after all, that we are to resort, as to the great fountain of all the law and the authority which should govern in the case now on trial; and I am indeed exceedingly mistaken in all the views I have been able to take of the subject, if from this source alone, without the assistance of any foreign code whatsoever, there may not be derived all the light and information, which may be necessary to guide this Hon. Court in the proper exercise of its high functions, as a court of impeachment, and lead them to a safe, and correct decision.

With reference then to the provisions of the Massachusetts constitution, I shall assume, and with no small degree of confidence, the following positions, viz:

1. That the Senate of Massachusetts, when assembled in the form of a court of impeachment, is, to all intents and purposes, a court of judicature;—that it is not, as has been falsely imagined by some, and as intimated indeed, by an Hon. Manager, to be regarded as a convention in the nature of an inquest of office; sitting to investigate the general character, and manners, or morals, of the magistrate, and to remove him from office or not, according to its own will and pleasure, or upon any grounds of policy or state expediency.

2. That the jurisdiction of this Court extends only to the trial and punishment, of certain crimes and offences, against the known laws of the land.

3. That in the trial of these offenees, it is bound by the same rules of evidence; the same legal notions and definitions of crime, and the same precision as to the laying the accusation, as prevail in the inferior courts of the common law.

Permit me then first to inquire, is this a court of judicature? And really Sir, one would think, that the language of the constitution as to this, were almost too plain and explicit to require, or even to admit, of any comment, in the way of illustration.

A bare recital of those provisions that relate to the subject of impeachments, which give to this honorable body its existence as a court, and as such, have clothed it with all its powers and attributes, would seem indeed to supersede the necessity of all argument or inference.

Referring then to the article which has already been quoted, we find it commences with the declaration, "The Senate shall be a court with full authority to hear and determine all impeachments," &c.

Permit me to say, Sir, that this of itself, (if we proceed upon the unquestionable principle that where technical terms are employed in our constitution, they were intended to be applied in their technical sense) would be abundantly sufficient to establish my position, that this court of impeachment, is no other than a court of judicature; or to adopt the language of the great oracle of the English law, in his definition of a court, that it is "a place where justice is judicially administered"; I would add, not arbitrarily administered, as would seem to be inferred by an Hon. Manager.

If, however, any thing be required by the way of additional explanation as to the intent and meaning of the constitution, in this respect, we find in the subsequent provisions of the article referred to, every thing that can be necessary for this purpose; "But previous to trial of every impeachment, the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence. Their judgment, however, shall not extend further than to removal from office, &c.

But the party so convicted, shall be nevertheless liable to indictment, trial, judgment, and punishment, according to the laws of the land."

What have we in all this, Sir, but a complete delineation of a court of judicature?

In directing the course of procedure by impeachment, the language of our constitution, from the very inception of the process, by the grand inquest of the Commonwealth, to its final adjudication by this high Court, is purely technical, and as already remarked, must receive its appropriate, technical interpretation. In the description here given us of the powers and the duties of this high tribunal, we find then, it speaks of an inquest or presentment, of a court, of the trial, of conviction and of judgment. Permit me once more to inquire, Sir, what more than all this can be wanted for the description of a proceeding before a court of judicature?

Indeed it would seem as though this honorable body, by the very form and manner of its organization on the present occasion, had virtually recognized the principle for which we contend. Every thing which we see before us, and around us; the proper executive officer of the law in attendance, the very crier with his formulary to open and to adjourn your session; every thing indeed, except the presence of a traverse jury on either side of your hall, is calculated to impress the mind with the conviction, that you are not now concerned in the mere arbitrament of a cause between the Commonwealth and the Respondent; but are in the exercise of your high functions as a court of judicature; judicially employed in the administration of public justice; and called to pronounce upon the guilt or innocence of the defendant, according to the laws of the land.

Thus, Sir, I have endeavored briefly to show, and I humbly hope it has been done satisfactorily, that this high tribunal is "a court in which justice is to be judicially administered." If then the position be correct, it results, I apprehend, as a legal conclusion from the premises, that the decision of this Court upon the case now on trial, like every other judicial decision, must proceed upon some more sure and certain grounds than the mere individual sentiments and opinions of its members as to the character or conduct of the party accused; that it must in fact have for its foundation the unquestionable evidence of a violated law.

I shall not attempt, in this place, to illustrate by any reasoning of my own the principle last stated, but will beg the attention of this Court to a few passages in relation to it, which are quoted from books of most familiar and unquestionable authority.

"The judgment, (it is said) though pronounced, or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact; which judgment or conclusion depends, therefore, not on the arbitrary caprice of the judge, but on the settled, invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit, or action, is but the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study, to point out; and therefore, the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "It is considered." *Consideratum est per Curiam*," that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own, but the act of the law, pronounced and declared by the court, after due deliberation and inquiry.—1 *Co. Inst.* 39, &c.

Such we perceive, Sir, are some of the wise, and most salutary principles of the common law, in regard to the nature of the trial and the judgment in a court of ordinary jurisdiction. If then this honorable body, organised as it is under the constitution of Massachusetts, as a court of impeachment, is to be regarded, as I am well assured it must be, to all intents and purposes, as a court of judicature, what shall be said of the not less novel, than alarming doctrine which was advanced by the learned Manager; that it is a court, nevertheless, whose powers are transcendent, which is bound by "no common law rules and principles," and is left to the exercise of its own opinions and judgment, independently of all other rule or authority? Sir, I will cheerfully leave it for the learning and ingenuity of the Hon. Managers to reconcile, if it be possible, in the conclusion of their argument, these seeming inconsistencies.

I will now proceed, in the second place, to a brief inquiry as to the extent of the jurisdiction, which belongs to this Court, as a court of impeachment, and the nature of the delinquencies over which it has the power of trial and punishment. Upon this head, it is first of all to be remarked, that the constitution of Massachusetts, differing in this respect from that of Great Britain, has very wisely restrained the trial by impeachment to one class only of the citizens, who are public functionaries; and even with regard to these, such offences only, as may have been committed "in their offices," are subjected to this trial. Such is the express provision of the constitution. It is not then to be disputed that, whatever may have been the inadvertencies, or even the crimes of the Respondent, in his conduct as an individual, he is not amenable for these to a court of impeachment. Suppose him to have been guilty of any imaginable offence against the peace and order of society; that he has been a party to a duel, or even a principal in a scene of murder and assassination; yet if these offences, high and aggravated and detestable as they may seem, have not been brought home to him, as being a manifest dereliction of some official duty, he is not most assuredly, under the constitution of Massachusetts, amenable for all this to a court of impeachment.

The wisdom and vigilance of our laws have not failed to provide another, and not less effectual remedy for all such mischiefs.

Again, Sir, I would take occasion here to repeat, that it is not for every petty delinquency; for any thing and every thing, which may be deemed incongruous or exceptionable in the behaviour of the magistrate, even in relation to his official duties,

that he can be subjected to removal and disfranchisement, by this extraordinary process of impeachment. Accustomed for a long time to the frigid office of a judge, he may perchance have lost, in some measure, the feelings and sympathies which once belonged to him as a man; he may have become habitually austere; peevish and petulant towards parties and witnesses, and every one who may have occasion to appear at his bar; yet if his duties as a magistrate be discharged with fidelity and integrity; if he have committed no offence against the law of the land, his removal by address is the only constitutional and appropriate remedy for the evil.

I may add, Sir, that it seems to have been in tenderness towards these frailties and infirmities of human nature, to which the men in high stations are more peculiarly exposed, that the wisdom of our constitution has provided the milder corrective which has been mentioned.

It is not, indeed, to be denied (although I have always been accustomed to regard this as being an exceptionable feature in our present system of government; a blemish which, for one, I would very gladly have assisted in correcting at the late revision of that system) that by this process of address, the whole magistracy of the Commonwealth, so far at least as regards the mere tenure of their office, has been virtually left to the sovereign will and pleasure of those branches of the government, which it was the policy of our constitution to exclude, in every other case, from the least participation in the exercise of judicial power.

There is nevertheless much comfort in the reflection that the removal by address, is after all a very different thing from a condemnation for crime. It implies not corruption, nor is attended with infamy or reproach; it is but the loss of office, and nothing besides. The magistrate, in such case, if he be sustained by conscious rectitude, as is the Defendant at your bar, may meet his doom with firmness and composure. He may even regard it, as being among the common ills in the order of Providence, which not unfrequently alight as well upon the just as the unjust; and yet are the result of an inscrutable wisdom which it is not permitted for mortals to explore. If even then it be true, Sir, as was intimated by an Hon. Manager, that there is existing against the Respondent a degree of "popular excitement," a general feeling of dissatisfaction with regard to his conduct, either as a magistrate or a man, which might tend to impair his usefulness as a public functionary; yet if he be not found guilty of some official and definable offence against a known law of the land, let his case be transferred to the consideration of that other department of the government which has been specially appointed to administer the proper remedy for such an evil.

Let him, if you please, be deprived of his office, if it be only to gratify the very whim and caprice of the people who conferred it upon him; but, in the name of justice, of humanity, I implore, that it may never be said, a citizen of Massachusetts, for such causes as have been supposed, has been subject to all the complicated miseries and horror of a condemnation, by impeachment.

Thus much, Mr. President, I have deemed it proper to observe in respect to a species of individual and official improprieties, which in my view are clearly without the jurisdiction of this Court. With your leave, Sir, I will now proceed to a brief examination of the cases, wherein, as I think, the proceeding by impeachment, must be regarded as the appropriate constitutional remedy;—and in respect to this, notwithstanding all that has been said of the constitution or laws of another country, nothing more, in my humble judgment can be necessary to lead us to a safe and satisfactory conclusion, than a reference to a few plain, and intelligible words, which are to be found in those clauses of our own constitution that have already been recited.

The authority of the Senate, then, as a Court of impeachment, according to the language of the constitution, is "to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices." Such is the brief constitutional description of the offences, and the only offences, of which this tribunal, as a Court of impeachment, can have cognizance; and it would be strange indeed, it would be a sad reflection upon the character of those learned and enlighted statesmen who were the framers of the instrument, if in relation to so interesting a subject, they should unwarily have been led to the adoption of terms of so dubious and equivocal an import, as to require great depth of research in order to develope their true intent and signification.

I am fully persuaded, Sir, that this is by no means the case; and that we shall be enabled by a little reflection, very readily to comprehend every thing which could have been intended by this delegation of power on the subject of impeachment. With reference to the clause that has been quoted, the whole stress of the inquiry, seems to rest upon the words, *misconduct* and *maladministration*. What then are the legal import and signification of these terms? We answer, precisely the same, as of *crimes* and *misdemeanors*;—that they are, in every

respect equivalent to the more familiar terms that are employed by the constitution of Great Britain in its description of impeachable offences, subject only to the wholesome limitation, which, in this Commonwealth, confines this extraordinary method of trial to the official misdemeanors of public functionaries.

In support of this position, I would take occasion to remark, that one of the words that are alluded to, namely, "maladministration," is a term of purely technical origin, and like *burglary*, *larceny*, or any other term that we have seen fit to adopt from the English code, is susceptible, by a reference to that code, of a precise and definite interpretation.

On referring to the Commentaries of Sir William Blackstone, (vol. 4, p. 121,) it will be perceived that this most learned and analytical commentator has spoken of the "maladministration" of public officers, as being a species of offence, belonging to that well known class of offences, called "misprisions" or "contempts."

I beg leave to give you in the words of this author, a description, not only of the particular crime we are speaking of, but of the genus also of which it is a species.

"The fourth species of offences," says he, "more immediately against the king and government, are entitled *misprisions* and *contempts*. Misprisions are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon." Again, he says, "misprisions which are merely positive, are generally denominated contempts or *high misdemeanors*, of which the first and principal is the "*maladministration*" of such high officers, as are in public trust, and employment. This is usually punished by the method of parliamentary impeachment; wherein such penalties, short of death, are inflicted, as to the wisdom of the House of Peers shall seem proper."

Such we perceive, Sir, is the legal import of the term "*maladministration*"; that it is, in fact, a species of high misdemeanor; and can it be doubted that, with the adoption of the phrase, it was intended also to adopt its technical signification, in the constitution of Massachusetts? But it may be argued, on the other hand, that although "maladministration" may have been, in theory, thus classified and arranged under the title of misprisions, yet it has been left after all, at the mere discretion of a high court of impeachment in England, to determine what degree of delinquency shall amount to this offence.

Without intending to bestow any extravagant eulogium upon the jurisprudence of that nation, I will nevertheless venture to pronounce, that no part of their system will be found to exhibit, in relation to this or any other subject, an example of such looseness or incongruity.

In the criminal code of Great Britain, "misprisions," as we learn from our author, are divided into two sorts, negative and positive; the former consisting in the concealment of something which ought to be revealed; and the latter, in the commission of something which ought not to be done; I would beg leave here to inquire, if, in the juridical annals of that nation (excepting, always, the reign of its tyrants and oppressors) the concealment or commission of any thing, has been construed a misprision, but of some act which amounted to an offence against the established law of the land?—If the misprision be of treason, the preexisting crime of treason must be proved against the accused; if it be of a felony, so the felony must be established; and it is beyond the power of all the peers in the realm, in their high court of impeachment, to pronounce against an Englishman upon any other grounds.

Thus it has been shown, Sir, as I humbly trust, that the "maladministration" of a public officer is nothing less than a high misdemeanor, in other words, a high crime; for I have the authority of the learned writer last referred to, "that crimes and misdemeanors, (according to their legal acceptation) are merely synonymous; and that they each import, "an act committed or omitted in violation of a public law, either forbidding or commanding it."

If then it be inquired, what is the precise description of those crimes or misdemeanors of the public officer, for which, under the constitution of Massachusetts, he may become liable to impeachment, I answer; first of all, bribery; or in the quaint language of the Institute, "when a person in a judicial place, takes any fee, gift, reward or brocage for doing his office, or by color of his office, but of the king only;" secondly, the crime of extortion; thirdly, the embezzlement of public money, which has been entrusted by law to the custody of the magistrate; fourthly, the rasure, or falsification of a judicial record.

Here too, it may very properly be observed, that a judge of our Supreme Judicial Court might render himself clearly liable to impeachment, who should contumaciously refuse the giving of a judicial opinion, when duly required so to do, in pursuance of that provision of the constitution which gives authority to "each branch of the legislature, as well as the governor and council, to require the opinions of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions."

All these, and perhaps others might be added to the enumeration, are, without doubt,

offences against public justice; they are crimes and misdemeanors; they are a species of "maladministration," according to the import of that term as it is employed in our constitution; and being such, are unquestionably the proper subject of impeachment, and I think I may safely add, of indictment also.

Furthermore, Sir, I am entirely content to admit, that an officer of government may render himself liable to impeachment, as well on account of duties omitted, as of offences committed. Should he have become habitually remiss and negligent in the performance of those public duties which are enjoined upon him by the constitution, and which by the express terms of his oath he has solemnly engaged to fulfil; should he by such, or by any other means, impede the course of public justice, he is guilty of an offence against the law of the land, and is properly amenable to a court of impeachment.

But, Sir, in that clause of the constitution which I have been considering, there is yet another term employed, in the description of impeachable offences, which is deserving of still more critical examination. It is the word "misconduct."

This term, unfortunately, is not, like the one with which it is conjoined, of technical origin, and does not therefore admit, especially when considered by itself, of that exact construction which would certainly have been desirable in such a case.

It is for this reason, that I have long been accustomed to consider it as a circumstance, very greatly to be lamented, that in so grave an instrument as the constitution of Massachusetts; an instrument having for its object the establishment and promulgation of the great, fundamental principles of our social compact; and whose provisions, therefore, should have been if possible, so plain and explicit, as to require neither argument, nor inference, a word of the description alluded to should have been employed in relation to any subject; much less, in reference to that most important of all subjects, in a civil government, the definition and punishment of crimes.

It is, in my humble judgment, to this, more than to any other cause, that we may attribute the prevalence in this Commonwealth, of all those vague incoherent notions, in regard to the doctrine of impeachment, which I have had occasion to notice in a former part of my remarks.

In reference to the doings of a public officer, the word "misconduct," if taken separately, and by itself, admits undoubtedly of an almost infinite latitude of interpretation.

According to its common and popular acceptation, it is a term of most extensive import; comprehending within its scope any thing and every thing that may be conceived amiss in the morals or even manners of the individual.

Whether a judge on the bench have been guilty of the most shameful violation of public duty; of bribery, of extortion, of peculation; or have been deficient only as to some of those little acts of courtesy and condescension which the people of Massachusetts are wont to expect in the demeanour of their rulers, the case may nevertheless, according to the popular acceptation of the term, in the latter instance, as in the former, he deemed a species of "misconduct" which would subject the unconscious offender to the pains and penalties of an impeachment. Permit me here to inquire if it be possible to imagine, for a moment, that any word which is to be found in the constitution of Massachusetts, could have been intended to be left open to any such endless variety, to any such abuse of construction? No Sir, it would be a gross imputation, not less upon the political integrity, than upon the intelligence and patriotism of the great men whose wisdom was employed in framing the instrument, were we even to indulge the suspicion, that they could intentionally have exposed the rights and privileges of the public functionary, or indeed of the humblest individual in the community, to any such doubts and uncertainties.

It behoves us then to inquire, in reference to the context, and more especially, to the term "*maladministration*," with which the word "misconduct" is associated, in the clause that has been referred to, if the last mentioned expression was not very clearly intended to be applied in a much more precise, and limited sense than that which has been supposed.

For my own part, Sir, I consider the word "misconduct," as it is employed in the context, as being precisely equivalent to the technical term "misdemeanor"; whose legal signification is sufficiently intelligible; and that it cannot therefore be taken either to amplify or abridge the force of the word with which it is connected. I do not deem it necessary to resort to any nice and subtle distinctions, or to seek the aid which might be derived from a critical attention to etymologies, in support of this construction.—A course of examination like this might gratify the taste of the philologist, but could afford no useful information, to a high court of judicature, in forming a judgment upon the innocence or guilt of a fellow citizen standing accused of high crimes at its bar.

On the other hand, if it be proper, in the construction of any legal instrument, and we are taught, by the most respectable authorities to believe it is, to avoid all abstruseness and subtleties, and to adopt that sense of its

terms, which has been sanctioned by the common usage and understanding of the community in which the instrument was formed, it would seem to be peculiarly fit that a similar rule of exposition should be resorted to, in settling the great principles of a social compact, wherein the rights and privileges of a whole people are involved; a compact, which being intended for the security of all, ought also to be so plain and simple, as by all to be readily comprehended.

Proceeding on such principles of construction, although I may not be permitted to quote as authority binding upon this honorable Court, any common notions that are entertained with regard to the signification of words that are employed in the constitution or laws of the Commonwealth, yet even from that source, it is possible, that something may be drawn which, in the way of argument and illustration, may be deemed pertinent to the present inquiry. I would beg leave then to refer for a moment to a few familiar terms in our language, of which the word "misconduct" may, in fact, be considered a derivative; and which may serve to show that even the most general and popular acceptation of that word is by no means at variance with what I have supposed to be its legitimate meaning as it is used in the constitution of Massachusetts.

The terms to which I allude, are the three verbs, to *misconduct*, to *misbehave*, to *misdemean*.

According to the common acceptation of these words, they have always, I believe, been considered as mere synonymes; and if we may rely on the authority of our common lexicographers, this, most unquestionably, is the fact.—To *misconduct* is to *misbehave*, to *misbehave* is to *misdemean*, and to *misdemean*, in its substantive sense, is nothing more nor less than being guilty of a *misdemeanor*; and as this latter term is technical, and signifies a crime, it would seem to follow as a conclusion from these premises, that *misconduct* also, in its legal interpretation, can be made to signify nothing less.

But, Sir, there is yet another view of this subject which seems to be deserving of attention, and which will afford, as I think, much additional support to the construction for which I have contended.

It is not to be forgotten that, in the clause of our constitution which specifies the offences or improprieties (if the Hon. Manager would have it so) that shall be the subject of the trial by impeachment, the words *misconduct* and *maladministration* are introduced conjunctively; and I must confess, that I am unacquainted with any legitimate rule of construction (especially in regard to a law so highly penal as that under consideration) whereby this connexion of the words may be severed, for the purpose of giving a force and an operation to either independently of the other. On the contrary, I hold it to be indisputable, that whatever may have been the nature of the official delinquencies that were intended by either of these expressions, there must be found combined, every thing which is comprised within the intendment of both, in order to make up the amount of an impeachable offence. If then it be proved, as I humbly hope it has been, upon the grounds of unquestionable authority, that *maladministration* in office is but another word for a high *misdemeanor*, it seems to follow as a corollary, that whatever may be the import of the term which is linked with it, nothing less than such "misdemeanor" can be made the subject of impeachment.

Nor am I able to perceive, Sir, that the learned Managers may find relief from the force of this conclusion, by resorting to any other rule of interpretation of which the nature of the case is susceptible.

Should it be contended that the word "maladministration" notwithstanding the conjunctive particle which unites it with its antecedent, was intended to be used merely as exegetical, the answer is obvious; that even in the way of exegesis, it was intended to explain and to qualify, what might otherwise have seemed to be loose and indefinite; and thus to interpose, in favor of the magistrate, a very salutary restraint upon the mere whim and caprice of his accusers.

I am fully sensible, that the construction which I have thus attempted to give to the two words of the constitution which are here alluded to, has proceeded, in a great measure, upon the ground, that the first of these terms is merely superfluous, and inoperative. So, indeed, I think it is; and that the whole intent of the constitutional provision, so far as relates to the description of offences that were to be made the subject of the trial by impeachment, would have been quite as fully expressed, and much more plainly and distinctly, had the whole been left to depend on the legal and technical import of the single word "maladministration." In this respect, it has appeared to me, that the provisions in relation to this subject which we find in the constitution of many, and indeed most of the other States in the Union, are much more suitably and better expressed than our own.

In the constitutions of Pennsylvania, South Carolina, and of at least four other States, the provision is substantially this; "that all civil officers shall be liable to impeachment for any misdemeanor in office;" and although there is some variety in the phraseology which is employed in the constitutions of other States, in relation to this subject, yet I will venture to pronounce, that no one can be construed to have extended the

jurisdiction of its court of impeachment, so as to embrace any species of delinquency, short of the legal denomination of crimes and offences.

But it may perhaps be asked, how then should it have occurred, that the framers of our constitution, differing in this respect from the wise men of other States, should not have been content to leave their description of impeachable offences to depend upon a single word of known technical signification, instead of placing it in conjunction with a mere nugatory, inoperative phrase, by which its force and meaning could neither be enlarged nor restrained? To this I answer, that the case, after all, upon the view which I have taken of it, presents but one, among the almost numberless examples that might be quoted, of that redundancy of expression, that heaping together of words, which has always been the common, inveterate fault of legislation, not only in this country, but in that also from whence are derived our habits and notions on thi ubject.

Accordingly we find, on looking over our constitution and laws, how frequent is the recurrence of such expressions, as "crimes and offences," "crimes and misdemeanors," "laws and ordinances," and various other such copulatives, whose intent and meaning might have been obviously as well conveyed by precisely half the number of words as are employed for the purpose.

Upon the whole, Sir, if the construction which I have attempted to give, be correct, and I have much reason to believe it is, of that portion of our constitution which treats directly upon the subject of impeachment, and from which in fact the Senate of Massachusetts derives its whole authority, and even its existence as a court in such cases, it follows of course that nothing less than an offence against some standing law of the land can be made the subject of its jurisdiction.

But, Sir, there are still other provisions of the constitution which in my view have a most material and forcible bearing upon the subject, and are therefore deserving of consideration. Of these, the first provision to which I would beg leave to refer, is that contained in the tenth article of the declaration of rights, which is in these words, viz:

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

Now, Sir, let the great fundamental principle which is recognized in this provision, be applied to the case on trial, and without seeking the aid of any thing else which may be found in our constitution, we shall be entirely satisfied with the result. What then is fairly to be understood as the proper meaning and import of this provision? In my own view it is but a reiteration of the great principle which is stated in another part of the constitution, and which forms in fact the very basis of our social compact, that it shall be a "government of laws and not of men." According to my version of the clause it is therefore substantially to this effect; that the rights of the citizen, as to every thing connected with his life, liberty or property, shall not depend upon the mere judgment and opinion of men, but upon some known rule of action, which has been established for the regulation of his conduct, as a member of the society.

It is true, Sir, that the life of the Respondent is not immediately involved in the result of this trial. He is exempt (though it may well be doubted if a man of honor and sensibility would regard this, as an immunity in such a case) from the terrors of the gibbet. Whatever may have been his crimes, we know that it does not belong to this tribunal to inflict the punishment of death. So as to the personal liberty of the Respondent, this we know also cannot be directly affected by your decision.

Should he even be condemned, his personal freedom, so far as relates to the privilege of mere physical motion and action, are yet unrestrained. The wide world will nevertheless remain still open before him; and if he will be content to live, and to move, like the first murderer, a wanderer and an exile, with the foul mark which your sentence will have stamped upon him, he may indeed be permitted to roam through creation as far and widely as he shall choose.

But, Sir, I would beg to inquire if the property of the Respondent be not directly and most deeply concerned in the issue of this inquiry?

It is perceived that the judgment of this Court, in a case of impeachment, may extend not only to the removal from office, but to a subtraction also of certain civil privileges of the convict, which, in the view of every honorable and high-minded man, may be considered as amounting to a total disfranchisement. If indeed the office of the magistrate were the only object aimed at by this prosecution, there might perhaps be some appearance of plausibility in the suggestion, that as it was the "people who gave, so it is the right of the people to take away;" and that, against the sovereign decree of the people, or their constitutional representatives, in such a case, there could therefore be no reasonable cause for murmur or complaint.

Even with regard to this, however, I am not exactly prepared to admit the soundness of the position. There is, as I think, something like a property belonging to the judicial officer, in virtue of his appointment to

the station which he occupies; it is to be regarded as a grant of power and privilege, of which he has an absolute right to the enjoyment, until by the commission of some crime he shall have broken the conditions upon which they were conferred; and I must be permitted to say, that it is not at the pleasure of this Hon. Court, or of any other earthly tribunal, to alter or to disturb, in the slightest degree, the tenure of this possession.

But, Sir, there are yet other rights belonging to this Respondent, in comparison with which the possession of office, with all its petty honors and emoluments, are but as the very dust of the balance, which are immediately involved in the issue of this inquiry. In addition to dismissal from office, you may, if it be your pleasure, (and if he have been guilty of high crimes and misdemeanors, I do not hesitate to say that this ought to be a part of your judgment) pass upon him the disgraceful sentence of disqualification to hold "any place of honor, trust or profit under this Commonwealth."

Here then we perceive, Sir, that one of the dearest privileges of the citizen, that which gives him his highest distinction as a party in the social compact, and raises him to a proud elevation above the mere herd and rabble of despotisms, is committed to your custody, and may be lost by your judgment.

Do we then find that the constitution has been negligent in regard to the preservation of rights of the description here alluded to? On the contrary it is every where to be seen that, next to life and liberty, which are the unalienable gift of a merciful Creator, these rights are regarded as being among the most precious possessions of the citizen.—Accordingly almost every successive page of the instrument presents us with some distinct manifestation of the unwearied assiduity of its framers, to protect them from even the possibility of infringement.

Here I would beg leave to call the attention of this Hon. Court to another clause of our constitution, which, in reference to the point immediately in question, would seem to be too plain to require illustration. The clause to which I allude, is a part of the twelfth article of the declaration of rights; and is thus expressed, viz:

"And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Thus it is seen, Sir, that the great and enlightened minds which were called into exercise in the proudest days of this republic, did not deem it sufficient in accommodating a system of government to the condition of a free, intelligent people, that it should barely secure to the individual the privilege of living and breathing, and of enjoying unmolested the perishable fruits of his labour and industry. Much less did they descend to the low grovelling notion, that nothing is of value to the citizen, and fit to be placed under the protection of the law, save his silver and gold, his houses and his lands. In the view of the great men to whom I have alluded, it is not the vile dross that is dug from the bowels of the earth whereon we tread, nor the senseless bricks and stones that compose our dwellings, which constitute our richest possessions as members of civil society. Accordingly we find, Sir, that it is to the civil privileges and immunities of the citizen, in other respects, it is to his political rights as an elector of his rulers, and the capacity of being himself elected to office, it is in fact his well earned honors and distinction as a public functionary, as well as his life, his liberty, his property, that the constitution of this Commonwealth has most emphatically extended its regard and protection.

Such I conceive to be the nature of those "privileges and immunities" which were intended by the constitution to be guarantied to the citizen, and of which he should not be despoiled or deprived but by "the judgment of his peers or the law of the land." What then are we to understand by the terms that are here employed in designating the process, and the only process, whereby the individual may be lawfully deprived of the enjoyment of these privileges? As to the first part of the provision, namely, "by the judgment of his peers," it will, I trust, be at once admitted that nothing more nor less could have been intended by these expressions than a reference to the favorite trial by jury; and that the alternative expressions "or the law of the land," must have been introduced principally with reference to a class of cases, such as those in equity, or of admiralty and maritime jurisdiction, or determinable by the law martial, or lastly by impeachment, as to all which the trial by jury was intended to be dispensed with in conformity with the established rules and principles which are applicable to such cases.

It is at any rate quite sufficient for my purpose, that whatever may have been intended, even in the cases that have been enumerated, as to the form of the trial, the great principle is nevertheless, in this clause of the constitution, as well as every where else throughout the whole instrument, distinctly kept in view, that the law of the land shall be the rule of decision.

But it may be said, on the other hand, that the constitutional provisions in regard to the trial by impeachment, are of themselves

to be regarded as constituting a portion of the standing law of the land. So, indeed, they are, Sir, according to the construction which I have attempted to give, of those provisions; but most assuredly it is otherwise, if they are to be taken in the extravagant sense in which they have been construed by the Hon. Managers. So far as the constitution of Massachusetts has seen fit to dispense, in any case, with the customary trial by jury, and to appoint a special and extraordinary tribunal to sit in judgment upon the proceedings of public officers; if it have conferred upon that tribunal the authority of removing from office, or of inflicting any other penalty, however ignominious, upon the individual who shall have been convicted of any known definable offence, whether great or small, against a known, established law of the society, it is not for the Respondent, or any other citizen in the community, to call in question the wisdom or the justice of such a regulation. It is undoubtedly to be regarded as being a portion of the law; the supreme law of the land; and as such we bow to its authority with the most profound respect and submission. But, Sir, if on the other hand, the construction should be admitted, which has been contended for by the learned Managers; if a high court of impeachment has been erected; and in relation to the important and most interesting subjects which fall within its jurisdiction, has been left to the exercise of its sovereign discretion; if in the language of a learned Manager, its powers are transcendent; independent of all common law rules and principles, and it may hold at its mere will and pleasure, the office, the reputation, and the dearest immunities and privileges of the citizen; then I do not hesitate to say that the very foundation of such a court is laid in injustice and oppression.

The regulation by which a court of this description may have been created, whether it be found in the constitution or elsewhere, may be designated by any other honorable appellation which one may choose to confer upon it, but it surely is not entitled to the name of a law. It is in fact but a mere arbitrary mandate, the "*sic volo, sic jubeo*" of despotic power; and partakes no more of the essence of a law than the papal bull or imperial rescript. What, sir, do we understand as being the import of the term *law*, but that it is "a rule of civil conduct prescribed by the supreme power in a state, establishing and ascertaining what is right and what is wrong"? It is a rule, not the mere private opinion and judgment of any man or body of men, in whatever form they may be assembled; it is a rule which must have been prescribed and promulgated; not left to dwell in secret, and to be sought for in the bosom of the judge.

Again, it is a rule whereby the right is established and the wrong is ascertained; and hence it results, that the innocence or criminality of the individual, so far as relates to his conduct as a member of civil society, and his responsibility to its laws, can no otherwise be determined upon, but by an examination according to the test of this rule.

In this view of the subject, it would be a gross imputation upon the character of our government, as a government of laws, were we for a moment to admit the supposition, that it could have been its intention, in any imaginable case involving the rights of the citizen, to dispense with the application of the principles that have been stated, by confiding to a court of impeachment or to any other tribunal, a discretionary power, so peremptory and absolute as that which has been supposed. I am fully persuaded that nothing can be found in the constitution of this Commonwealth which is fairly susceptible of such construction.

As to those particular provisions which relate expressly to the trial by impeachment, it is to my mind most manifest, that nothing more was intended than to establish the Court for this purpose, to define the extent of its jurisdiction, to prescribe the manner of its organization, and then to leave it to the exercise of its functions, in conformity with those established principles of the law which are binding upon all the inferior judiciary tribunals.

Having thus considered, and with more minuteness perhaps than was required by the occasion, the nature of those delinquencies which are properly cognizable by this Court, I would beg to be indulged in an opportunity of submitting a few remarks in relation to the rules and principles by which it should be governed in the trial of the offender.

It will be remembered that it has heretofore been stated as a position on which I should rely, that this high tribunal, when sitting as a court of impeachment, "must be bound by the same rules of evidence, the same legal notions, and definitions of crimes, and the same precision as to the form of the accusation, as prevail in the inferior tribunals."—I am sensible, Sir, that the arguments which may be urged in the maintenance of this principle, have been in some measure anticipated in the course of my observations upon other points which were intimately connected with it.

Hitherto however the reasoning in support of this position has been principally founded upon inferences that were somewhat remote from the premises; I would now beg leave therefore to submit for the consideration of this Hon. Court, a plain and positive authority, which, in my view, has a direct bearing upon the question, and is absolutely conclusive with respect to it.

I allude to a clause in the constitution of this Commonwealth which will be found in the twelfth article of the declaration of rights, and is in the following words, viz:

"No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him."

Now, Sir, upon a view of this clause, the first question which presents itself for our consideration is, whether among the crimes and offences here alluded to, were intended to be included as well those which are triable before the highest court of judicature, in the form of impeachment, as those which are cognizable only by the inferior tribunals in a proceeding by indictment? Whether, in fact, it could have been intended by the constitution, to afford a security and protection to the rights of the merest vagrant in our streets, which should not also, be extended to the highest magistrate of the Commonwealth? Sir, it would be absolutely affrontive to the dignity of this Hon. Court, were I to suppose it possible, that they would condescend to listen for a moment to an argument upon this question. I will therefore venture to assume it as an admitted position, that the terms "crimes and offences," as they are employed in this clause, were intended to comprehend every species of delinquency, whether of the magistrate or the individual, which could be made the subject of a criminal prosecution, in any form of proceeding, or before any judicial tribunal known and established by the law of the land. If this be true, it follows thence as a conclusion, that no person in the Commonwealth can be held to answer any more upon impeachment before this high court, than upon indictment before the inferior tribunal, until the offence with which he is charged shall be fully and plainly, substantially and formally described to him.—Now, Sir, however full and plain and substantial may be the description given in this impeachment of the various delinquencies, of one kind or another, that were intended to be charged upon the Respondent, I will venture to pronounce, without the fear of contradiction, that upon an examination of the articles, it will be discovered at once that they do not present, in any single instance, that formal and technical description of any crime or offence, which was unquestionably intended by the constitutional provision which has been recited. It is not from hence to be inferred, Sir, that in the formation of these articles the learned managers were in any degree remiss as to the exercise of that care and attention and ability, which have since been so conspicuously displayed in the fulfilment of other portions of the important duties committed to them. It is most manifest, that the construction of the impeachment was accommodated to the state of the evidence which was exhibited before them; and if they have failed to describe, with sufficient formality and precision, any crime or offence, which can be the subject of an impeachment, it is because the existence of no such crime or offence could, in their opinion, be established by that evidence.

But it may be insisted on the other side, that by the law of impeachment, or in other words, by the parliamentary usage of Great Britain, a greater latitude is allowed, as to technical formalities, in this method of prosecution, than in proceedings by indictment; I would beg leave however to observe, that on recurrence to the authorities, even this position will be found to be at least extremely questionable. It is most certain, at any rate, that a contrary doctrine was strenuously insisted upon in the late trial of the Queen; and the principles, in relation to the point, as they were deliberately settled by the peers and the judges more than a century ago, in the memorable case of Sacheverell, were confidently referred to as giving entire support to this doctrine. Be this however as it may;—whatever may be the law of impeachment in England, or whatever its parliamentary usage, it nevertheless remains yet to be demonstrated, that this law, or this usage, has ever been received and established as authority in the Commonwealth of Massachusetts; more especially it remains yet to be shown, that this law and this usage, proceeding even upon the supposition that they may heretofore, in some "olden time," have been "used and practised upon" in the Colony or State, have thereby acquired such ascendeney, such high and commanding authority, as to be privileged to ride over and control an express provision of our Constitution.

But, Sir, after all that has been intimated as to the technical forms which are deemed so necessary in the allegations of an impeachment, I beg it may be distinctly understood, that it is very, very far indeed from the inclination of the counsel for the Respondent, feeling as they one and all do, the most entire confidence in the purity and integrity of their client, and in the substantial merits of the defence which they are undertaking in his behalf to avail themselves of any objections of this nature; to cavil about mere forms; or, indeed, to depend on any thing but the law and the evidence, and the substantial merits of the case.

It was not, therefore, I do assure you, Sir, principally with a view to any mere question of form, that I have deemed it necessary to call the attention of this Hon. Court to this last mentioned clause of the constitution. It was resorted to as affording an aux-

liary, and, as I humbly conceive, a conclusive ground of argument, in support of a former and much more important principle which has heretofore been asserted in the course of my remarks, that no person in the Commonwealth can be held to answer to a court of impeachment, or to any other tribunal, for any thing but some crime or offence, which is susceptible of a plain, formal and technical description. Such, most undeniably, is the obvious sense of the constitution; and I think I may safely challenge the Hon. Managers, in the very plenitude of their professional wisdom and experience, to adduce a living reason for the requirement of such a description of the offence, in an accusation by indictment, which is not equally urgent and forcible in the case of impeachment. It seems then to result as a natural and necessary inference from the principle which is established by this clause in the constitution, that, whatever may have been the irregularities in the official conduct of the Respondent, he cannot be held to answer for them, in this Court, unless they shall be found to amount to some offence against a standing law of the land.

In further confirmation of this great and fundamental principle upon which we rely, I will venture to pronounce as a matter of juridical history, that for more than a half century, not a single instance has occurred, even in England, of a conviction upon impeachment, for any thing short of an indictable offence.

Such as has been stated, we most conscientiously believe to be the constitutional law of impeachment in this Commonwealth.—By this law we fervently implore that the cause of our client may be adjudged. More than this we cannot expect or desire. It is the circumstance, and the only one, which we deprecate, that the official character, or conduct of our friend should be adjudged without the authority of some known rule and principle.

In a preceding part of my remarks upon this head, I had occasion to express my astonishment at some of the sentiments which were advanced by the Hon. Manager who opened this cause on the part of the Commonwealth. I now gladly avail myself of an opportunity to offer the tribute of our sincere respect and gratitude for other observations, of a very different tendency, which subsequently fell from one of his learned associates. The Hon. Gentleman last alluded to, was pleased to avow, that "he should stand upon the law, upon the statute of the Commonwealth," in his course of reasoning for the support of this prosecution.

It is I assure you, Sir, no affectation, when I say, that to the feelings of the Defendant, as well as of his counsel, there was something cheering, encouraging, in the declaration that has been adverted to. It was like the first sight of land to the bewildered mariner, after being driven for many days without chart or compass, upon the trackless ocean, and at the mercy of the winds, and the waves. It seemed to dispel at once the darkness that had been gathering around the cause, and to open to our view a haven of security and repose.

We cheerfully acquiesce in the correctness of the rule thus propounded by the Hon. Manager, and shall submit with the most perfect resignation to whatever consequences may be the result of its operation.

Thus, Sir, I have submitted all the observations which were intended, in relation to this branch of our subject. Its discussion, I am aware, has been elaborate, and I fear, also, tedious. I beg leave, however, to offer as an apology for any thing which may have seemed amiss in this respect, that since my first acquaintance with this cause, and with the facts and circumstances attending it, my mind has been deeply impressed with the conviction, that every thing respecting it must depend on the previous question which would arise as to the jurisdiction of this Hon. Court; in other words, as to the nature of the offences here cognizable, according to the constitutional law of impeachment in this Commonwealth. This question meets us at the very threshold of the inquiry. An error here, therefore, as was said by an eminent barrister upon a very similar occasion, "would be like what is called an error in the first concoction, and would pervade the whole system."

I will only add, that if the decision of this question should be, as I humbly trust it must be, in support of the principles which I have had the honor to advance, there is at once, in my judgment, an end of this cause; for I will venture to pronounce, that neither in the allegations of the impeachment, much less in the evidence which has been adduced in its support, is there any thing presented to the view of this Hon. Court, bearing even a similitude to any crime or offence against a standing law of the land.

At a quarter before six o'clock, Mr. Blake appearing to be much fatigued, a motion was made to adjourn to nine o'clock, to-morrow morning. The court was adjourned accordingly.

SENATE.

TUESDAY, APRIL 24.

COURT OF IMPEACHMENT.

The usual messages between the two Houses were delivered by Mr. Doolittle of the Senate, and Mr. Lawrence of the House of Representatives.

The Court was opened and Mr. Williams this day appeared and took his seat as a member, having been sworn at the last session of the Legislature.

Mr. SHAW. In consequence of the wide range of law taken by the counsel for the Respondent, the Managers feel themselves obliged to read some new authorities, which they will introduce either now or hereafter, as the Hon. Court shall direct.

The President directed him to read.

Mr. SHAW. I will first refer to the former cases of impeachment determined in this Commonwealth, to show that the present articles are not only sufficient in point of form, but that the charges are even more formally set forth than in these precedents. The cases to which I allude are those of Wm. Greenleaf, Sheriff of Worcester, and Wm. Hunt, John Vinal, and Moses Copeland, Justices of the Peace in several counties of this Commonwealth; all of which stand recorded on the journals of this House, when formerly acting as a Court of Impeachment; and in all of them, excepting the last, the impeachment was followed by conviction. Yet the articles contain only very loose and general charges of misconduct and maladministration; and the final question put to the members of the court was in no less general terms. For example, the first article in the first of these cases of impeachment was, "the said Wm. Greenleaf, Sheriff, &c. hath illegally and unjustly, from time to time, detained in his own hands, for his own private use, public monies, when the Commonwealth had a right to, and was in great want of the same." And the question of "guilty" or "not guilty" was put in the following terms; "Is Wm. Greenleaf, Esq. Sheriff, &c. guilty of misconduct and maladministration in that office, charged upon him by the impeachment of the House of Representatives, or not guilty?"

Mr. HOAR. I beg leave to inquire of the Hon. Manager, whether any question was raised in regard to the form, in the first place, of the articles exhibited, and in the second place, of the judgment rendered, in either of the cases to which he has referred, or whether they were suffered to pass *sub silentio*.

Mr. SHAW. No such question appears by the journals to have been raised. In 4 *Bl. Com.* 5, we find the definition of *misdemeanor*, as follows; "A crime, or misdemeanor, is an act committed, or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonimous terms; though, in common usage, the word *crimes* is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of *misdemeanors* only."

In the same book, p. 121 it is said "*misprisions*, which are merely positive, are generally denominated *contempts* or *high misdemeanors*; of which the first and principal is the *maladministration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment;" &c.

In p. 139 the same author gives his definition of bribery. "*Bribery* is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office." Mr. S. continued to read the subsequent remarks on this crime as viewed by different nations; those relating to the English law were as follows; "In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same. But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward 3d,"&c.

In relation to the certainty which is required in the description of the offence alleged, Chitty, in *Crim. Law*, vol. 1. p. 169, observes; "The first general rule respecting indictments is, that they should be framed with sufficient certainty," &c. He goes on to make several remarks on the subject, and refers in a note to the case of *The King* vs. *Horne*, in *Cowp.* 682, which was a prosecution for a libel. The defendant brought a writ of error in the House of Lords. Lord Chief Justice De Grey, in delivering the unanimous opinion of all the judges upon a question put to them by the House of Lords, observed;—"The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of *guilty* or *not guilty* upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes."

Mr. WEBSTER. I wish the learned gentleman had given us this string of authorities somewhat earlier in the case; but, since he has chosen to reserve his artillery to this late period, he must give us time, if we require it, to examine the authorities thus newly introduced. I take this opportunity therefore to give the Hon. Managers notice, that if we should detect any thing in them deserving particular attention, we shall insist on this right. At present I see nothing which we are not willing to admit.

Mr. SHAW. I am not aware that any new principle of law has been introduced. The cases read do but lay down the most common and familiar principles, for which we did not deem it necessary to recur to books. But, in consequence of the erroneous views of the law exhibited in the course of the argument of yesterday, we have judged it necessary to cite some particular authorities. The gentlemen complain that the offence in these articles is not sufficiently charged. By these words I understand the point at issue to be merely whether the charges are alleged with such sufficient certainty, that the Respondent may know what crime he is called upon to answer; and I have accordingly cited authorities to that point.

In the case of *The King* vs. *Holtond*, 5 Term Rep. 607, it was ruled, that "in an indictment against a servant of the East India Company for offences in India it is sufficient to charge him with a *wilful* breach of duty without adding that it was *corrupt*," &c. In a note to 2 *Chitty's Crim. Law*, p. 237, it is said, "If a magistrate abuses his authority from corrupt motives he is punishable criminally by indictment or information." &c. "Where they have acted partially, maliciously, or corruptly, they are liable to an indictment. And, in some cases, a mere improper interference appears to be thus cognizable." &c Again, "It is sufficient in an indictment against any officer, to aver that he *being such*, &c. committed the offence, and proof that he acted as such would suffice." The case of *The King* vs. *Salisbury*, 4 Term Rep. 456, was an indictment for an improper exercise of authority, and Lord Kenyon there says, "It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous."

Mr. DUTTON. With the permission of the Hon. Court I will cite a few authorities for the consideration of the Court and of the learned counsel for the Respondent. In 2 *Wooddeson*, 586, in the chapter on parliamentary impeachments, the learned commentator observes; "It is certain that magistrates, &c. 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 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." In p. 604, it is said, "the lords refused to commit the first earl of Clarendon, because he was impeached of high treason generally, the particular species of his supposed criminality not being denoted; but this refusal was highly resented by the commons, who voted it an obstruction to the public justice of the kingdom, and a precedent of evil and dangerous consequence."—In p. 605;—"These articles need not pursue the strict form and accuracy of an indictment; for it has been ruled, that by the law and usage of parliament, in prosecutions by impeachments for high crimes and misdemeanors, by writing or speaking, the particular words supposed to be criminal are not necessary to be expressly specified in such impeachments. The resolution indeed passed in a party cause; but it seems agreeable to a concession of the lords several years before, that the commons might, if they pleased, impeach in general terms; and the ancient precedents are rarely conformable to the technical exactness required in other prosecutions." The course pursued yesterday by the learned counsel for the Respondent in regard to the law, has imposed on us the necessity of making some further investigation, and of citing precedents from the common law. In 2 *Co. Inst.* 279, we have the form, which is very general, of the ancient writ of *quo warranto*. This process was succeeded by a more convenient mode of prosecution by informations in nature of *quo warranto*; and these are in use with us. (10 *Mass. Rep.* 290.) The information is general; the respondent must answer specially. I will refer also on the same subject to *Rast. Entr.* 412, 6 *Com. Dig.* 65, and 3 *Bl. Comm.* 262.

Mr. WEBSTER. Will the learned Manager say that there is any resemblance to a *quo warranto* in an impeachment?

Mr. DUTTON. I state the authorities. I shall use them in argument in such way as I think they will bear.

At 20 minutes before 10, Mr. BLAKE proceeded in his argument:—

Hitherto, Mr. President, it has been my intention merely to consider the general principles of law which are applicable to the trial by impeachment, under the constitution of this Commonwealth. It is my present business to apply those principles to the case in question; and I am very greatly mistaken in all the views I have been able to take of the subject, if it may not be demonstrated beyond the reach of contradiction, not only that there has been nothing proved, but that there is in fact nothing even alleged against the Respondent, which, for a single moment, could be deemed sufficient to justify a conviction. With reference to the state of facts, as they stand upon the proofs before you, I feel myself warranted indeed in pronouncing, that when divested of the gloss and false coloring, which are always to be expected in the statement of prejudiced and exasperated witnesses, they contain nothing

which could even seriously affect the reputation, much less establish the guilt of the Respondent, either as a magistrate or a man. I profess not, Sir, to have become acquainted with any peculiar circumstance attending the remote origin of the present prosecution. I know not what private piques and jealousies; what local discontents; what hopes or what fears of any seeker of the office of the present incumbent, may have been mingled in its conception. I know only that the impeachment came to us, directly from a high and most respectable branch of our government, and for that reason, if for no other, it is undoubtedly entitled to the most serious and respectful attention. There are however some circumstances in the case, which are apparent on the very face of the record, and upon which therefore, though not immediately connected with the substantial merits of the cause, it may not be improper for me to bestow a few preliminary and cursory remarks.

On looking at the articles of impeachment, we find that they embrace in point of time, a period of almost fifteen years, the full moiety, at least, of the active life allotted to man;—that they comprehend, within their scope a great variety of petty items in the official transactions of the Respondent, which are obviously picked up from every quarter of his precinct.

It is manifest indeed that every nook and corner has been ransacked for the materials of this prosecution; that no little obliquity, no trivial irregularity, in the whole course of his official proceedings, has been overlooked, which could have been brought in to swell the catalogue of his delinquencies.

From all this we have authority to infer, that somebody (not surely the House of Representatives, nor any one of its Hon. Managers) has been on the alert, extremely busy and astute in preparing the matter of this accusation. The Hon. House, though ostensibly the makers of the bill, did not assuredly provide the materials of which it is composed. It was their duty, and the whole extent of their duty as the grand inquest in this case, to act upon the evidence which was brought before them. In a word, Sir, the hand of a prosecutor, and of a very vigilant one too, is visible throughout. Enough too is understood of the common propensities in human nature, to convince us, that this prosecutor cannot have been destitute of collateral aids, of all the ordinary "*means and appliances*" that could be desired for the furtherance of his purpose. It is quite enough, we know, especially with regard to the public functionary, that the trump of accusation should be blown, that the cry of *fraud, fraud*, should be sounded in the land, in order to bring forth the voice of thousands to reiterate and swell the peal. Such is, and ever was, the propensity of man.

From these considerations, and from various others of a similar tendency that might be suggested, there is, as I think, the best possible reason to conclude, that there is now in array before this Hon. Court, a complete presentment of every impropriety, great or small, which could by possibility be imputed to the conduct of this Respondent, through the whole course of his official career.

And what after all, Sir, is the result of all this diligence, this scrutiny, upon the conduct of this individual? What, in a general view, appears to be the aggregate of all the supposed misdemeanors that are imputed to him? So far as he is charged with extortion or bribery as a judge, and it is for this or for nothing, that he stands regularly accused before you, it will be seen by arithmetical computation, that the paltry sum of about forty six dollars, in the course of fifteen years of active, official employment, constitutes, even according to what is set forth in the articles, the entire amount of the alleged peculation! Well indeed might it be, as it was said, by the Hon. Manager, that this is no case of the "ravaging of provinces, or the plundering of an empire."

I concur, however, entirely with the learned Manager, that it is not by the smallness of the amount, in such case, that we are to measure the degree of offence. On the contrary, I will most readily admit that the degree of criminality should be estimated in the very inverse ratio of the amount of temptation.

But, Sir, when we consider what has hitherto been the character and standing of this Respondent; that he was educated to a liberal and honorable profession; that he has, for many years, occupied a high public station; that he is learned and intelligent; and above all, has a family and friends, whose love and esteem and confidence must have weighed, in his estimation, beyond all pecuniary or earthly considerations; under such circumstances, I hold it to be utterly impossible, that by the temptation of any such sum as has been mentioned, picked up as it must have been, by a few dimes and cents at a time, through a protracted series of years, he can have been influenced to the perpetration of deeds which could, by possibility, expose him to ignominy and ruin.—The supposition is against nature, and nature's laws, and cannot be endured!

On looking at the character of man, and to the ordinary transactions in society, we do not find, that bribes of this description are according to the tariff of corruption. Men who are prone to be corrupt, if time and opportunity be allowed them, have genally been found in the practice of their frauds upon a much more enlarged and extensive scale.

Permit me here to remark, Sir, that of all the offices under the government of this Commonwealth, that of judge of probate, especially for the county of Middlesex, bordering, as this does upon the great metropolis of the State, must afford the widest scope, and the most convenient opportunities to the fraudulent, and corrupt judge.

In allusion to this subject, it has been very properly stated by the Hon. Manager, that in the course of a single generation, the whole property of a county must necessarily be subjected to the disposal of this officer; and it is scarcely too much to suppose, that in his official arrangements of all this wealth, an opportunity must be afforded him, if he be corrupt, to cut and to carve for himself according to his taste and appetite.

In setting off dower; in the auditing and allowance of accounts; but more especially in the appointment of administrators, where creditors appear in competition, and where thousands may be dependent on the mere will and preference of the judge, it is most obvious, that his decrees, were he disposed to make of them a matter of barter and sale, might become to him a source of princely revenue. Yet do we find, Sir, that the Respondent stands accused of any thing like this? On the contrary, although every thing which existed must be taken, as I think, to have been alleged against him, and in its worst possible form, a few dollars and cents, through a succession of years, appear to have been the whole fruits of his suspected peculations!

Sir, I do solemnly protest; and I make my appeal to the feelings of this Hon. Court, and to their knowledge and experience as to the character of human nature, that, under the circumstances which have been alluded to, the very minuteness of the extortions that are charged upon the Respondent, must be considered as affording of itself incontestible evidence that they were, if committed at all, the result of mere mistake or inadvertency, and could not have proceeded from that corrupt intent, that *mala mens*, which is essentially necessary, to the constitution of crime.

Upon a question like this, I wish it were possible to command by my voice, the presence in this hall of the whole magistracy of the Commonwealth; it would be indeed, an assemblage of as much purity and intelligence, as could be found among the same number of individuals upon the face of this globe; I wish I could put to them, the facts in this case, and leave them to judge, according to the dictates of their own experience, as men or as magistrates, upon the point of innocence or guilt; and I should then like to see, which of the congregation may not have fallen into some mistake like those that have been supposed; which would have the conscience to cast the first stone at our client as a token of condemnation!

What then, Sir, in a general point of view, is the aspect of the present prosecution—what the general scope and character of the delinquencies to which it has reference? Upon this head, I hope I may be permitted, for the sake of vindicating in the very outset of the inquiry, the moral character of our honorable client, to speak first of all negatively.

Among the variety of details which are contained in the fifteen laboured articles of this impeachment, we no where find that, as a judge, he stands accused of any sinister or corrupt decrees; with any partialities, with any unreasonable delays or denials in the exercise of his official duties. Much less do we find that any thing is imputed to him like severity, or oppression, by the weight and force of his authority as a judge. These, Sir, are among the more ordinary transgressions of ill-disposed magistrates, but they seem not to have been reckoned among the faults of this Respondent. On the contrary, it will I trust be admitted on all hands, for it is a matter of notoriety, that there is not a county in the Commonwealth, wherein the arduous and difficult duties of a judge of probate have been performed with more promptitude and exactness, with more ability; and, I may add, with more kindness and accommodation to the citizen, than they have uniformly been in that county to which the office of the Respondent appertains.

Accordingly it is perceived, and the circumstance is of so singular a character as to deserve the particular attention of this Hon. Court, that with the exception of a solitary instance, and that, as we shall have occasion to show, an extremely questionable one, not an individual has appeared before you through the whole of this investigation, complaining of a grievance, or injury of any kind, at the hands of this judge.

It would seem to be but reasonable to expect, that if the conduct of a public officer had been marked, as is pretended in the present case, for a series of years, by an habitual course of peculation and injustice, the actual sufferers by such frauds, would have been the first and the loudest, to proclaim his malefactions. Who then, Sir, are the supposed sufferers, by the manifold iniquities of this Respondent? Paradox as it may seem, we find nevertheless on inquiry, that if any have been offended against, they are those only who appear before you reluctantly, and in mere obedience to your summons. Those only who, being here, complain not of injustice, but are grateful for favors; and instead of accusing the Respondent as an oppressor, have spoken of him as their friend and benefactor.

With the single exception that has been alluded to, such we have perceived to be the views and the feelings of every witness who has been called to testify upon this occasion. Yet it is from these witnesses and none others, that all the evidence which is adduced in this case has been derived; and if any crimes have been committed, it is they, and they only, who have been aggrieved by those crimes. Hence we have too much reason to infer, that the accusation against our client must have originated rather in that overweening solicitude for the public good which is sometimes busied about trifles, than in the conviction that any great evil were existing in the community, which seemed to require the interposition of the highest judicial power of the Commonwealth.

Having submitted these preliminary remarks, which have appeared to me as being fit and proper for the occasion, I will now, with your permission, Sir, proceed to a more immediate consideration of the specific grounds of complaint which are set forth in this impeachment.

It is not however my intention, either now, or at any other time, to enter into a minute examination of each of the articles separately and distinctly; or to attempt any thing like a critical apportionment of the evidence which has been adduced in their support. In this course of examination there has already been presented to us, by my learned friend who preceded me, a statement so perspicuous and forcible, that it would be presumptuous were I to attempt, by any observations of my own, to give to it much additional strength, either in the way of illustration or argument. I shall therefore confine my remarks to such general views of the subject, as seem not to have been particularly urged by the gentleman alluded to.

On recurring to the articles of impeachment the charges against the Respondent appear all to be reducible to the following heads:

1st. The holding of probate courts at times and places not warranted by law, and transacting official business thereat in the absence of the register.

2d. That the Respondent, at certain probate courts, in his capacity of judge, demanded and received, for certain official acts, other and greater fees, than those allowed by law.

3d. That being judge of probate he also acted in the capacity of counsel, and gave advice to persons who were executors or administrators in his county, and received fees for such advice; and this too, in some instances as to matters which might come in litigation before him, as judge.

4th. That as judge, he allowed in the account of administrators and guardians the very sums he had received of them when acting as their attorney or counsel.

It may, I think, be stated, Sir, that within the scope of the charges here enumerated, are, virtually, comprehended all the grounds which have been seriously relied upon by the Hon. Managers in support of this prosecution; and as to the law and the facts which are applicable to each of these charges, I would beg leave to submit a few brief and cursory remarks.

First then as to the holding of probate courts at improper times, &c.; it will be perceived that this allegation, if so it may be denominated, extends alike to the five first articles of the impeachment, and is set forth in each in almost precisely the same words.

In reference to this charge I would beg leave first of all to notice a circumstance which was not adverted to by my learned associate; that this does not appear in either of the articles that have been mentioned to have been laid as a substantive offence; and hence we have authority to infer that as such it could not have been intended to be relied upon. Much indeed was said about it by an Hon. Manager in the course of his remarks; but in all this we think he was wandering from the record; and treating of a subject not now under consideration.

In our view, this charge, or to speak more properly, this intimation, this suggestion as it stands in the articles, is to be regarded but as a prelude and inducement to the matter which succeeds it; and to have been introduced merely as a circumstance giving a degree of color and aggravation, to the principal offence which was intended to have been alleged.

On recurring to the articles that have been mentioned it will accordingly be perceived, that the supposed impropriety, as to the time or place of holding the courts, is uniformly followed by the statement of some transaction at such courts, which, of itself, was deemed sufficient to afford grounds of accusation.

But, Sir, all this may, perhaps, be regarded rather as matter of form, than as belonging to the substantial merits of the case; and is not therefore deserving of further consideration.

We are then quite willing to admit, if this Court will consent to proceed upon the ground of such concession, that the question here submitted shall be, not whether any offence like that alluded to is charged by the impeachment, but whether any such has been established, by the law and the evidence.

In the discussion of this point I shall not trespass upon the patience of this Hon. Court, by attempting to follow the learned Managers through all the labyrinths of the English law; of all those ancient statutes and ordinances and usages respecting the

Probate jurisdiction, which they have seen fit to explore upon the present occasion.

The very few remarks which I have to make upon the question will be directed to the consideration of what we find respecting it in our own times, and in our own laws and constitution; and indeed it was this ground after all, and this only, independently of authorities derived from any other country, that the learned Gentlemen were eventually compelled to stand upon in defence of their positions.

Accordingly we were referred to that clause in the constitution of Massachusetts, chapter 3, article 4, which provides that "the judges of probate of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people shall require. And the legislature shall, from time to time, hereafter appoint such times and places; until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct."

We were then referred to the 10th section of the act of the 10th March 1784 [*Mass. Laws*, 187.] which provides; "That the judges of probate in the respective counties of this State, shall have certain fixed days for the making and publishing their orders and decrees, and such days to be made known by public notifications thereof in the several counties."

Passing over a course of antecedent reasoning and references of the Hon. Gentlemen which seemed to be more curious than useful; and at any rate not to have any material bearing upon the point, I believe I am fully justified in stating, that the two provisions which have been recited comprise in fact the whole ground, or at any rate, the only ground that could be deemed even plausible, which was assumed in support of their argument.

Proceeding then upon the supposition that neither in our constitution nor laws there were to be found any other regulation which would seem to justify the conduct of the Respondent in regard to the proceeding which is deemed so offensive, I would beg leave to inquire if the principle contended for on the other side be quite so clear, and even self evident, that any judge in the land might not be supposed to entertain a doubt respecting it, without being exposed to all the complicated horrors of impeachment?

As to the subject of fixed times and places for the holding of courts, we perceive that the provisions, both of the Constitution and the law are merely directory; that they contain no restrictive, or prohibitory words, that may be construed as an interdiction of any preexisting law or usage in such cases. We know full well, also, (for of this circumstance we have been sufficiently apprized by a portion of juridical history with which we have been favored by a learned Manager,) that in that country from whence our probate jurisdiction, with all its incidents, was derived, the office of the ordinary, or, as we have it, *the judge of probate*, was always, merely ambulatory; that as to the time and the place of holding his courts every thing was left to his own opinions and discretion. Such we know, moreover was the law and the usage in this then colony, antecedent to the adoption of our constitution.

Hence it would seem but reasonable to infer, that if it had been the intent of the constitution, or the law, to effect a fundamental change in the system; to correct a well known prevalent usage, and to place these courts upon a new and different establishment, there would have been employed for this purpose apt and sufficient provisions, which should have admitted of no diversity of interpretation.

Under the circumstances that have been stated, I may be permitted, at any rate, to demand the judgment of this Hon. Court, and with some degree of emphasis, if it would not be repugnant to every principle of justice; a violation indeed of the common charities which are due to the frailty and fallibility of human nature, were it admitted, for a moment, that an erroneous decision in such a case, might be received as the evidence of crime.

Whatever at any rate may be the true constitutional provision that has been referred to; admitting, for a moment, that the views which appear to have been taken of this subject, by the Respondent were entirely fallacious; if there be any thing in this affording evidence of a deliberate outrage upon the constitutional law of the land, the Respondent nevertheless may derive, both as a magistrate and a man, some consolation from the reflection, that in this respect he did but follow the high example which had been set before him by the whole legislative authority of the State; who, by their public acts, had again and again committed a similar outrage. I refer, Sir, to those repeated acts of the Legislature which have been passed from time to time for the accommodation of particular counties in the Commonwealth, whereby, (the stubborn provision of the constitution notwithstanding,) judges of probate have been specially authorised, so far as the Legislature were empowered to delegate such authority, to appoint at their discretion, other times and places for holding their courts, besides those which were heretofore regularly established by law. It need not be said, that, upon the construction that is contended for by the learned Managers all the acts here alluded to

are nothing more nor less than a palpable infringement upon the constitution. Thus then we have the legislative exposition of the rule; and shall it be imputed to the Respondent as a crime, that he was not more wise than those whom we have appointed to be the makers of our laws; or that in forming a judgment upon the subject in question, he should have allowed himself to be influenced in any degree by the weight of their example?

But Sir, even this is not all which we have to say upon this branch of our subject. Beyond all this there is yet in this cause a place of refuge and of rest for the Respondent, in which it is not possible he should be disturbed, however unrelenting the severity with which he shall be pursued. I allude to the provision in the act of March 7th 1806, which was referred to by my learned associate and which is mentioned again only for the sake of once more reminding this Hon. Court how absolutely conclusive is its operation upon the question now in debate.

It was the intention of this act, after the appointment of certain fixed times and places for holding the court of probate within the county of Middlesex, to give to the judge of that county, the same discretionary authority as to other times and places which by previous acts, that have been alluded to, had been given in such cases to the probate judges in certain other counties; and the provision alluded to is in these words, viz:

"That when the said times and places shall be found to interfere with the terms or sessions of other courts, or when the judge of said court of probate, for the time being, shall be prevented, by reason of sickness, inevitable casualty, or other cause, from holding the same at the time prefixed therefor, or when it shall appear to him to be for the general benefit or the interest of individuals, he shall be, and is hereby fully authorised and empowered to appoint such other times or places for holding said court as he shall deem expedient, by giving public notice thereof or notifying all concerned;" &c. [1 *Mass. Laws*, 335.]

It being then admitted, or at any rate established beyond all contradiction by the proofs in the case, that in every instance of the special courts alleged to have been holden by the Respondent due notice thereof had been previously given to all the parties concerned, the only remaining question, so far as relates to the point under consideration, would seem to be reduced to simply this; whether a judicial officer be chargeable with a high crime and misdemeanor, whether he be liable to impeachment, and thereby to be deprived, not only of his office, but of his common privileges as a citizen, for having assumed as the basis of his judgment and proceedings in a given case no better authority than an act of the legislature of the Commonwealth, which might by possibility, be construed an infringement of the constitution. Sir, I will not comment on such a proposition!

But alas! it is alleged as another crying sin of this Respondent, that he should have had the presumption to hold some of the courts that have been alluded to, in the absence of his register; and it has been elaborately and strenuously urged by an Hon. Manager, that the register, being a constituent part of the probate court, every transaction of the judge which was not performed in the presence of that officer must be regarded as being founded upon a mere assumption of power, as warranted by no legal authority and void.

It was really to have been expected, that in the maintenance of a proposition, so novel; I may add so apparently at variance with all notions of common sense; there would have been an attempt on the part of the Hon. Managers to have shown to this court something like a familiar principle, a known and established usage, or at any rate the semblance at least of some plausible argument. More especially was this to have been expected, after the assurance which had been given us by one of the learned gentlemen; that he professed to "stand upon the law, upon the statute, in support of every part of this prosecution." In regard to the proposition here alluded to, it would seem to be almost superfluous to remind this court, how sadly the learned advocate has fallen short of the fulfilment of his engagement.

Upon this subject, as well as every other connected with the prosecution, the Hon. Gentlemen have given us the most decisive proofs of their great industry and depth of research upon this occasion; we have indeed been much entertained, and edified also, as I admit, by the profusion of ancient learning which they have been pleased to spread before us; but I submit, if it be not a most remarkable circumstance, considering the apparent confidence with which the position alluded to was assumed, that all the law, and every thing bearing the semblance of authority, which has been brought forward in its support, consists, after all, of one single dictum, one solitary scrap of intelligence, comprised within the compass of less than two lines, which has been discovered in the work of an ancient English commentator upon the ecclesiastical usages of that nation; wherein it is laid down in so many words, "the ordinary may not speed a cause without the attendance of his register."

I readily admit, Sir, that the office of the ordinary, under the ecclesiastical jurisdiction in Great Britain, bears a near resem-

blance, in regard to many of its powers and attributes, to that of the probate judge in Massachusetts; but I am not, I confess, quite so ready to concede, that the report of a mere dictum, or even a grave ordinance of an English bishop, who may have lived some centuries ago, with respect to the functions of his register, or any other subject connected with his jurisdiction, shall be regarded as the law of this land, unless there shall have been given to it, at least, some countenance by the constitution and law of the Commonwealth.

What then do we find in this constitution or this law, which would seem to give support to the lone authority which has been alluded to, and upon which indeed the whole argument of the learned Managers appears to be bottomed?

The constitutional provision has only regulated, we know, the manner in which the register of probate shall be appointed, leaving it as the proper business of legislation to define his duties, and to do every thing else which might be deemed expedient in relation to that office.

Accordingly, by the statute of March, 1784, we find the whole subject completely disposed of, and every thing appertaining either to the office or officer particularly specified.

The provision is, "that there shall be, in manner as the constitution directs, a suitable person in each county within this Commonwealth, appointed or to be appointed, register of wills, administrations, accounts, decrees, orders, determinations, and other writings which shall be made, granted, or decreed upon by the judges of probate of wills in their respective counties; which register shall be sworn to the faithful performance of the duties of his office; and have the care, custody, and keeping of all files, papers and books to the probate office"; &c.

Here then we have, Sir, an exact enumeration of all the powers and the duties of a register of probate; and I would beg leave, most emphatically, to inquire of the learned Managers, what they can discover in all this, which would seem to give color to their inference, that the register "is a constituent part" of a probate court; in other words, that his office is so colleagued, so absolutely interwoven with that of the judge, that the latter may, on no occasion, "presume to speed a cause" without the presence of the former. I would not, Mr. President, presume to treat with levity any argument which should appear to be urged with seriousness by either of the learned Managers, who so well know how to make the most of their case, but I cannot forbear remarking, that the position which was assumed in regard to the particular point under consideration has seemed to me but little short of being ludicrous. As well might it, I think, have been said on the other hand, and even with more appearance of propriety, that the whole business of the register, such as the recording a will, the transcribing an administration account, and the various other official writings which it might require the labor of many days to copy into his book of records, must nevertheless all be performed in the presence and under the very eye of the judge. Indeed, if the two officers in question be thus connected and inseparable, it would seem to follow as a consequence, that not only must the person of the register be in attendance at all the courts, but it becomes his duty also to transport on such occasions, from place to place throughout the county, his archives and every book and paper which is to afford the evidence of his proceeding. Surely, Sir, there is to be found in the specification which is given us by the statute of the duties of this office, nothing that can give countenance to any such absurdity.

For aught that we find in this law the respective duties of the judge and the register are entirely distinct and independent; as much so indeed as the duties of the chief justice of our supreme judicial court, from those of the clerk, or even of the crier, whose humble province it is, (if the court so please to order) to proclaim the opening and the adjournment of the session. With reference to the functions and the station which are assigned by the law to a register of probate, it is manifest that he must be regarded in every possible respect, as a mere ministerial officer, a mere clerk or recorder, having no discretionary power or authority of his own, but bound, in every case, to proceed in conformity with the directions of the judge.

It is not, indeed, until after all the duties of the judge have been consummated, that those of the register are supposed to commence. An application is made to the judge for a grant of administration; we find the register is but a silent, inactive spectator upon this occasion, until the business shall have been completed, and he is required, in the exercise of *his* functions, to record the proceedings and decree in the case. The probate of a will, or the allowance of an account of an executor, administrator, or creditor is contested; a trial of some sort is to be had; what do we find to be the predicament of the register in such case? He has no voice, nor can take any part in the investigation. It does not appear that there is authority given to him, by the statute, to be even so far auxiliary to the judge, in such a case, as to administer an oath to a witness. He is a mere mute on this occasion, and as to any useful, practical purpose, his presence would seem to be as unessential as the very chair whereon he sits. Indeed, Sir,

unless we should proceed upon the ground that the legislature were so far wanting in magnanimity, that they allowed themselves to be so far governed by a narrow, illiberal jealousy, in regard to the appointment of this officer, as to have given him a station merely for the purpose of his becoming a spy upon the judge, it is utterly impossible to imagine, considering the nature of the powers and duties that have been assigned to him, that it could have been their intention to require his attendance upon occasions where it would be obviously so senseless and unavailing.

Admitting however, after all, that the construction which has been given by the counsel for the Respondent upon this point is fallacious; there is yet one other question in the case; one indeed which the learned Managers, throughout the whole course of their argument, not only upon this, but upon all other articles of the impeachment, seem to have regarded as being but of secondary importance, but which in our view, is nevertheless deserving of *some* consideration.

I allude to the question of criminal intent; the *quo animo*, from whence these several aberrations of the judge may be supposed to have proceeded. We had hitherto imagined, though the principle seems, on the present occasion, to have been almost entirely overlooked by the learned Managers, that something more than the exhibition of the law, and the mere naked act of its violation, were necessary in order to establish the criminality of the party accused. We had indulged in the belief that the mind, as well as the body, must necessarily have some influence and agency in the consummation of crime; that there was in fact, a degree of good sense, as well as of legal principle, in the maxim; "*Actus non facit reum, nisi mens sit rea*"! In reference to all judicial officers, we had furthermore supposed that there was some little indulgence and charity due to them as well as to their fellow beings, on the score of the fallibilities and infirmities which are incident to our nature; that in the discharge of their official functions, they must, not merely have mistaken, but wilfully perverted the law, in order to have subjected themselves to a prosecution for crime.

Proceeding upon these principles, which we had indeed supposed to have become too familiar to admit of contradiction, I would beg leave to inquire of the learned Managers, (admitting their construction of the law to be correct) what evidence has been given us, tending to establish the corruption, or even to excite a reasonable suspicion, as to the purity of this Respondent, in any of the proceedings which have yet been alluded to? So far as relates to the subject of holding special courts at other times and places than those designated by the law, do we find, from the evidence in the case, that, if this were unjustifiable, it must necessarily be attributed to a sinister and corrupt motive; or is there not, at least, some tolerable ground for the supposition that it may probably have been with a view to the public accommodation? With regard to most of our judicial officers, who in the course of their public duties, are frequently called from their houses, and their fire sides, to sojourn in various parts of the Commonwealth, we certainly do not find that they are so greedy of employment, as to be willing to sacrifice the little repose, and relaxation, the domestic tranquillity and comfort which are allowed them in their customary vocations, for the sake of keeping up a perpetual, unceasing exercise of their public functions. For the greater accommodation of suitors, they do indeed occasionally consent so far to go without the ordinary routine of their official duties, as to attend to the examination of a cause at their chambers; but I do not remember that an example of this kind has ever been regarded as an offence, as an improper officiousness on the part of the Judge, but on the other hand, it has I believe been generally esteemed as the evidence of his kindness and condescension; as a proof indeed of his willingness to make, at least, an occasional sacrifice of his own personal ease and convenience to the public good.

These remarks, Mr. President, appear to me as being most particularly applicable to the circumstances and condition of the probate judge, so far as relates to the special courts which are the subject of complaint against him. The ordinary duties of his station are, as we all must know, of such a nature, that were he to decline attending to any other business besides that which must necessarily devolve upon him at the regular and stated sessions of his courts which are appointed by the law, he is nevertheless the very slave of his office. His leisure, his whole time, indeed, is literally broken up into a thousand fragments; insomuch that one would scarcely think it were possible there should be a single hour, from the beginning to the end of the year, which he might fairly be authorized to claim as his own. Where then, I repeat Sir, shall we look for a sinister motive which could have prompted to the holding of these special courts which are the subject of accusation? Was it that the judge must have been absolutely in love with labor and drudgery; or that for the paltry gain of some fifty or an hundred cents which, from the evidence in the case, appears to be about the amount of all the extra compensation which he could expect to obtain by any such extraordinary session, that he was willing thus not only to allow his domestic retirement to be broken

in upon, but to hazard at the same time his reputation ? Under the circumstances that have been adverted to, I humbly submit that it is most apparent upon the evidence, that if, in relation to the point under consideration, any law have been violated by the Respondent, the offence is solely attributable to error of judgment; to an excess of kindness and courtesy, and not to any of these selfish and corrupt motives which are essential, in such a case, to the constitution of crime.

Upon any other hypothesis, the conduct of the Judge on the occasions alluded to in the articles, presents to us an enigma which admits of no satisfactory solution. It is a species of self denial, of self immolation, I may say, which is without a parallel in any thing which we know in the history of human nature.

It is fully established by the evidence which is before this Hon. Court, that nothing ever was, or could have been, transacted at any of the special courts that have been alluded to, which must not regularly have come before this Judge of Probate at the stated sessions of his court which are appointed by law, had he chosen to await their arrival, instead of permitting his domicil, at Groton, to be thronged and disturbed at unusual seasons. It is also in proof before us, that if he presumed to act, on such occasions, in the absence of the register, it was not, at any rate, that he might thus have an opportunity of taking to himself the fees of that officer. Those fees, on the contrary, appear, in all cases, to have been regularly accounted for.

From these considerations it would seem to result as a necessary consequence, that if any improper motive be attributable to the Respondent, in regard to the proceedings which have been alluded to, it cannot at any rate have originated in any disposition to enlarge thereby the sphere of his official duties, or to secure to himself emoluments of which he might otherwise have been deprived. Upon the whole, I feel myself entirely warranted by the state of the evidence in the case, to aver that it is utterly impossible to find in it the slightest indication of a criminal intent.

We are then, as I think, reduced to the necessity, either of imputing to the Respondent a high crime which must have been without any conceivable motive; the mere result of that wilful, and wanton propensity to mischief, which is exemplified, only in the character of those monsters who sometimes appear in society, or of supposing, that if any irregularity existed in the case alluded to, it must have proceeded from an error of judgment, which the most upright and intelligent man in the community might very naturally have fallen into under similar circumstances, and for which, being a judicial officer, he cannot be holden accountable before this or any other earthly tribunal.

I will not affront the understanding of this Hon. Court, by supposing there can be a doubt, as to which of these hypotheses should be adopted as the basis of its decision.

With these observations, I dismiss the subject of the special courts, and the nonattendance of the register. I should not indeed have felt myself justified in detaining your Honors, for such a length of time, in the discussion of a subject, which, according to my own views of it, was so extremely plain and simple, but for the circumstance that it seems to have been regarded so differently by the learned Managers; who did not fail to bestow upon it a degree of emphasis and argument, that were to have been expected only in their treatment of a most serious ground of accusation.

In conformity with the arrangement I had proposed, I now proceed to a brief consideration of the matter charged against the Respondent which falls under the second general head of the allegations contained in the impeachment. In addition to the several misdemeanors which have already been noticed, it is a part of the accusation, which we find set forth, with some immaterial variation of circumstances in each case, by the five first articles of the impeachment, that the Respondent, in his capacity of Judge of Probate, did, on certain occasions therein mentioned, "demand and receive for certain official services, other and greater fees than those allowed by law in such cases."

In proceeding upon an examination of this branch of our cause, I must be permitted to say, that it is of the utmost consequence that we should at the very outset, come to some clear and distinct understanding as to the precise nature, in a legal point of view, of the offence, which is, or at least was here intended to be alleged. With reference to the circumstances, as they are stated in the article, it cannot, I suppose, be doubted, that if any thing like an offence, known at law, was intended to be charged, it must be the crime of extortion. It must indeed be this, or it is nothing. If then upon an examination of the evidence in the case, we find, as I am well assured we shall, that it is utterly insufficient to maintain the charge of extortion, then it will be contended, upon the principles which I have heretofore had occasion to consider so fully, that no offence has here been established, which can properly be made the subject of trial by impeachment.

Thus it becomes necessary that we should in the first place, attend to the legal definition of the crime of extortion; for it will not I trust be questioned by either of the learned Managers, that if this be the of-

fence which was intended to be charged, "the same rules of evidence, and the same legal notions as to the nature and essence of the offence" must prevail in this Hon. Court as a Court of impeachment, which would be obligatory upon the inferior tribunals at the trial of the same offence by indictment.

According to the description which is given us of this offence in the books of authority, we perceive, then, that it "consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due." See Black. Com. vol. 4, p. 141. Also 1 Hawk. P. C. 170.

With reference to this definition of the offence, it would be easy to show in the outset, were it deemed necessary for our purpose, that there is wanting in each of the five articles of the impeachment which have relation to this subject, a most material averment, without which, (if I am correct in the principles that were stated in a former part of my remarks, as to the necessity, in all criminal prosecutions, of a formal as well as a plain and substantial description of the offence) it would be manifestly impossible for this Hon. Court, whatever might be the state of the evidence before them, to proceed upon any legal grounds in pronouncing a judgment against the accused.

The objection to which I allude is simply this; that although it is alleged that other and greater fees than those allowed by law were demanded and received by the Defendant, yet this is, in every instance, unaccompanied by any averment as to what were the regular, legal fees, for the particular services in question. It is I presume, Sir, beyond all doubt, that an omission of this sort would be fatal upon demurrer, or on motion in arrest of judgment, in a trial by indictment; and I know not why a rule of law, founded so obviously in reason and common sense, should not be deemed equally applicable, especially under the constitutional provisions which have heretofore been cited, to the trial by impeachment.

In support of the general principle, as it has been stated, I would here beg leave to refer the Court to the case in 3 *Leon. Rep.* 268; and also to what is laid down upon this point in 2 *Chitty's Criminal Law*, 146. *in nota.*

The case in *Leonard* was that of Stephen Lakes, commissary of the bishop of Canterbury, and R. Hunt, apparitor, who were indicted of extortion, "That they, *colore officiorum suorum*, had, *malitiose* accepted and received 11 shillings and 6 pence for the absolution of one B. who was excommunicated, where they ought to have but 2 shillings and 6 pence: among the exceptions taken to this indictment, one was;—because it is not showed what is their due fee; and that was conceived to be a good cause of exception; and if no fee be due, the same ought to appear in the indictment; and so it was the opinion of the court, that they should be discharged."

The familiarity of the principle may still further be illustrated by a reference to all the established forms of indictment for extortion, which, from time immemorial, have been in use in the courts of common law; wherein it will be perceived that the averment which has been mentioned, is not, in a single instance, omitted.

But, Sir, it is not, I assure you, with any view to avail ourselves, especially at this stage of the cause, of any apparent defect in the mere form of this prosecution, that I have deemed it proper to bring to your notice this last mentioned objection.

In regard to the point in question, it is not so much the ground which we assume, that sufficient is not alleged in the articles of impeachment, but that enough has not been established by the proofs in the case, to make out the crime of extortion. I feel myself fully warranted indeed, by the state of the evidence, in going still further; and in assuming it as an undeniable position, in point of fact, that not the semblance of proof has been adduced by the learned Managers, in a single instance, having even a tendency to show that as to any official act of this Respondent, a greater fee was received than such as is provided by law for that specific act.

A very little attention to the evidence which is in the cause will, I think, be sufficient to satisfy the Court, beyond all doubt, of the truth of this assertion.

The Hon. Managers, in the course of their argument, were pleased to say that, in relation to the matter charged against the Respondent on the score of receiving excessive fees, they should stand upon the fee-bill of 1795. Be it so; we most cheerfully meet them upon that ground; and if any regulation which is to be found in the act alluded to has been violated by the Respondent, he is entirely willing to stand convicted before you.

With reference then to the provisions of this statute, as affording the rule, and the only rule of decision, let us attend for a few moments to the matter which is alleged, (and to that also, if it please the Hon. Managers, which is not, but regularly, should have been, alleged in the articles) and to the evidence which is relied upon for its support.

Considering however that the averments in each of the five articles that have been alluded to, so far as relates to the point now in question, are much in one and the same form; and that there is, in relation to each

of them, precisely the same general ground of objection, as to the utter insufficiency of the proofs whereby it has been attempted to support them, it would be quite an unnecessary consumption of time, to go into a particular examination of these articles separately and distinctly. I will therefore confine my remarks, for the present at least, to the matter which is charged in article first, as affording an example which will sufficiently illustrate the whole scope of the exception which we take to the evidence which has been relied upon in the cause.

In the article alluded to, it is among other things alleged, that the Respondent on a certain time at his office in Groton, and not at any probate court held according to law, did decree and grant letters of administration on the estate of one Nathaniel Lakin, to one Abel Tarbell, and thereupon, did issue a warrant of appraisement and order of notice; and that the Respondent, did then, and there, wilfully and corruptly, demand and receive of said Tarbell, for the business aforesaid, as fees of office, other and greater fees than are by law allowed, to wit, the sum of five dollars and fifty eight cents.

Here we see, Sir, and the same will be perceived on recurring to the four succeeding articles, that material defect in the averment, to which I have before had occasion to advert. Admitting however that it is competent for the learned Managers to supply by their proofs, what is obviously so deficient in their allegation; I would now beseech them to bring the evidence which is in the case to the test of the fee-bill whereon they rely, and then to inform us, for which of the official acts of the Judge that are enumerated in the article, it stands now in proof, that an unlawful compensation was received? It may be that the aggregate amount of fees that were received by the Respondent, on the occasion alluded to; or even that the sum of five dollars and fifty eight cents which is alleged as being but the excess over and above his lawful fees, shall be found upon computation to be more than the entire amount of what he might rightfully have claimed for the specific services enumerated. I humbly trust, however, that upon a solemn trial before a High Court of impeachment, or indeed before any tribunal professing to be governed in its proceedings by any legal notions or principles, it will not be deemed sufficient by any gross, lumping calculations of this nature, to attempt to maintain the charge of extortion. More especially since we learn from the authorities which have been referred to, that in a prosecution for this offence, before the courts of ordinary jurisdiction, every individual, official act of the magistrate, which is intended to be made a matter of complaint against him, must be set forth by the indictment, separately, as a distinct, substantive ground of the accusation.

But, Sir, we do not stop here. Our principal objection to the insufficiency of the evidence that is offered in support of the articles in question, partakes still less than what might possibly be inferred from my former observations upon this point, of any thing in the nature of an exception to form.

On referring to the whole evidence, as it now exists in the case, I will venture to assert, without the fear of contradiction, that it will not be found to contain one jot or tittle of proof giving authority for the inference, or even to justify a suspicion, that, for the official services which are shown to have been rendered by the Judge on the occasion alluded to, whether those services be estimated collectively, or each, by itself, as a separate item, a greater compensation was received by the Respondent, either upon the whole, or for any particular service, than might fairly be received without the least appearance of an infringement upon the regulations of the statute which has been mentioned.

We find it stated, in the article under consideration, that the business performed by the Judge, at the court therein mentioned, consisted of a decree, and grant of letters of administration; secondly, a warrant of appraisement, and thirdly, (if this may be regarded as a separate act) an order of notice.

Now on turning to the statute, we perceive that the two first of these acts, namely, the grant of administration, and the warrant of appraisement, are indeed, noticed in the fee-bill; and that for the former the sum of fifty cents, and for the latter, thirty cents, are stated, respectively, as the fees.—As to the order of notice the statute is silent. We find in it no allusion, even, to any such process.

If then it were the fact, that no other official service was performed by the Judge, in the case in question, than those which have been mentioned; and that for these services he wilfully and corruptly demanded and received a greater sum than even the eighty cents allowed by the statute, it could not, indeed, be denied, that we have before us a palpable case of extortion; and I do not hesitate to admit, also, that it is a case of a most bold and flagrant character.

But, Sir, there is presented to us by the allegations in the article alluded to, but a very imperfect, stinted view of the case, which has been developed in the course of the trial. It is now distinctly in evidence before this Hon. Court, that the papers which were furnished upon the application of Mr. Tarbell, and for which a fee of some sort was demanded and received by the Judge, were somewhat more numerous, and

partly of a different description from those which are stated in the article. They appear in fact to have been a complete set of administration papers, so called, which not only in the county of Middlesex, but in every other county within the Commonwealth, it appears to have been customary, almost from time immemorial, for the administrator to receive and to pay for, from the judges of probate.

A set of these papers has been submitted to the inspection of the Court, and they will have been seen to be of the following description, viz ;—

1. A formal petition or application to the Judge, in writing, praying for a grant of administration.

2. A written decree of the Judge, containing the evidence of such grant.

3. The commission, or as it is more generally, but less technically denominated, the letters of administration.

4. The blank form of the administrator's bond.

5. Warrant of appraisement.

6. Orders of notice, &c. &c.

Such, from the incontestible evidence in the case, appear to have been the papers which were prepared by the Judge and voluntarily paid for by the administrator, in the case alluded to. We are, indeed, without any evidence whatever, (but this circumstance is not, I humbly submit, attributable, in any degree, to the fault or negligence of the Respondent) as to the precise sum which may have been received, as his fee, upon any one separately, of the documents which have been enumerated.

Yet from the testimony which has been given before the Court, as to the common usage, in similar cases, as well as from the very nature of the transaction, we have the best possible reason to presume, that neither of the papers in question was pretended by the Judge to have been furnished gratuitously, or without demanding a stated fee of some sort for the labor of preparing it.

Such, then, we perceive to have been the nature of the business performed by the Respondent on the occasion referred to; and for which, not only the sum of five dollars and fifty eight cents which is mentioned in the article, but perhaps also, (though of this nothing is alleged in the impeachment) still further sums were received in the way of compensation.

And here, Mr. President, I beg leave to pause, for a moment, and to request of the Hon. Managers, that they would point their finger to any scrap of the evidence that has been adduced, tending to show that for any one of the papers that have been specified, a greater fee than that allowed by the statute, was, in fact, received by the Respondent. More especially I would inquire, to what portion of this evidence they would resort for the proof, that more than fifty cents was received for the grant of the administration, or more than thirty cents for the warrant of appraisement, which are above referred to in the article ? I will venture to affirm that no evidence upon this point, either on the one side or the other, will be found to exist in the cause ; yet it cannot be doubted that it was incumbent upon the learned Managers to make good the accusation, as we find it set forth in the article ; and that, to this end, it was indispensably necessary that their proofs should have been brought home to those particular acts of extortion which are therein enumerated.

But it may be said to the Respondent, on the other side, (and this is all, indeed, that can be said by way of encountering the difficulty alluded to) that if you have mingled your proper official acts with sundry extrajudicial proceedings, which happen not to have been provided for by the statute, and have taken, in the way of fees, a round sum for the whole, this shall not avail you ; although the party may have consented, and very cheerfully, and even gratefully, paid his money for your services, it is nevertheless a fraud upon the law, and cannot save you from conviction as an extortioner.

In answer to any arguments of this sort, that may be urged, I would beg leave to repeat the idea which has already been slightly intimated, that it was by no means owing to any culpable omission, of the Judge, that the proof is not now before this Hon. Court, as to the precise amount of fees which were received by him, for each of the services which are proved to have been rendered upon the occasion alluded to. In relation to this subject, there is, we know, a particular clause in an act of our legislature, which was expressly intended to provide for cases of this kind, and of which, if the party supposed to have been aggrieved by the extortion complained of, had chosen to avail himself, there would at once have been an end of all difficulty in ascertaining the particular instance wherein the Respondent might fairly be accused of this species of imposition.

I allude to the fifth section of the fee-bill ; which requires of the civil officers, in certain cases, to exhibit to the party upon a demand therefor, a particular statement of their claim for fees.

This law was undoubtedly intended for the double purpose of operating not only as a check upon the magistrate, but of enabling the individual also, to avail himself of the best possible evidence, whereby to establish the guilt of the party attempting to practise a fraud upon him. In the case under consideration, or in either of those alluded to in

the four succeeding articles, it does not, however, appear that any such bill of particulars as that which has been adverted to, was demanded of the Respondent; and it will not, therefore, as I humbly hope, be presumed, against the express words of the statute, that he was bound to present such a bill, or that he is in any measure, accountable for any embarrassment or inconvenience that may attend the present prosecution by reason of the absence of a document of this kind.

By way of rendering still more plain and familiar the principle for which I contend, I will take as an example for illustration, a case which, as we all know, is of every day's occurrence among magistrates whose official fees, as well as those of the Judge of Probate, are expressly prescribed by law. On referring to the very fee-bill of 1795, which is relied upon as the very foundation of the charge in the impeachment now under consideration, it will be seen that there is allowed to a justice of the peace, the sum of seventeen cents for taking and certifying the acknowledgment of a deed, and that no provision whatever, is made by the statute, as to any other service which he may be requested to perform in relation to such an instrument. Now, suppose the case, which, without doubt, is an extremely common one, that a magistrate of this description, in consideration of his experience, and supposed acquaintance with technical niceties, should be employed by some neighbor or friend, not only to take the acknowledgment, but to make the whole draft of some long and difficult conveyance; and should receive as a compensation for such service, the voluntary payment of an hundred cents, without exhibiting or being required by his employer to exhibit a bill of particulars whereby the amount intended to be given or taken for the bare acknowledgment might be ascertained. I beg to inquire, Sir, if the magistrate, in such a case, either on the ground of having vouchsafed to perform a service not precisely within the sphere of his official duties, or for having thus mingled his official dues with those which could be claimed only in his individual capacity, has been guilty of extortion, and thereby laid himself open to all the horrors of an impeachment? It may be so; but I will venture to affirm, that if such be our law of extortion, there is not an acting justice throughout the Commonwealth, who has not again and again been guilty of this offence, or who ought, therefore, to be suffered any longer to escape the ignominy of a public prosecution. Yet in point of principle, the case which has been supposed is not, in my opinion, at all distinguishable from that under consideration.

But it may be contended, and has been indeed, by the learned Managers, that a portion of the papers which appear to have been furnished, and for which fees were received by the Respondent, on the occasion alluded to, were superfluous, irrelevant, and it was therefore fraudulent and extorsive to annex them to his grant of administration, thereby imposing upon the party an unnecessary and useless expense. Here, Sir, I will very readily admit, that if actuated by sordid and sinister motives, a judge of probate, under the pretence of its being requisite to the fulfilment of any official duty on his part, should require and receive pay, for a series of idle, senseless formalities in any case, whether the compensation for such services were given voluntarily or otherwise, it might amount, according to its circumstances, to a case of extortion. But I must be permitted to say, that very different indeed from any thing of this kind is the aspect of the case now under consideration. It cannot but have been apparent to this Hon. Court, upon an inspection of the blank forms that were exhibited, indicating the course of procedure which has usually been adopted, in relation to a grant of administration, not only by the Respondent, but by his venerable predecessor, in the office of probate judge for the county of Middlesex, that all business of this sort has, uniformly been conducted in that county with most remarkable regularity and accuracy; and especially, that no formality has ever been required of a suitor, but such as was obviously appropriate, and in conformity with the strict principles of law. It seems, indeed, to be admitted, that with the exception of one only of the papers which have been alluded to, namely the petition, or memorial, from the party applying for administration, all the rest may be deemed, to say the least, unexceptionable. As to this formality of the petition, it has been, we admit, somewhat peculiar to the county of Middlesex; and from the evidence in the case, it does not appear that the probate judges of other counties have, generally, been accustomed to require it. In place, however, of considering this circumstance as exposing our client to imputation, I feel a degree of pride in adverting to it as one, among many other proofs of his superior accuracy and intelligence. Among all the forms which usually attend the issuing of letters of administration, there is not, in my humble judgment, a single one of more significance, and which seems to be more essential to the safe and orderly conduct of the business in question, than that of the petition. It is, to speak in technical language, the "*impetratio brevis*," the regular and proper inception of a proceeding in the probate court; and instead of its being regarded as a singularity, that the judge of one county only should have required such formality, it should rather be-

come matter of surprise, and even reprehension, that it should, any where, have been omitted.

Let us consider for a moment, Sir, the several facts and circumstances which ought to be established and become matters of record before the judge, in order to justify his grant of administration;—

First of all, he must have legal evidence as to the death of the testator or intestate.—Secondly, the goods and effects of the deceased; in other words, the "*bona notabilia*" within the proper jurisdiction of the judge, are of course a subject of inquiry and examination.—Thirdly, the claim of the applicant to administer, either as widow, next of kin, or creditor, must be established and ought to be so, in a course of legal investigation.

Permit me to inquire, Sir, if with respect to essential circumstances of this nature, however they may be deemed as merely preliminary to the main object in view, any prudent, intelligent judge of probate would, or ought to be willing to proceed upon the ground of mere, verbal representations? As well, I think, it might be expected that the judges of our ordinary common law tribunals, should consent to go on to the trial of a cause without the exhibition of a writ of any kind, and upon the mere oral statements of the parties in litigation. Suppose a conflict for the right of administration be subsisting between two or more of the pretended creditors; or betwixt divers individuals, each claiming precedence as being kindred of the deceased;—in such a controversy, the property of the respective competitors may be, and not unfrequently is, involved, to the amount of thousands; shall it then be expected of a judge of probate, in such a case, that he will go on to its final decision, without having it, at all times, in his power to show, by his record, as well the manner of the commencement, as the termination of the process?

Thus it is, as I think, perfectly apparent, that no irregularity is imputable to the Respondent on the ground of his having required, at any time, of parties transacting business at his courts, a compliance with any oppressive or needless formalities: It would, however, have been quite sufficient for all the purposes of our argument upon this head, if nothing more had appeared in the case than that the forms of proceeding which have been customary in the probate courts of Middlesex were such as, in the honest opinion of the judge, were fit and proper in the discharge of his judicial functions, however his own judgment, upon this subject, might happen to differ from that of any other man or body of men in the community; for it surely cannot be doubted, that, in a case, where the law which establishes the court, and defines its jurisdiction, has omitted to prescribe to such court the particular forms of its process, it necessarily becomes, not only the privilege, but the duty of the judges, in the exercise of a sound discretion, to establish their own forms and to require a conformity thereto.

Under the government of this Commonwealth, or of the U. States, we do not indeed find many instances, wherein great latitude appears to have been given to the judges of our ordinary courts of judicature, for the exercise of that discretionary power to which I have adverted. In the courts of the United States, the forms of process, we know, (excepting those that pertain to the equity, and admiralty and maritime side of their jurisdiction, which are to be governed by the course of the civil law) are particularly prescribed by statute regulation. So also it is with the courts of common law in this State. Very different indeed is, however, the predicament of our probate courts.

From the charter of William and Mary, which has already been referred to as having laid the foundation of the probate court in this Commonwealth, we derived, indeed, all that was wanted, so far as regards the proper jurisdiction and powers of such a judicatory; but nothing more. It came to us unaccompanied by any directions as to those forms of procedure, without which its powers and the great purposes of its institution could not be carried into effect; nor does it appear that such forms have since been provided by any acts of our own government. Under such circumstances it results, of course, that all the immense variety of most important business belonging to this court, must either have been transacted without form or order, or that it became the duty of the respective judges, to establish, from time to time, such necessary rules and regulations as might seem to them meet and expedient.

Such appears to be the view which has always been taken of this subject by the several judges of probate throughout the Commonwealth; and it is not surprising, therefore, that on referring to the usages in the different counties, there should have been discovered some little diversity of practice in regard to matters of form, like that which I have already had occasion to notice as having been somewhat peculiar to the county of Middlesex.

But it is still contended by the learned Managers, that, even admitting the extra services which were rendered and the papers that were furnished by the Respondent, at the court alluded to, to have been regular; and such, and such only, as seemed to have been required by the nature of the case; yet, as neither the one, nor the other, are particularly provided for by law, and both are without the sco[illegible]e of the fee-bill, it was an

act of extortion, to demand and receive a compensation of any kind, for the fulfilment of any such official duty.

Sir, I do not think I speak extravagantly, when I say that the fallacy of this position was shown by my learned colleague to absolute demonstration. In my own view, at any rate, his arguments and illustrations seemed to be entirely irresistible; and it would therefore be presumptuous, were I to attempt to heighten their effect by any observations of my own.

Considering the nature and course of the business appertaining to the probate courts, the various official acts which must necessarily be performed by the judge, to which there is not an allusion, much less a particular amount of compensation annexed by the fee-bill, it seems to be utterly incredible that it could have been the intention of this statute to enumerate, specifically, all the duties of this officer, or to prohibit the taking of any fees whatever, except for the precise services therein specified. If such be, indeed, the true construction of this act, and the judge is entitled to claim no more than his fifty cents, for all the acts necessarily incident to the grant of administration in any one case, it is most certain, at any rate, that the whole emoluments of his office would scarcely be sufficient to defray the expense of the mere stationary that must be consumed in the performance of its duties. Their annual amount would not, I will venture to say, exceed the sum of two or three hundred dollars; and yet, as we all well know, the duties appertaining to the office of judge of probate, especially in a county like Middlesex, are of such a nature as must almost entirely preclude the possibility, from the beginning to the end of the year, of an engagement in any other occupation.

Admitting then the fee-bill, like all the other cotemporaneous regulations of our Legislature, in regard to public functionaries, to have been founded in that rigid economy which has, at all times, marked the character of our government, yet if it be also admitted that it was in the contemplation of the law, that the arduous and highly important office in question should be confided only to men of talents and respectability, it would be absolutely affrontive to the good sense of the Legislature, were we to put upon their act the construction which has been contended for.

Be all this, however, as it may, I must beseech the learned Managers, before they demand the condemnation of our client upon the accusation which is here referred to, that they would be pleased to put their finger upon any prohibitory clause of the statute, upon which we were assured their whole argument would be founded, inhibiting a judge of probate, at the peril of impeachment, from receiving a reasonable compensation, a mere *quantum meruit*, for useful services, in regard to which no precise fee happens to have been established by law.—More especially I desire, that they would have the goodness to refer us to any known legal principle, upon the authority of which they can be justified in giving so harsh a name, as that of bribery or extortion, to a transaction of the kind which is here alluded to.

I am absolutely certain that no such law can be shown, and hence, that against no law has the Respondent, in this particular, offended.

I proceed now, Sir, to the consideration of the third ground of accusation against the Respondent, which is, in substance, to this effect; "That being judge of probate, he did nevertheless, on sundry occasions, presume to act, in the capacity of attorney or counsel in behalf of certain persons who were then executors, administrators, or guardians, accepting from them retainers, from time to time; and, indeed, for having so acted, in one or two instances, in relation to business which then was, or thereafterwards might come, before him as judge. This charge, Sir, if, as it is set forth in the impeachment, it amounts to any thing, imports nothing less than the heinous, detestable crime of bribery, and is, of course, deserving of very serious and particular attention.

In reference to the facts and circumstances which are stated in the ten different articles containing a charge of this nature, the offences imputed to the Respondent may properly be ranged under these two distinct heads, namely;—

1. The having given advice to, and accepted retainers from divers persons, being executors, administrators, or guardians, in relation to certain probate matters, which were not however then pending in his court, and upon which he probably never would be called to adjudicate.

2. Having permitted himself to be retained as counsel, in relation to certain business in his office, which remained to be afterwards formally, and as we say, ministerially, acted upon, in virtue of his authority as judge of probate.

Such appears to be the substance of all the material facts which are set forth and relied upon in support of this article of accusation; and although the allegations here, as in the former case, are obviously insufficient, in point of form, yet we are quite content to meet them, as importing a charge of bribery. If indeed it be not this offence which was intended to be alleged, then we say, nothing is alleged amounting to any crime known in the law, and which, upon the principles

heretofore insisted upon, can be made the subject of impeachment.

It becomes necessary then that we should consider, for a moment, the legal principles which are applicable to the crime of bribery; and first of all that we attend to the legal definition of this offence.

We learn from the books of authority, that bribery is a species of offence against public justice;—"Which is when a judge or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in office."

In attending to this definition of bribery, it will be perceived, that the concurrence of two distinct things is absolutely essential to the constitution of this crime; first, that the reward received should be an undue one; and secondly, that it should have been given and received under such circumstances, as to indicate its tendency at least to produce a bias upon the conduct of the magistrate in relation to some matter connected with his official duties. I would here beg leave to remark, that in reference to the particular facts and circumstances which are relied upon by the learned Managers in the case on trial, it is of the utmost consequence that both these points should be distinctly kept in view, through the whole course of the inquiry.

I must be permitted then to remind this Hon. Court in the outset, that if the proofs which have been brought forward against the Respondent, be found upon examination to amount to no more than this; that, since his acceptance of the honorable office which he now holds, he has been occasionally engaged in business in the county wherein he resides, as an attorney and counsellor at law; that he has, on several occasions, accepted retainers, and taken fees for professional services, from persons who were administrators, executors, or guardians, and resident in the same county with himself; yet if it be not also in proof, that these retainers, and this advice, or these professional services, had reference to some case then pending before him, or upon which he might, at some time, be called to act as a judge, he is no more chargeable under such circumstances, with the crime of bribery, than he is with that of burglary or murder. In the case that has been supposed, the essential ingredient, that which constitutes, in fact, the very gist of the accusation, is obviously wanting to consummate the offence. It is, the acceptance of the "undue reward," in reference to some anticipated official act of the magistrate; the acceptance of the reward, under such circumstances as afford reasonable grounds for the supposition that it may tend to bias him in the exercise of his judicial functions; to "influence his behaviour" in relation to some matter upon which it may become his duty to officiate. It is in this, and this only, as I infer, that the great mischief consists, of that offence against public justice which is denominated bribery.

Accordingly, Sir, if it were in proof against our client that, in any disputed case which was pending, or even expected to come before him; if in any controversy concerning the probate of a will or the allowance of an account of any administrator, executor or guardian, he had demeaned himself by the acceptance of a gratuity, however inconsiderable, for any service supposed to have been rendered in favor of a party to the litigation, it would, without doubt, be a case of bribery.

I admit, moreover, without the least hesitancy, that, upon any legal ground, it would be entirely unavailing, either in the way of excuse, or even extenuation of the offence, that his final decision of the case in question should appear to have been just and upright; and entirely uninfluenced by any sinister consideration. In the contemplation of the law, it would be enough that he had voluntarily placed himself in the way of temptation; that, with reference to some official duty, he had accepted "an undue reward," and thereby exposed himself to the influence of those prejudices and partialities, from which the mind of a judge ought, most certainly, by all the means in his power, to be kept free.

It will be perceived however, Sir, on reference to the evidence in the case now on trial, that nothing of the kind which has been alluded to, is imputable to any official act of the Respondent. If I am not very greatly mistaken as to the state of the proofs which have been brought before you on this occasion, there is not a single fact or circumstance which can be mentioned, having even a tendency to show, that either in court or out of court, he ever presumed to act the attorney or counsellor; much less that he ever received a fee in regard to any disputed case; any controversy, whereupon he then was, or in the natural course of events, ever could be, required to act in his judicial capacity. Were it not for the great length of time which has already been employed in this discussion, and for the apprehension which I feel that the patience of the Court may have become wearied, it would afford me a degree of satisfaction to present here something like a recapitulation of the evidence that has been adduced, as it applies to the several charges in the impeachment, for the purpose of demonstrating, as I think it would be in my power to do, that I have not spoken too strongly or confidently in relation to the posture of the case, so far at least as regards the point now in question.

There are however, Sir, two particular ar-

cles of the impeachment, upon which, even at this advanced stage of the cause, I hope I may be indulged in submitting a few remarks, in addition to those which were made by my learned associate. I allude to articles sixth and twelfth.

From the very urgent and elaborate manner in which the matters set forth in these articles were pressed upon the attention of the Court, it is manifest that they have been considered by the learned Managers, as being of great pith and moment; as constituting, in fact, the very strong hold of the prosecution. So indeed, when viewed in comparison with any thing, and every thing else, which has appeared in the case, they unquestionably ought to be regarded; and it is most certain, therefore, that if the Respondent can legally be convicted upon either of the charges which have been brought forward against him, the conviction ought to be upon one or other of the articles here alluded to. I am nevertheless entirely content that the case, as it stands, upon either of these articles, shall be received by this Hon. Court, as but a fair sample of all the other charges in the impeachment; and that if there be any thing here to warrant a judgment of condemnation, it shall be taken as conclusive proof that the conduct of our client has been, in every thing, guilty.

What then do we find, from the evidence, to be the foundation of the charges in question?

The first of the articles here referred to, which is the sixth in the impeachment, has relation to certain transactions of the Respondent, in his capacity of Judge of Probate, which are alleged to have taken place about sixteen years ago, in regard to the partition or assignment of a portion of real estate, wherein one Mary Trowbridge and her sister appeared to be jointly interested as coparceners.

In the statement which is given us of these transactions (not indeed by the witnesses, but by the allegations of the impeachment) it presents to us, without doubt, a most foul, and flagrant case of bribery; and not of that bribery only which is a mere offence against public justice, but a species of the crime which would appear to have been aggravated by circumstances of the vilest treachery and fraud upon the rights of an individual. For it would seem from the circumstances, as they are stated, that, not only was the "undue reward received" by the Respondent, with reference to a contested question which was then immediately to be acted upon by himself, in his capacity of judge, (and this of itself would have been clearly enough to bring the case within the guilt of bribery,) but that the offence, if I may be allowed the expression, was doubly consummated by a most unjust and fraudulent decree.

It would appear, moreover, that upon the occasion alluded to, the price of corruption was by no means graduated upon that narrow, illiberal scale by which were measured out those few dollars and cents, which are alleged to have been the fruits of his various, subsequent acts of extortion. On the contrary if we were to rely upon the representations that are given us in the article, it would seem that the wages of iniquity, in this one instance, had been in some good degree proportionate to its baseness and its extent; for we are led to understand that the round sum of fifty dollars was actually received by the Respondent, as a consideration for the infamous act of assigning, by his decree, to one of two coparceners, who were litigating before him, the whole of a valuable estate, of which the other party must obviously have had an equal claim to a moiety. It is, also, a circumstance which should not be omitted in the enumeration of those which have a tendency to heighten the atrocity of the case stated in the impeachment, that the misdemeanor here imputed to the Respondent must have been among the very first acts of administration in his, then, newly acquired office of a judge; so that we are left to infer, that instead of devoting himself, as might naturally have been expected from a young and inexperienced public functionary, to an honest fulfilment of his official duties, he must have commenced, at the very outset of his career, with an abuse of the confidence that had been reposed in him, by the adoption of a vile system of fraud, and peculation!

Such are the prominent features of this transaction, as they have been portrayed by the glowing pencil of an embittered prosecutor; and is it not remarkable how suddenly, how completely, every lineament has been transformed, on being touched by the magic wand of truth?

It is perceived, indeed, upon a recurrence to the evidence in the case, that the Respondent, at a certain time, but at a period long anterior to the date of his commission as judge of probate, being then a practising attorney at law in the county of Middlesex, did presume, in that capacity, to give advice, and to render other professional services, concerning the estate which has been mentioned, to Mary Trowbridge; and that he probably may have received, on that occasion, from her agent, Jonathan Loring, the customary retaining fee, which would have been demanded, in such a case, by any other practising lawyer.

It is in evidence also, that before the termination of the business in question, the Respondent accepted his commission of

judge of probate; and that soon after that event, he did, by the mutual consent, and indeed, upon the joint application of both coparceners, officiate in the case, by the performance, in his judicial capacity, of the mere formal act of designating certain persons as appraisers of the estate alluded to, for the purpose of giving a legal form, and effect, to a compromise of the whole subject, which had heretofore taken place between the parties interested. It is not denied that, for each of the services here alluded to, the Respondent did receive, as well he might, a reasonable compensation, as the attorney and adviser of Mary Trowbridge; and this too, without dreaming of the necessity of consulting any fee-bill, or looking at any statute of the Commonwealth, in order to ascertain the precise sum which might lawfully he accepted, when voluntarily tendered in such a case.

Such, then, appear to be the sum and substance of the proofs as relative to the charge in question. And I would here beg to inquire of the learned Managers, what they can discern in all this, giving the slightest indication of the crime of bribery, or of any other offence against the laws of the land? What there is indeed that can afford the least ground of imputation upon the character or conduct of the Judge, either in his personal or official capacity?

From the state of the evidence in the case, it is apparent that the "very head and front of his offending hath this extent, no more;" that being a judge of probate, he did nevertheless, on the occasion alluded to, as he confessedly has done on very many other occasions, presume to act, in a certain transaction which was in no wise connected with any official duty, in his capacity of an attorney and counsellor at law; for I cannot bring myself to believe that it will, for a single moment, be contended even by the learned Managers, whose duty it undoubtedly is, to enforce the prosecution upon every legal ground, that the mere formal act of designating appraisers, under the peculiar circumstances which have been stated, can be regarded in the light of a judicial proceeding.

It is most certain, at any rate, that the case which is described in the impeachment, was one that never did, nor ever could, have come before the Respondent in his capacity of judge; that he did not, in fact, as is strangely intimated in the articles, make any assignment of the whole, or any part of the estate in question, to either of the contending parties; nor render any decree, nor perform any act or thing, throughout the whole course of the transaction, which could have called for the expression of a judicial opinion. On the contrary, the whole affair which is alluded to, appears to have been, from beginning to end, a mere matter of amicable arrangement and compromise between the parties. Thus we see, Sir, that the fee which is alleged to have been received by the Respondent as the attorney of Mary Trowbridge, was literally, and lawfully, taken by him in that capacity; and could not, by possibility, have had reference to any act which he was expected to perform in his quality of a public functionary. The reward therefore, even admitting it to have been "undue" and unreasonable, can have had neither the effect, nor the tendency to "influence his behavior in office." It results as a consequence, that it cannot be regarded as having been in the nature of a bribe.

The essential ingredient of the offence, that which, in legal contemplation gives to it the character of crime, is obviously wanting; and I maintain with confidence, that the case which is here presented to us upon the evidence, bears no more resemblance to the crime of bribery, than it does to any other offence which I might choose to mention, in the whole catalogue of human transgressions.

With your permission, Mr. President, I will now proceed to a very brief and cursory examination of the matters exhibited in article twelfth;—and here, Sir, I will have the candor to confess, that considering all the charges in this impeachment to have been sanctioned by one of the highest branches of our government, and the presumption arising from thence, that every thing which it contained, must, to say the least, have been founded upon specious and plausible grounds, there was something, upon the first presentment of this particular article, which did not fail to produce, upon the mind of every member of the counsel for the Respondent, a considerable degree of solicitude, and even discouragement. As regards the feelings of the Respondent himself, it is natural to suppose that an accusation of the nature here alluded to, proceeding too, from so high and commanding authority, could not but have been, under any imaginable circumstances, absolutely appalling.

Having, long since, been apprized of the active means which were in operation, in order to stir up the popular feeling, and to bring to the public view every circumstance of his official conduct in its worst possible aspect, he was, in some measure, prepared, even before the finding of this impeachment, to act upon the defensive; and to encounter every accusation which could be alleged against him upon any plausible grounds.—It must be confessed, however, that the statement which is contained in the article in question, was wholly unexpected, as it has reference to a transaction which of all others, in the course of his life, would, in his

own view, have seemed to be the most harmless and inoffensive.

It has, nevertheless, risen up before him, and like a dark and angry cloud, seemed at first to threaten with desolation and death, every thing it should overtake in its progress. He has however, and with as much serenity and composure as conscious innocence could inspire, awaited its approach. He has encountered all its fire and fulmination, and is not consumed or overwhelmed. Thank God! he yet survives the threatened tempest; and has the satisfaction to have seen, that it was, after all, but a mere congregation of foul and fleeting vapour, which, in a moment, was dissolved and chased away by the irresistible influence of truth.

It is not my intention, Mr. President, to enter into a particular consideration of the circumstances of this case, as relates to any question of fact; or to undertake, by a comparison of the relative character and credibility of witnesses, to form an estimate of the weight or strength of the testimony which has been given on the one side and the other. The task of such an examination has, already, been most ably and satisfactorily performed by the learned Gentleman who preceded me, and it would not be in my power to give any additional force to his remarks.

The few observations which I wish to submit, upon the article under consideration, are of a more general nature; and will have reference only to those principles of law, which, in every possible view that can be taken of it, are applicable to the case, and by which this Court must, as I conceive, be governed in deciding upon it.

The charge in this article, like that in the preceding one, which has just been considered, although not set forth with much attention to technical form, must be considered as a charge of bribery; and, as in the former instance, also, to have been accompanied by circumstances of peculiar aggravation.

This, without doubt, must be the offence that was intended to be described; or it is no offence known to the law, and cannot, therefore, upon the principles heretofore stated, be made the subject of an impeachment.

It is the question, then, which is to be decided by this Hon. Court, whether upon the evidence in the case, and with reference to the legal definition which is given us of this offence, the Respondent can be adjudged guilty of the crime of bribery.

Here, Sir, I will very readily admit, that if the statement which was given you, of certain transactions, by *Colonel Ware*, the favorite and principal witness for the prosecution, is to be received, without abatement or allowance on account of the peculiar circumstances of prejudice and ill humour under which he was called to testify, the conduct of our client must indeed have been such, on the occasion alluded to, as would without doubt, very much diminish the high reputation which he has hitherto sustained in the community. It must have been marked by such circumstances of forwardness and effrontery, such indications of a base cupidity, such a ravenous appetite for fees and emoluments, as would have been absolutely shameful in a judge; and in his character as an individual, even, could not fail to bring down upon him the contempt of every liberal and honorable man.

Such, it is admitted, would be among the consequences which must necessarily result from the facts and circumstances as they are stated by this witness, if they had been established in the cause, and left unaffected by any countervailing testimony; and, Sir, as it is a mere question of bribery, and nothing else, which is now under consideration, I will not even stop to inquire as to the truth or falsehood of the statement above alluded to. In justice, however, to the feelings of our client, not because the circumstance is deemed, in any degree, essential to the merits of his cause, I would beg leave, in this conviction, barely to call to the recollection of this Hon. Court, how completely the whole aspect of the case was reversed by the representation subsequently given of it by Mr. Grout, who was also present on the occasion alluded to; how immediately, all that was before so mean, and base, and contemptible, according to the views that were taken of it, by an inflamed and exasperated party, was by a cool, unbiassed observer, made to assume the shape of a common and inoffensive transaction.

But, Sir, in so far as relates to any question connected with the legal merits of the present prosecution, I am entirely content to admit that the testimony which has been given to you by *Colonel Ware* may have been substantially correct; that notwithstanding his former grudge, and the vindictive disposition towards the Respondent which he appears to have manifested on so many occasions, yet that when put to the test of an oath, he may nevertheless have been inclined, "in nothing to exaggerate, nor to set down ought in malice," against the object of his enmity.

Indeed, I should be disposed even to quote and to rely upon, the testimony of this most prominent of the witnesses on the part of the Commonwealth, for the purpose of disproving and setting at nought the very accusation which he has been called to substantiate.

It has heretofore, again and again, been laid down as an undeniable principle of the law, in relation to the crime of bribery, that the "undue reward" alleged to have been received by the offending party, must be

shown to have been given under such circumstances, as that it might naturally have a tendency to "influence his behaviour in office."

To this end, it must of course be made apparent, that some case was depending, or at least, expected to come before him, which might call for the exercise of his judicial functions, and thereby afford him an opportunity for the discharge of this debt of corruption, by the partiality and injustice of his decrees.

Now, Sir, I would beg to inquire what case was pending before the Respondent as judge of probate, or ever likely to come before him for adjudication in that capacity, to which the five dollar fee which is mentioned in the article may be imagined to have had reference? On referring to the testimony of Colonel Ware, we not only discover that it falls short of proving the existence of any case of this nature, but in fact that it establishes, beyond all possible doubt, (if he may be supposed to have testified without any undue prepossession in favor of his enemy) the very contrary position. The case to which he alludes; that, upon which the professional advice of the Respondent was given, and the fee in question received, appears from the statement of this witness (and herein, it must be confessed, he stands supported by all the other evidence before you) to have been most obviously, an affair belonging no more to the jurisdiction of the judge of probate, than to this high court of impeachment, or to the tribunals of any foreign country. Confiding, as I do, in the well known intelligence, the great learning and liberality of the Hon. Managers, I feel assured that, with reference to the proofs which appear in the case, they will not feel themselves at liberty to deny the truth of this position.

Here then, as in the former instance, there is most obviously wanting that essential circumstance, which constitutes the very foundation of the charge of bribery; and as this is the only specific, known offence, which is implied in the allegation, there is consequently wanting, as we say, that which alone can form the basis of an impeachment.

But, Sir, there are yet other circumstances which are cursorily intimated in the article under consideration, that ought not, perhaps, to pass entirely unnoticed. In allusion to the five dollar fee, which is alleged to have been received by the Respondent, and supposed to have been in fact the reward of his corruption, it is stated, at the very close of the allegation, as having been allowed "in the guardianship account" of Mr. Ware, from whom it had been received. It is also suggested that this allowance was, in fact, by a kind of interlineation, brought into an account, which had been theretofore finally closed and adjusted by the judge, with the consent of the parties interested. Whatever may be the degree of freedom and latitude which is allowable by the law of the land, as to the mere forms of prosecution by impeachment, it will not, I presume, be contended, that either of the circumstances here adverted to, as they are stated in the article, are to be considered in the light of a substantive ground of accusation.

It is very clear, that by the framers of the impeachment, they could not thus have been intended; but, on the contrary, were introduced merely as circumstances of aggravation, and for the purpose of swelling the amount of evidence to be adduced in support of the principal charge. Be this however as it may, I cannot, for my own part, consent to regard this portion of the article in any other light.

First, then, as to the allowance of this charge of five dollars in the guardianship account of Mr. Ware;—and here it is obvious, that whether this act of the Respondent is to be regarded as being justifiable, or otherwise, must necessarily depend upon the answers that shall be given to several preliminary questions.

And first,—Was the case referred to in the article, concerning which the advice was given and the fee received, of such a nature, that a Judge of Probate might reasonably and honestly consider a guardian to have been authorised, at the expense of his ward, to apply for professional assistance; or was it a case so entirely plain and simple, that no man of common sense, however unlearned in the law, could by possibility have entertained a doubt as to the proper course to be pursued?

Upon this latter branch of the question, it would seem to be sufficient for me barely to remind the court, that in truth and in fact a doubt of this kind was, at any rate, entertained by this guardian respecting the business in question; and yet we are told that *Colonel Ware* is a man of very considerable standing and respectability in the community, and certainly not wanting in ordinary intelligence. But we do not rely on this circumstance alone, conclusive as it may seem to be. In the course of the testimony which was produced before the Court, there has been given to us a very full explanation of the nature and circumstances of the case here alluded to; and it cannot but have appeared most manifestly to every one, that it was in reality a case by no means unattended with difficulty. On the contrary, it was obviously of such a nature as to have required a considerable degree of attention and reflection; and I much doubt if there is a man in this assembly, professing not to be well acquainted with legal principles and forms, who would have been able to point out to

this guardian the proper course to be pursued respecting it.

Upon this point I have only to make this additional remark, that the affair in question was, confessedly, one in which the property of the ward was alone concerned. The guardian appears to have had no personal interest whatever in the question; so that this expense, if it were allowable on any grounds, was without doubt a charge properly belonging to the guardianship account.

Thus far, then, it must certainly be admitted, that no irregularity is apparent in the conduct of the judge.

Was there, then, any thing so monstrous in the amount of the fee which is alluded to; considering the nature and circumstances of the case, was the sum of five dollars so grossly exorbitant, so manifestly disproportionate to the nature and value of the services rendered, that in demanding it, the Respondent shall be presumed guilty of a base imposition as a counsellor, and in allowing it, shall be charged with having committed gross fraud and injustice as a magistrate? It remains for this Hon. Court to pronounce, by its decision, the proper answer to this inquiry.

For my own part, I profess not to have much acquaintance with the usages of my professional brethren in other counties, with regard to the customary demand of fees in any case; I will venture to say, however, that there is no man in this metropolis, who has ever had the misfortune to be engaged in a litigation of any kind, or on any occasion to seek for professional advice, to whom a charge of the kind here alluded to would appear to be unusual, or extravagant. Much less do I believe there is an individual, in any degree conversant with the professional usages in this section of the country, who would be disposed to consider it as an impeachable offence in a judge of probate, or any other judge, to have decided in favour of such a charge, as being but reasonable and just.

If however it be necessary to the justification of the Respondent, that there should be an estimate of the exact worth of the professional advice which he gave on the occasion alluded to, it is surely a circumstance, which deserves to be considered in the calculation, that this advice was found to have been, in its consequences, wholesome and correct; that it was in fact the means of giving to his client the free controul of a very considerable property, which before was involved in confusion and embarassment.

Still, Sir, another of the preliminary questions, which were alluded to, remains to be considered.

Was it, or was it not, a high misdemeanor of this Respondent; was it or was it not an offence for which he ought to be removed from office and otherwise disgraced, that he presumed as a judge of probate, to allow in a guardianship account a certain sum of money, which had been paid to himself, for services rendered in his capacity of counsellor at law?

Permit me to say that the solution of this question most obviously depends on another which precedes it; and that is, whether a public functionary of this description is by the very tenor of his commission, by the nature of his official duties, to be considered as necessarily cut off from all the ordinary associations; more especially, from every species of commercial intercourse with the rest of mankind? Take the case, for an example, which is by no means a fanciful one, that, in aid of his official business, a judge of probate happens to have become a dealer in merchandize; upon the application of some guardian, he has sold cloths, or any other necessary articles, knowing them to have been purchased for the use and sustenance of the ward, and has received a price for his commodities, which was agreed upon as being but fair and reasonable;—I would beg to inquire if the judge may not allow in the account of the guardian the amount of such a purchase, without incurring the guilt of bribery, or of any other offence for which he would be liable to impeachment? Or if a judge of probate, for the accommodation of a person, being an executor or administrator, should perchance let to him a horse, or chaise, for the purpose of enabling him to attend the probate court on some necessary business of his administration, would it be criminal for the judge to accept a reasonable compensation in such a case; or even, if he should happen afterwards judicially to have decided that the price thus received was a fair charge upon the estate, of which the party who paid it to him was the lawful agent and representative?

I imagine it could not have been the intention of any learned manager to press his notions of delicacy on such a subject to this extent; and yet it is apparent, that as to every thing properly belonging to the present question, the cases here supposed, and that which is under consideration, are in no respect different. Upon this head I shall say no more.

As to the matter of the pretended "interlineation," which is slightly stated in this article, I have a word or two only which I wish to offer for the attention of this Hon. Court.

If indeed the circumstance here alluded to is to be considered as having been brought into the impeachment, as merely incidental to the principal accusation, as tending only to aggravate, to heighten the complexion of some great crime, with which it is supposed to have been connected, I should not, most assuredly, Sir, have been inclined to bestow upon it a single remark.

There having been, as is most sincerely and confidently believed by the counsel for the Respondent, a palpable failure in the proof of any known crime whatever, upon the matters which are set forth in the article under consideration, it surely would not have been deemed necessary, or even proper, especially in the present protracted stage of this discussion, to detain this Hon. Court, and still farther to trespass upon its patience by a course of argument upon mere circumstances and incidents, which, whether truly or falsely represented, could have no possible effect upon the decision of the question in issue.

But, Sir, if when speaking of this supposed "interlineation," it was intended, by the article, to impute to the Respondent any thing like the rasure or falsification of a judicial record, then indeed, the aspect of the case is immediately changed, and it presents to us an accusation of a most grave and serious import.

When I had occasion, in a former part of my remarks, to mention the several offences which, under the constitution and laws of the Commonwealth, were conceived to be proper subjects of impeachment, the rasure of a public record was included in the enumeration, and distinctly admitted to be an offence of this description. So it is unquestionably.

If then, upon the evidence which was before them at the drawing up of these articles, it was conceived by the learned Managers, that there was any thing in the act of "interlineation" here referred to, bearing the similitude of the crime which has been mentioned, it was certainly a very blameable omission on their part, that it was not thus stated, and fully and formally set forth in the impeachment.

Instead of bringing it in at the very heel of their complaint and treating it, which they manifestly have done in the article under consideration, as a mere circumstance of aggravation which is supposed to have attended the commission of another and very different offence, it was undoubtedly their duty, as faithful conductors of the prosecution, to have set it forth, by a separate article, as a distinct, substantive offence; and in that case, it would, most certainly, have been deserving the most serious attention. It is perfectly apparent, however, not only from the manner in which this subject of the "interlineation" is treated in the article, but from the whole tenor, also, of the facts and circumstances in relation to it which have been disclosed to the view of this Hon. Court, and had without doubt been previously considered, with due deliberation, by the learned Managers, that they did not intend to lay much stress upon it; that it was not regarded by them as affording, of itself, any distinct grounds of accusation, or as being, in fact, of such a nature as to deserve any other, or more serious notice, than precisely that which is bestowed upon it by the impeachment.

It must, undoubtedly, have been well understood by the learned Managers, that the paper which is said to have been interlined by the Respondent, could not by possibility, at the time when this operation is supposed to have been performed upon it, be construed, upon any legal principle, to have been such a judicial record, as that its rasure or falsification would amount to the offence in question. The court of probate, whereat this offensive transaction is supposed to have occurred, was yet in session; the paper alluded to, like all others appertaining to the business of that court, was still in the possession and under the entire controul and direction of the judge, and it was therefore, most unquestionably, competent for him, at this period, to alter, amend or qualify any of his judicial acts respecting it, according to the dictates of his own judgment and discretion. It seems that the document in question contained the statement of a certain guardianship account, which a short time previously, but at the same session of the probate court, had been passed and allowed by the judge. An item of expense was subsequently incurred by the guardian, which, in the opinion of the judge, was honestly and fairly entitled to allowance in this account. Under such circumstances I submit, Sir, with the utmost confidence, that it would have been an act of manifest injustice in the judge, had he, at any time before the termination of this court, and before his proceedings had passed over to the hands of his register, and actually become thereby a matter of public record, refused to open this account for the purpose of inserting therein, as was done, the item alluded to. The Hon. Managers are themselves deeply versed in the principles of the law; the customary practice and usages of all our courts, in relation to cases of the kind here alluded to, must be also, as I well know, quite familiar to their recollection. I am sure, therefore, they will have the candor to admit, that it is the every day's practice of those courts, to take much greater license with their own proceedings, in the way of modification or amendment, at any time during the continuance of the same term, than that which was taken by the Respondent, and is imputed to him as a high crime and misdemeanor, as an indication of gross bribery and fraud, upon the present occasion. The truth is, Sir, and this familiar principle is, to say the least, quite as well understood by each of the learned Managers, as it is by either of the counsel for this Respondent, that every act of the judge is to be considered as

being merely "in paper"; in legal contemplation, as partaking, in no respect, of the nature of a public judicial record, until the actual adjournment of the term, when, as was intimated in a former part of my remarks, the functions of the judge shall have ended, and those of the recording officer have commenced. Thus much as to this matter of the interlineation; which concludes in fact all which I had intended to say upon the merits of the whole transaction, which is the subject of all the charges in this twelfth article of the impeachment. And, Sir, I cannot but indulge a humble hope, that notwithstanding the inflamed, envenomed appearance which is given to every part of this transaction, by the manner in which it is represented in the article, it will yet be found, upon reference to the proofs which are before the court, and to the explanations and arguments which have been stated, that it was, after all, in truth and in fact, entirely harmless and inoffensive. I do not hesitate to declare, and this with the utmost sincerity, that to my own mind it has seemed, upon much reflection and examination, as presenting less the aspect of a crime, than any thing else which has been imputed to the Respondent through the whole course of this prosecution.

I cannot consent, Mr. President, notwithstanding the lateness of the hour, and the great length of time which has been employed in the consideration of this principal branch of the impeachment, entirely to take leave of it, without at least a cursory allusion to some of the observations which fell from an Hon. Manager in the course of his argument upon the article in question. I refer to the learned gentleman who was the second that addressed you in behalf of the prosecution, and whose argument upon the particular subject here alluded to was much more minute and elaborate than that of either of his Hon. associates. From the whole scope and tenor of his remarks upon this part of the case, it was manifest that it had been the subject of his most particular attention; that he had considered it in fact the very bulwark of the prosecution; and that if the complaint against the Respondent could not *here* be maintained, it must necessarily give way at every other point.

Such, I think, are the inferences which were fairly deducible from the observations of this gentleman;—yet we find, that after having sifted the whole subject to the very bottom; after having canvassed, at very great length, and most certainly with an uncommon display of learning and ability, every fact and circumstance, and every legal principle which was deemed in any degree applicable to the question, he was brought at last, by the very force of his own reasoning, to the confession, that although some great offence had indeed been committed yet "it was not in *his* power to give to it a legal definition or a name."

That it was not bribery, nor extortion, nor either of those *nameable* offences whose character and attributes are described to us in the criminal code, seemed, if I mistake not, to have been distinctly admitted in the argument.

It was, nevertheless, a *certain something* in the character and conduct of the judge, which, in the opinion of the learned Manager, seemed to call loudly and imperiously for *impeachment, impeachment!!*

Gracious heaven! and shall it then be said, that in this favored land, where, as we had hitherto been taught to believe, there was something like perfection in the system of juridical polity, a citizen may rightfully be condemned without ever being told the *name*, or without the power of comprehending the *nature* of the offence whereof he was accused? Shall it ever be said, that under the blessed constitution of Massachusetts, which, with a kind of parental solicitude, seems to have watched over the rights of the subject, and, in providing for their security, to have interposed a thousand checks and guards against arbitrary power, it is nevertheless possible, that by the authority of *one high Court of Judicature* in the commonwealth, a public functionary may be hurled from his station; may be convicted, degraded, disfranchised, upon the ground of some supposed delinquency, of which neither his prosecutor, nor (as may be well said also) his judges were capable of giving a legal interpretation? Most confidently I trust not. God forbid, that the event of this trial should give countenance to any such paradox.

But, Sir, there were a few other observations, of a similar tendency with those already alluded to, that fell from the Hon. Manager to whom I have referred, and which must not be suffered to pass by entirely unnoticed.

In reference to this same twelfth article of the impeachment;—"We stand here (said he) on no statute, on no particular law of the commonwealth; there is none for such a case.—We stand here upon the broad principles of the common law, of common justice. Such conduct in a public magistrate, as is described in this article, and has been proved before the court, is disgraceful, and contrary to the usages of all civilized nations." Again, says he, "we have shown the conduct of the Respondent upon this occasion to have been grossly improper and mischievous in its tendency; this is quite enough; he has rendered himself unworthy of office, and therefore ought to be impeached and removed."

Such, Sir, was undoubtedly the substance of the remarks; and, as I have them upon my minutes, such appear to have been the very words of this Hon. Gentleman; and I should like exceedingly to see what, in legal contemplation, would be the aspect of all this, if it were embodied in the form of an indictment; if it were plainly, and substantially, and formally set forth, according to the constitutional requirement, and thus presented for trial to either of our inferior courts of judicature.

Suppose, by way of further illustration, it should be the pleasure of this Hon. body, for upon the present occasion it is acting in the capacity of both judge and jury, to return, in the manner of a special verdict, that in the course of the transaction here alluded to the Respondent had been guilty, not indeed of the violation of any "statute or particular law" of the commonwealth, nor of the crime of bribery or extortion, nor of any other of those different species of offences which I have formerly had occasion to mention, as falling under the general description of "maladministration in office;" but that his conduct as a judge had nevertheless been "mischievous in its tendency;" that he had offended against the "broad principles of the common law, and common justice, and the usages of civilized nations, and thereby had rendered himself unworthy of the honorable station which he now holds."

Suppose, Sir, upon a general statement of this kind, the case were submitted, as it well might be, under the constitutional provision, for the consideration of the Supreme Judicial Court of the State, I desire to know what judgment would probably be pronounced upon it; more especially, whether it could be considered as amounting to a "crime or misdemeanor in office," according to the legal acceptation of those terms, and therefore as being the proper subject of an impeachment?

Such as is *here* last supposed is, as I contend no other than the precise question, which is now to be decided by this Hon. Court, and I must be permitted, therefore, to say that the arguments of the learned Manager which have been alluded to, so far as they may have been intended to apply to this question, were much too vague and indefinite to have an influence upon it.

It is indeed much to be lamented, that, upon the present solemn occasion, in the trial of a cause so deeply affecting the honor, the property, and I may add, the very civil existence of a respectable fellow citizen, any Hon. Gentleman, concerned in its discussion, should have taken an opportunity to indulge, in any fanciful speculations, any flights of rhetoric, or affecting appeals, having no visible relation to the law or the fact of the case.

Considering that several weeks, and even months, were allowed to the learned counsellor for study and preparation for the management of the present prosecution, it would certainly have been more consistent with his usual habits of accuracy, and the high reputation which he sustains for talents and legal erudition, if, instead of talking in general terms about the "broad principles of the common law," or descanting upon the subject of "deeds without a name," he had condescended to present to us his views as to the constitutional law of impeachment in this commonwealth; and attempted at least to point out the specific offence, that was supposed to have been committed by the Respondent, in violation of that law. It must however be confessed, that it was obviously owing much more to an inherent defect in the cause, than to any culpable omission of its Manager, that he did not choose to descend to the consideration of any such particulars. With regard to that portion of the complaint, which is here alluded to, it is most manifest that, in his view of its merits, there could have been no possible alternative, but a formal abandonment, or an attempt to sustain it upon the loose and general grounds which were assumed.

And here I would take occasion to remark, that nothing could be desired more favorable to the cause of our client, than the inference which is plainly deducible from the circumstance last mentioned;—nothing which could serve to show, more clearly and conclusively, that he has committed no offence which can properly be made the subject of impeachment, than that the delinquency which is charged upon him, is nevertheless of so doubtful and ambiguous a character, as that one of the ablest and soundest lawyers of the Commonwealth, being also one of the principal conductors of this prosecution, has, openly, confessed himself at a loss to give to it a legal, and technical denomination.

But, Sir, there is yet an additional subject of complaint which is set forth, among other things, with a degree of imposing formality in the impeachment, and which appears to have been relied upon, as matter of serious accusation. It is stated that on several occasions, even in relation to matters which were then pending before him as a judge of probate, the Respondent did presume to give advice to parties, as to the form and manner of presenting accounts, drawing up petitions, and such like formalities; and that professing in such cases to act in his capacity of an attorney at law, he did even go the length, in some instances, of officiating himself as a scrivener, in drawing up formal papers of this description, receiving,

at all times, a small compensation for these services. In point of fact, we do not deny that the statement of circumstances, so far as respects this ground of complaint, is substantially correct; but we do deny, most strenuously and confidently, that any thing can be inferred from such acts, bearing the least affinity to crime. On the other hand, we do insist that it is not only the privilege, but in some sort, a moral duty of the judge of probate, on certain occasions, to perform services of the kind here alluded to, for the purpose of facilitating the dispatch of business, and of relieving parties from the delays and perplexities in which they must, otherwise, necessarily be involved. I do not pretend to say, Sir, that it would be decorous and proper, or even justifiable, upon strict legal principles, if a judge of any of our common law courts were to descend from his bench, in order to engage in the performance, whether with or without compensation, of any ministerial office of the description here adverted to. There is however, as we all well know, something peculiar in the nature of the jurisdiction and the powers and duties of the probate judge. His court is in a great measure, *sui generis*; and governed by rules and forms widely differing from those of our other judicatories. It will not I presume be denied, that except in so far as it may, from time to time, have been modified by particular acts of our Legislature, the whole character of this court must be considered as remaining, to this day, precisely what it was at its introduction by the charter of William and Mary.

In its whole character and attributes, it is, then, no other than that branch of the ecclesiastical courts of Great Britain, which is denominated the prerogative court; and whose judge as to every thing else but his subservience, in some measure, to an archbishop under whom he holds his commission, may be regarded as the original, whereof the probate judge of Massachusetts is the very image and transcript.

In considering the nature and circumstances of our own court of probate, we have consequently, as I think, abundant authority to adopt in this country, as in England, the very obvious and familiar distinction which prevails, between the amicable and contentious side of its jurisdiction; in other words, between that department of this court which is principally concerned in mere formal matters;—"in doing what no one opposes"; and that which is employed in the examination of litigated questions which must necessarily call for the exercise of his judicial functions.

The business of the former, we say, is merely ministerial, and that the latter department only, is to be considered as comprising every thing which properly belongs to the office of the judge.

With regard to the kind of business not immediately within the sphere of his official duties, but which may nevertheless be performed with impunity, by a judge of probate, for the furtherance of any matter remaining to be arranged, on the amicable side of his court, there is, as I think, no difficulty in ascertaining the true line of legal distinction. In respect to any matter in controversy before him, and upon which it may become his duty to pronounce a judicial opinion, it results, of course, that he cannot lawfully be of counsel for either of the contending parties; or by any other means, voluntarily place himself in a relation to either, which would be likely to produce even the slightest influence upon his mind in the decision of the cause.

Such, I conceive to be the great principle of the law in relation to the whole of this subject; and the reason of the rule seems to be quite as obvious as the rule itself. It is neither more nor less than this, that in the discharge of every official duty, the judge must be impartial, upright, just; as far as the lot of humanity may permit, exempt from all prejudices and prepossession, and in a situation at all times, to do equal and exact justice between man and man. So long, then, as a judge of probate, or any other judicial officer, shall strictly keep himself within the compass of this principle, I know not, for my own part, of any fair and honorable occupation, in which he may not be engaged, without incurring the penalties of bribery, or of any other offence against the established law of the land.

If a judge of probate, condescending for a time to waive the dignity of his station, shall consent to give advice, or to afford any other assistance, as to some mere matter of form, in a proceeding on the amicable side of his jurisdiction, I contend that this is no offence, in the sight of God or man. Being an attorney at law, as well as judge, and therefore conversant with all the customary forms of process in such cases, if he will condescend, even in his own court, to assume the humble employment of the scrivener; if he will voluntarily take upon himself the labor and drudgery of revising, and drawing up anew, any imperfect account which has been presented to him by an executor, administrator, or guardian, and require but a just and reasonable recompence for such service; all this, I insist, so long as his feelings or opinions, as a judge, are not in danger of being, in any manner, affected by the operation, is entirely harmless in its tendency, and may therefore be done with perfect impunity. The same, precisely, may be said, as to the drawing up of petitions for license to sell real estate of testators or intestates, for apportionment of widow's dower, and various other acts of a similar nature that might be enumerated, which be-

ing done with the consent of all the parties in interest, are entirely innocent, because they can have no possible influence upon any judicial decision.

In the absence of any particular law or statute of the Commonwealth prohibiting the judge of probate from practices of this kind, for it has, as I think, been clearly demonstrated by my learned associate, that the recent statute which has been referred to does not even approach the case, I will venture to challenge the Hon. Managers to state a single ground of authority, any one principle of law or common sense, tending to show that any act, of the kind which has been mentioned, may be construed a crime.—If then it be lawful for the judge to perform such services, it would seem to follow, as a consequence, that it cannot be unlawful to demand and receive for them a reasonable recompence. The compensation in such case, surely, cannot be regarded in the light of "an undue reward"; and it partakes not of the nature of a bribe, because it was not taken "for doing his office."

There is then, most manifestly, nothing in the cases here supposed bearing the slightest similitude to the crime of bribery, or extortion; yet it must be one or other of these offences, which is intended by the impeachment, or there is nothing alleged, to which, by the law of this land, the Defendant is bound to make answer.

But, Sir, it is not enough upon this occasion, especially in relation to that particular part of the cause which I have just been considering, that we merely vindicate our client from the imputation of crime. The counsel for the Respondent feel themselves fully warranted by all the circumstances of the case, in going much beyond this. In their view, the conduct of their client in the several instances here alluded to, was not only such as must be deemed excusable in the judge, but highly creditable to his feelings and character as a man;—that the various ministerial services and acts, which he is said to have performed, on certain occasions, and which are now brought forward as the evidence of his corruption, were, in truth, not only harmless and inoffensive, but ought in fact to be regarded by this Hon. Court, as they most unquestionably were by the parties interested, as so many proofs of a kind and obliging disposition to accommodate his fellow citizens.

Here I would appeal to the recollection of every one who had occasion, at any time of his life, to perform the duties of executor or administrator, and to go through with the various legal formalities which are required in the fulfilment of such a trust, if he did never take the liberty, in regard to those forms, of asking and receiving advice and instructions from the judge, without imagining that in doing this he had committed a crime?

Yet, according to the doctrines which have been advanced, this is nothing short of tampering with a judge; and is quite sufficient to involve both the parties concerned in the guilt of bribery.

Were it necessary, I might proceed to multiply examples almost without number, which would tend still further to illustrate the tremendous consequences that must ensue from the adoption of the principle, in relation to this subject, which has been urged in argument before this Court.

The truth is, Sir, that the little acts of accommodation to parties, having business at the probate office, which are now imputed to the Respondent as a great offence, are in reality, when fairly and properly and legally considered, not only entirely faultless, but they have become in fact, by long usage and custom, a sort of facility which is always expected from the judge, and is in some measure indispensable to the avoidance of delays and expenses which would, otherwise, become a heavy grievance to the individual.

We have indeed, for so long a time been accustomed to these facilities at the probate office, that it is not, in my opinion, too strong a statement of the case, to say, that were they now to be interdicted, we should hear a general murmur of complaint throughout every county in the Commonwealth.

Let the principle be once established, which seems to be assumed by the impeachment, that a judge of probate may not, with impunity, presume to give an intimation, in the way of advice or direction, even as to the mere form of proceeding in any matter which is pending in his court; that in relation to any business coming within the sphere of his jurisdiction, he can lawfully perform no act, in court, or out of court, except such as may have been particularly provided for by some express law of the Commonwealth, I would beg this Hon. Court to consider for a moment, what consequences would be likely to result from such a reformation in this branch of our juridical system. It cannot be doubted that the judge, if he should consent to continue at all in office under a limitation of this kind, would of course take special care, notwithstanding all former usages, to accommodate his deportment, in all respects, to the very letter of the law. For the future, we should indeed see in him the image of a man in authority, but nothing besides. Enshrined in all the majesty of office, we should behold him, in his station erect as a statue, and cold as the very marble of which it is composed.

To the numerous inquiries of the multitude of suitors in attendance at his court, the discreet answer would, of course, be yea yea, and nay, nay; for, with the terrors of

the new law impending over his head, he might very reasonably infer, that, whatsoever should be said, more than this, might be construed against him as "coming of evil."

Should any doubt, or difficulty arise as to the mere manner of stating an account, returning an inventory, or relative to any other formality required by law, of any executor or administrator, in the discharge of his duty, he must take special care not to affront the feelings or dignity of the judge by an appeal to him for the solution of the question. It is, indeed, within the province of the judge to decide the point which has arisen, by a formal adjudication, but he cannot, regularly, do this, until the question shall have been presented to him, in due form and order, and in the shape of a legal issue. No, surely; the law of self-defence would be sufficient to deter him from doing this. The bewildered party is, therefore, instructed to take counsel. The village lawyer must be consulted and feed; another day must be wasted; and all this, to obviate an impediment, which a single hint from the judge, if he could have ventured but at the peril of impeachment to give it, would have been sufficient, in an instant, to remove.

But there is one, among the throng in attendance at his court, who, more than any other, is anxious to obtain an audience; her name is widow, and to her belongs the care of those little effects that were a husband's, whom she has recently followed to the grave. The little pittance is now in the custody of law, and is needed as the only means of giving daily bread to an orphan group who look to her for protection and sustenance. From a distant part of the county she has come; and would, if she knew the precise manner in which the object might be attained, very gladly administer upon these small effects. She is, however, by no means versed in intricacies, and knows no forms of the probate law. Upon the advice of neighbours, unskilled almost as herself, she has done no more, by way of preparation for her visit to the court, than merely to bring before the judge the two neighbours and friends who had consented to become responsible as sureties on her bond. As to all other requirements of petition for administration, warrant of appraisement, order of notice, and such like formalities, she knows not even the names of these proceedings, any more than though they were stated to her in some foreign language. Still she is not only ready, but in truth, anxious, to tell her artless story, and to make the statement of her pretensions. But here an unexpected obstacle stands opposed to her progress. The judge cannot even lend an ear to this recital of her case. It is inconsistent with the regular course of business in his court, to proceed, upon the mere verbal representations of a party. In this, as in all cases of like description which may come before him, it is not less his duty, than it is his unquestionable right, to require some written statement presenting the grounds of application; and although a widowed, and unprotected female may happen to be the suitor, he does not feel himself justified in dispensing with an established rule. Upon the very table which stands before him he has indeed abundance of formulæ, which have been drawn up by himself with care, and are suitable, not only to this, but to every other process which is incident to the business of an administration; and he could, in an instant, relieve the perplexity of this applicant, by furnishing gratuitously, or at a stated and very reasonable price, every thing which is necessary to the accomplishment of her object.

But, alas! the new doctrine of impeachment interferes. Were the judge to furnish the papers alluded to; much more, were he to receive the reasonable price which would be thankfully paid for them, it might be construed, by implication at least, that he had "become of counsel"; had "given advice," in a cause which was pending before him. It would be bribery, or some other crime, which might expose him to the malevolence of a busy prosecutor, and the probable forfeiture not only of his office, but of his privileges as a citizen of the Commonwealth. There is then, no other alternative —here also the miserable sufferer must be told to consult her lawyer; and is thus compelled either to incur an expense which her poverty can scarcely endure, or return, as she came, disconsolate, and perplexed in the extreme.

Be assured, Sir, that the cases here supposed are very far, indeed, from being merely ideal. They are in truth the representation, and but a very faint, and imperfect one too, of scenes in real life, which would not fail to become of every day's occurrence, at the probate office, should it be the pleasure of this Hon. Court to sanction, by its decision, the principles which have been advanced in support of the present prosecution.—Let it, once, be understood that the conduct of a judge of probate must be made in every respect, conformable with the rigid rules which would now be prescribed to him, by the Hon. Managers; that he can lawfully do no act for the accommodation of a party having business before him, except such as is specially provided for, by some positive law of the Commonwealth, or necessarily required of him in the regular performance of some official duty, and it is easy to foresee that it must be productive of such embarrassments and discomfiture to parties, as would be found in experience absolutely intolerable.—Such regulations at the

probate office as those here alluded to, however they may have been sanctioned by your decision, would not, I am persuaded be long endured by the community ;—And Sir, I will venture to predict, that after the functions of this Hon. Body shall have ceased, as a Court of Impeachment, and it shall have resumed its primitive character of an assembly of legislators, not a session will elapse before you will have occasion to listen, in that capacity, to much stronger, and more forcible appeals for the abolition of the new rule, than any which has yet been made to you by the learned Managers in favor of its adoption. Thus much as to that class of cases in this impeachment wherein the Respondent is accused of having corruptly allowed himself to be retained as the attorney and adviser of parties in relation to business then pending in his court.

There is now remaining one other topic of complaint against him, upon which I beg leave to bestow a few remarks, and I shall then have done with this elaborate, and, as I fear, tedious and uninteresting discussion.

It is, we find, even alleged against the Respondent as a crime, rather as one would think for the purpose of exhibiting, in one full array, every anecdote in the last sixteen years of his life bearing the semblance of an impropriety, and thereby of swelling the nominal amount of his delinquencies, than upon the expectation which any intelligent, reasonable man could have entertained, of obtaining a conviction, in a solemn trial by impeachment, upon any such ground ; that he did presume, on divers occasions, in his capacity of a counsellor at law, to give advice and other professional aid, to certain executors, administrators and guardians in relation to business, in some measure, connected with their respective agencies, as such ; it not being alleged however, in either of the charges of this description, that the business in question was then pending, or ever likely to come before him as a Judge, or in any other way connected with any official duty.—Such is the nature of this charge ; and this it will be perceived, on reference to the impeachment, is the *gravamen*, of five distinct articles, and notwithstanding the diversity of transactions to which they, respectively, have reference, it is very clear that all these articles must stand or fall together on one and the same principle ; with respect to this particular branch of the complaint, one would think it were quite sufficient for all our purposes, that there has been, manifestly, a total failure on the part of the learned Managers, to show us the least semblance of any law, upon whose authority, the facts and circumstances, as they are set forth in either of these articles may, by possibility, be construed as amounting to a crime. Even "the broad principles of the common law, and common justice," which were so much relied upon in another case by a learned Manager, seem not, here, to have an application ; for it will not, I trust, be pretended that it ever was learned from any book, case, or authority, that before any human tribunal, an act of the individual may be construed and punished as an offence, which is not only not prohibited, but by strong implication at least sanctioned and even encouraged by the laws of that society of which he is a member.

It has indeed been attempted to give some little color of support to this article of accusation, by bringing to bear upon it the provisions and penalties of the late statute of the Commonwealth, which I have already had occasion, slightly, to advert to, prohibiting judges of probate from being of counsel for parties in certain cases, and under certain circumstances therein particularly stated ; but I will venture here to assert, that, upon the argument of my learned colleague, it was shown to actual demonstration, that neither the letter nor the spirit of that law could be considered as having the slightest application to the cases in question. I will then even take it for granted, that the laws of Massachusetts are entirely silent upon this subject. What then, Sir, permit me to inquire, is the state of the case, and the question which is presented to you ? To me it seems to be simply this ; whether, in the absence of all legal prohibition and restraint, there is, nevertheless, perceived in the conduct of this Respondent, in the course of the several transactions here alluded to, such unquestionable indications of moral turpitude, of such a deep, and shameless depravity of disposition as to present a case of so gross a character as would justify the whole community in rising up with one accord in judgment against him, and with or without the forms of law, in hurling him from office.

And what after all, from the facts which are proved in these cases, appears to be the sum and substance of his offending ? Truly, Sir, it is no more nor less than this, that being judge of probate the Respondent did also continue to be, as he was long before the appointment was conferred upon him, a practising attorney and counsellor at law, in the county of Middlesex ;—for I hold it to be indisputable, that if the affording of professional advice and assistance to administrators and others, under the circumstances which are stated in the impeachment, is to be regarded as a crime, so likewise, and in the same degree, would it be an offence to render similar services to any other denomination of clients.

If, then, it be a fault in a Judge of Probate, or of any other of our inferior tribun-

als, that he continues also to be a practiser of the law, I must beg leave to say, that it is most surely the fault, not of the individual, but of the laws and institutions of the very government, from which he has received his appointment. In support of this suggestion, it will I trust be quite sufficient for me to remind this Hon. Court, that very nearly the one half of all the individuals, who at this moment are incumbents of this same office of Judge of Probate, are also attornies and counsellors, and engaged in the full practice of the law. It is not less true that such was well known to be their condition, at the time of their appointment, and that all the *honors* and *emoluments* of the office, which was about to be conferred upon them, would hardly have been sufficient to induce a formal abandonment of all their former occupation. How then shall it be said, that even the government of the Commonwealth has not, itself, by such a course of procedure, given its direct sanction to those very practices which are made, on this occasion, the subject of so grievous a complaint. Here, Sir, I must beg leave to enter my protest against all those nice and hairbreadth distinctions, by which it is attempted, in behalf of the prosecution, to discriminate between those particular cases, and clients, for which and for whom the judge may be permitted to perform his ordinary functions of a counsellor, and those which it is his duty to avoid, under the pains and penalties of impeachment. There is indeed a genuine legitimate distinction of cases, wherein he may or may not, with impunity, be retained or give advice as counsel, as has heretofore been stated; and that distinction is simply this, no more, that he cannot lawfully be of counsel as to "any matter which is pending or likely to come before him for adjudication." In other words, he must not voluntarily engage in any business which may tend to "influence his behaviour in office," or lead him to the prejudgment of any case.

I will venture to say, that all other discrimination in these cases is wholly unfounded in any legal principle, and altogether unmeaning and preposterous.

But, Sir, after all that has been said, I will here have the candor to confess, that although most assuredly there now is not, yet it is not less certain there ought to be, some law of the Commonwealth prohibiting the Judges of Probate, and every other judicial officer, of whatever grade or station, from being engaged also in the common and ordinary duties of a practising attorney or counsellor at law. The whole science of the law is in truth but one connected system; and it is, therefore, but reasonable to suppose that any individual in the community, however distinguised for his intelligence or integrity, being at the same time a judicial officer, and engaged also in full practice as a counsellor, must necessarily be in danger, while under the influence of his retainers, of imbibing prejudices and prepossessions in favor of the particular cases that he may happen to have espoused in the course of his professional business, which he would not find it easy entirely to dismiss from his mind, as it would certainly be his duty to do, when called to sit in judgment upon similar cases, in the course of his public duties.

This consideration is too obvious to have been overlooked by the Legislature of this Commonwealth; and it cannot therefore be doubted, that it is to the influence of those rigid principles of economy, which lie at the foundation of all our civil institutions, and have been most especially regarded in measuring out the wages of all our public functionaries, that the manifold defects in our system, not only with regard to our Judges of Probate, but all our other judicial officers, is principally, if not entirely, to be attributed. The executive department of our government, in whom is invested the discretionary power of making all appointments to office, has, without doubt, in the exercise of this power, from time to time, been influenced also by similar considerations. It was with this department unquestionably a matter rather of necessity than of choice, that so large a proportion as that which has already been stated of our Probate Judges have been selected from among the most busy practising lawyers in our Commonwealth.

The truth is, that none but a lawyer, and a very sound one too, can be deemed fit for such an office, and yet, not less true is it, that none but some tyro, some mere scavenger of the profession would consent to accept it, without being permitted to go on at the same time, with his ordinary professional pursuits. It is at best, as we all know, an office of more labor and drudgery, than of honor or profit; and though it might be acceptable to some as a mere succedaneum to other, and more profitable employment, I will venture to say that there is not a respectable member of the bar, unless it were for the mere gratification of devoting his time and labor to the public service, who would be inclined to enter upon the duties of such a station, as being his only legitimate occupation. It is owing then, I repeat, to a most manifest imperfection of the system, and not to any thing questionable in the character or disposition of the individual, that all our Judges of Probate, who are also practising lawyers, and the Respondent among the number, have sometimes presumed to mingle their official and professional employments together in any manner that might be deemed consistent with the existing laws of the Commonwealth.

I am aware, Sir, that all this in very many

points of view, in which the subject might be contemplated, is in a high degree objectionable; but it remains for the legislative department, and not for this court of impeachment, to apply the remedy.

Instead of leaving so useful and important a public officer as the Judge of Probate to wring his pittance from the petty items of your fee bill, which is scarcely sufficient to afford, for all his public services, the common wages of a drayman, let him at once be provided for by a fair and honorable salary —let his compensation be, in some measure, proportionate to his usefulness, and to the dignity of his station as a public servant; and be assured, we shall hear no more of any of those practices, which, however innocent and inoffensive, in every legal point of view, are nevertheless the principal subject of the present complaint.

Here, Mr. President, I am happy in having an opportunity of expressing my most cordial acquiescence in every sentiment which has been advanced by the Hon. Managers, as to the importance of preserving, at all events, and under the heaviest sanctions of the law, an unsullied purity in all our judicial tribunals.—It is this, after all, which, more than any thing and every thing besides, is essential to the promotion of all the great purposes which are contemplated in the formation of every legitimate government.—So far, then, as relates to every thing which is connected with the performance of any official duty, I would therefore, if it were possible, that the mind of the civil magistrate, should be kept, on all occasions, free as the very air he breathes, pure as the light of heaven; I would indeed, if it were possible, that our judgment seats might be elevated to an height, infinitely beyond the reach of any thing which is sordid and selfish here below, so that the dispensing of justice and judgment upon the earth might even bear some faint similitude to what it is at the great fountain of eternal justice, in the regions above, where all is immutable perfection, and nothing that is defiled can be permitted to enter.

Such perfectibility does not, however, fall to the lot of humanity. Our civil institutions, are, after all, but the mere invention of man, and must of course, partake of that frailty and imbecility, which are incident to the very nature of their author. We have nevertheless, the consolation of knowing, that although, in relation to the judicial, or any other department of our government, it may not be hoped to attain to any thing like perfection in the system, yet, that there is much within our power, to be performed in the way of melioration.

It is not, then, for this Hon. Court, by the infliction of its penalties, but it remains with the legislative power, by the correction of a bad system, to attempt a radical cure of the mischiefs which are complained of. If it be the duty of the magistrate to be faithful, and honest, and impartial, in the discharge of his public functions, it is not less the duty of the government, whose servant he is, to place him in a condition, where he may be exempt from the operation of those causes, at least, which are most likely to produce in him, a contrary course of behaviour. To this end, I will take the liberty to say that nothing more is necessary than to give to the judicial officer, not only as to the tenure of his office, but as to every thing which is required of him in the exercise of its duties, an independence which is suitable to his dignity and his services. As to one particular branch of the judicial department, namely, the supreme court of the State, we find the principle here stated is expressly recognized by the constitution as being so fundamental, so founded "in good policy," "so essential to the security of the rights of the people," that the framers of that instrument, were unwilling to leave its adoption or rejection to the mere discretion, to any of the uncertainties of a fluctuating legislation. Accordingly, Sir, it will be found, on recurring to an article in our bill of rights, that in respect to that branch of the judiciary which has been alluded to, the principle of "an honorable salary," as well as a substantial tenure, as being necessary appurtenances to the office of the judge, is expressly laid down, as having the force of an axiom in our political economy.

Such then we find to have been considered, at the adoption of the constitution, an unquestionable principle, as well of policy, as of justice, in relation to one set of our judicial officers; and I confess I know not upon what reasonable ground it could be pretended that it is not equally applicable to the condition of the Judges of our Common Pleas, the Judges of Probate, and all other civil officers, whether judicial or executive, whose duties are of such a nature, as that the whole of their time and their undivided attention, might very usefully be employed in the public service.

It is, at any rate, most certain, that until some liberal arrangement of this kind shall be adopted; until the judge of probate and other civil officers shall, in this way, be relieved from the necessity of resorting to various other employments, in order to eke out their scanty allowance of fees, and thus to increase the means of a comfortable subsistence, it can afford no reasonable ground of complaint, that in every instance, when about to engage in any business of their own, they have not deemed it necessary to stop short in the pursuit; and to calculate all the remote chances and contingencies which may possibly bring up something in

the course of their operations, which might be considered as interfering with an impartial and correct discharge of some public duty.

I beg, Mr. President, that it may not be inferred from any of these remarks, that, except in so far as the changes in the condition and circumstances of the Commonwealth may reasonably be supposed to have rendered it necessary or expedient, I am, by any means, in favor of breaking in upon that judicious system of economy, which was established by our ancestors, and whose salutary influence has so much assisted in the growth and prosperity of the country. More especially I beseech, that I may not be understood as standing here the advocate of any such change in the judicial, or any other part of our system, as would bring it to the similitude of that which we see in more ancient governments, where the honour and convenience of the individual, rather than the usefulness or public services of the functionary, seem to be the rule by which the amount of his official emoluments are regulated.

No, Sir, we have not here now, and I trust in God there will not, speedily, be introduced among us, any such noble and exalted personages as peers of the realm, with their princely revenues, to assist us at the trial of impeachments; nor have we archbishops of provinces, nor bishops, nor a tribe of commissaries, to preside over the concerns of our ecclesiastical courts, and who are permitted to carve their emoluments, *ad libitum* from the millions which are annually committed to their disposal.

Of our courts of common law more especially it may be said, that there is surely nothing there, which looks like unnecessary indulgence to the officer. The judge of that court, most certainly, is not one who is permitted to loll at his ease upon the woolsack, or is rewarded by the annual stipend of thousands upon thousands, beyond the value of all the services, which either he, or any one else in his station, would be able to render to the public. Very different indeed from all this is now, and I trust will long continue to be, the judicial system of this Commonwealth.

Of our judges, and indeed of every class of our public functionaries, it may justly be said, that the little which they receive from the public, is sufficiently accounted for, to say the least, by their unremitted devotion to its service. So true is this, that I will venture to affirm, that, with the exception of that one branch of the judicial department which has been alluded to, there is not a single office within the gift of the Commonwealth, which, on the score of mere emolument, any tradesman in the State would be willing to accept.

I am however aware, Mr. President, that all this is rather matter of argument to be urged before a legislative body, in favor of the reformation of a system, than circumstance in justification or excuse, of a public officer who is accused of crimes, before a court of judicature. In the view which I have last mentioned, I pray you to be assured, Sir, that none of the observations, here alluded to, have been offered for the consideration of this Hon. Court.

In the way of mere apology, or excuse, the counsel for the Respondent have nothing to suggest in his behalf. He has, as we verily believe, been guilty of no crimes, and for none, therefore, does he feel himself bound to make atonement. Meagre as has ever been the reward of his public services, he has, nevertheless, the satisfaction to believe that he has fulfilled every duty which could lawfully be required of him. As to any act, through the whole course of his official career, he is, therefore, without fear, because he is conscious of being also entirely without reproach.

Mr. President, I will detain you no longer, and, I am, indeed, deeply conscious of having already detained you much too long, in the discussion of the cause now on trial. For the patient attention with which I have been indulged through the whole course of my remarks, I would beg leave to express to you, Sir, and to every member of this Hon. Court, my most humble and grateful acknowledgments; and here Sir, I should certainly take occasion, also, to make many apologies for having perhaps presumed to take to myself so large a portion of valuable time in this debate, were it not that there are circumstances in the case which assure me that this cannot be necessary.

There are, I perceive, many distinguished members of this Hon. Body, who, like myself, have been long, and extensively engaged in professional pursuits. To those more especially, and to their recollection of what may have been their own feelings on occasions like the present, I appeal for my justification as to every thing which may have had the appearance of unreasonable prolixity in the course of my argument. Their own experience must have suggested to them, much more forcibly than I could now describe, what indulgencies are due to that anxious concern, that feverish solicitude which is sometimes felt by the advocate for the safety of his client, and is apt to magnify the very mites and atoms of his subject into circumstances of moment, which seemed to demand his serious attention.

And truly, Sir, if the solicitude which is felt by Counsel for the Respondent upon this occasion may be supposed to have been, in any degree, proportionate to the magnitude of the trust which is confided to them,

and to the weight of responsibility which they have assumed, it is impossible, that any degree of labor and exertion, and earnestness in their attempts to fulfil to the utmost this trust can be deemed to have been inordinate.

In every point of view, in which it is possible to contemplate the cause now before you, it must be regarded as a cause of very great, I might almost say of infinite importance ; not less as it concerns the individual who is on his trial, than as it may affect in its consequences, the character and welfare of the Commonwealth.

As regards the Respondent individually, it need not be said, for it must be obvious to this Hon. Court, that every thing belonging to him, which can be of any value in the estimation of a man of honor and sensibility, is most directly involved in the issue of this inquiry.

It is not then, be assured Sir, the value of the petty office of which he happens to have been the incumbent, nor any thing which belongs to it, about which his mind or his feelings are engaged upon the present occasion.

As to this, and all the little honors and emoluments which may have been derived from its possession, he now feels, and whatever may be the result of the present prosecution he will still continue to maintain, the proud conviction, of having rendered to the public, by his labor and his services, an ample equivalent for every distinction which they were pleased to confer upon him.

The office then, I repeat, is the very last, and least, of the subjects which now occupy his attention. But Sir, the civil privileges of the Respondent are also involved, directly, in the issue. One of the questions upon which you are called to decide, is no other than this, whether he may continue as he is, a citizen of the Commonwealth ; or by reason of some crime shall be thrust out from the community as being no longer worthy of such distinction. I know, indeed, that it is not within the power of this Hon. Court, whatever may be its opinion as to the deserts of this Respondent, to treat him as a mere outlaw, or to inflict upon him the penalty of total disfranchisement. It is, I know, but of one only of those privileges, now belonging to him as a citizen, of which he may lawfully be dispossessed by your decree. But I would nevertheless submit to any honorable member of this Court, and to every one who is alive to any elevated and honorable sentiment, to consider how much there is left to the individual, as a member of this body politic, after having been, ignominiously, shorn of a single immunity which is common to his fellow citizens, and which he has, once, been accustomed to enjoy.

In a government like this, whose proud motto is liberty and equal rights ; where the citizen is habituated, from his very infancy, to boast, that whatever may be the accidental diversities of his condition in other respects, he may, nevertheless, claim as a birthright, to stand upon an exact footing of equality with his very governor, as a citizen of the Commonwealth—in a government like this Sir, the loss of any one civil privilege, whereby the individual is reduced, by a single hair's breadth, below the common level of his fellows, must, necessarily, be regarded, by any man of honor and sensibility, as being precisely equivalent to the loss of all. In the view of such a man, to be an American citizen, is to be so, completely, and to all intents and purposes ; " Whole as the marble, founded as the rock, as broad, and general as the casing air."

May it not then well be said of this Respondent, that his civil existence is involved in the decision which may be pronounced in this cause ?

But even this is not all. It is not the loss of office, nor of civil rights, nor of all the honors that once belonged to the magistrate, which may be the only consequence of a condemnation.

Beyond, and much above all these considerations, great and weighty as they are, the Respondent has also a personal reputation, which, he humbly hopes may be deemed, by this Hon. Court, as being of some value, in estimating the amount of what he has at stake upon the occasion. Reputation, Sir, " the immortal part of himself without which all that remains is bestial ;"—this too is now committed to your disposal, and may be saved or blasted by your decision.

You may not, indeed, by your sentence, condemn the culprit to die ; you condemn him to live ; to live, a standing monument of shame and degradation ; a fixed mark to be pointed at by the slow, and moving finger of scorn. Sir, were the case my own, I do not hesitate to declare, that rather than be subjected to consequences like these, rather than struggle through the little remainder of life, bearing always, in my bosom, the spirit thus wounded and oppressed, I should hail with delight, all the sufferings that could await me at the scaffold or the gibbet.

But, Sir, I will not dwell upon the contemplation of consequences which might result from an event, whose occurrence, as I humbly trust, is quite too improbable to be the subject, even of a surmise: We have the consolation to know that the cause of our client is in the custody of intelligent, high-minded, and honorable men, and that it is next to impossible, that he should suffer,

in any manner, injustice at their hands. Conscious that he has in nothing offended, he does not supplicate for compassion; he well knows that the stubborn integrity of this high tribunal is not to be moved from its purpose by any such appeal. He asks, indeed, for nothing better than stern justice, and the protection of the law.

Upon the law and the facts of his case, it is his confident belief, and such most assuredly is the entire conviction of every member of his counsel, that the defence upon which he stands is absolutely impregnable. He appears before you, as he trusts, not only innocent of the crimes which are imputed to him, but with a character free from reproach of any kind. Under such circumstances he hopes it may not be deemed presumptuous to say, that he expects, on this occasion, something more than a mere escape from condemnation. He expects, indeed, not a bare acquittal, but a prompt and honorable one; an acquittal, which shall be attended with no circumstance affording grounds, hereafter, for the intimation, "*quam prope crimen sine crimine!*" but that he may be permitted to go from the presence of this Hon. Court, taking with him a character, which has even been made better and brighter by the severity of that criticism which has been exercised upon it.

Mr. President, as to every thing belonging to this cause, in which my client has any other concern than such as is common to every other citizen in the community, I have now done with my remarks.

In conclusion I would, however, humbly beg leave once more to remind this Hon. Court, that much more than all that which is valuable and dear to a single individual, is dependent upon its decision in this cause. Not the reputation and welfare of the Respondent merely, but the safety and honor of the Commonwealth, are, in my humble apprehension, seriously and most deeply concerned in the result of your deliberations.

The case is manifestly a leading one, and you are now about to settle for the first time principles, and to lay down a precedent, which are to become the rule and the guide, not of this generation only, but of all posterity, in relation to a great and momentous subject.

It is, in fact, to be determined by the decision of this day, whether the tremendous power of impeachment shall, hereafter, be confined to the salutary purposes to which it was destined by the constitution; or whether in this country, as it once was in another, it shall be let loose from all restraints; and thus delivered over to the hands of faction and intolerance, to be wielded at their pleasure as an engine of injustice and oppression.

It is moreover to be recollected that a proceeding in a high court of impeachment, as relates to its immediate consequences, in a public point of view, bears but little resemblance to an ordinary proceeding before a tribunal of inferior jurisdiction. A court of the latter description may be considered as a kind of domestic forum, whose proceedings, however unjust or oppressive, bring down the complaint and the ignominy, not upon the whole community, but upon the heads of those only, who are the immediate perpetrators of the mischief Not so is it, in any country, with the transactions of a high court of impeachment. This court is to be regarded as partaking, in some degree, of a political, as well as of a judicial character. It is situated upon an eminence; and the eyes of the whole world are directed towards it. It may be said, indeed, that the acts of such a court not only stamp the character of the tribunal itself, but of the nation also in whose service it is employed.

Let it then be generally understood, that in this enlightened age, and more especially in this most enlightened community, boasting as it does of the excellence of all its institutions, but more particularly of its purity and wisdom in the administration of public justice; let the disastrous event here occur, that in a high court of impeachment, a respectable magistrate of the Commonwealth has been arbitrarily condemned and disgraced; and I will venture to pronounce, (in the words of a distinguished soldier and scholar upon another and not very dissimilar occasion) "that it would be a foul indelible blot upon the first fair pages of the Massachusetts' history; nor would any series of rectitude in government, purity in manners, inflexible faith, nor the whole catalogue of human virtues, be sufficient to redeem her character in the estimation of the world."

Mr. Blake closed his argument at a quarter before one o'clock, and was succeeded immediately by Mr. WEBSTER, who spoke as follows:—

Mr. President, I agree with the Hon. Managers, in the importance which they have attributed to this proceeding. They have, I think, not at all overrated that importance, nor ascribed to the occasion, a solemnity which does not belong to it. Perhaps, however, I differ from them, in regard to the causes which give interest and importance to this trial, and to the parties likely to be most lastingly and deeply affected by its progress and result. The Respondent has as deep a stake, no doubt, in this trial, as he can well have in any thing which does not affect life. Regard for reputation, love of honorable character, affection for those who must suffer with him, if he suffers, and who will feel your sentence of conviction, if you should pronounce one, fall on their own

heads, as it falls on his, cannot but excite, in his breast, an anxiety, which nothing could well increase, and nothing but a consciousness of upright intention could enable him to endure. Yet, Sir, a few years will carry him far beyond the reach of the consequences of this trial. Those same years will bear away, also, in their rapid flight, those who prosecute and those who judge him. But the community remains. The commonwealth, we trust, will be perpetual. She is yet in her youth, as a free and independent State, and, by analogy to the life of individuals may be said to be in that period of her existence, when principles of action are adopted, and character is formed. The Hon. Respondent will not be the principal sufferer, if he should here fall a victim to charges of undefined and undefinable offences, to loose notions of constitutional law, or novel rules of evidence. By the necessary retribution of things, the evil of such a course would fall most heavily on the State which should pursue it, by shaking its character for justice, and impairing its principles of constitutional liberty.—This, Sir, is the first interesting and important impeachment which has arisen under the constitution of the Commonwealth.—The decision now to be made cannot but affect subsequent cases. Governments necessarily are more or less regardful of precedents, on interesting public trials, and as, on the present occasion, all who act any part here have naturally considered what has been done, and what rules and principles have governed, in similar cases, in other communities, so those who shall come after us will look back to this trial. And I most devoutly hope they may be able to regard it, as a safe and useful example, fit to instruct and guide them in their own duty; an example full of wisdom, and of moderation; an example of cautious and temperate justice; an example of law and principle successfully opposed to temporary excitement; an example, indicating in all those who bear a leading part in the proceedings, a spirit, fitted for a judicial trial, and proper for men who act with an enlightened and firm regard to the permanent interests of public constitutional liberty. To preserve the Respondent in the office which he fills, may be an object of little interest to the public; and to deprive him of that office may be of as little. But on what principles, he is either to be preserved or deprived, is an inquiry, in the highest degree important, and in which the public has a deep and lasting interest.

The provision, which the constitutions of this and other states have made for trying impeachments before the senate, is obviously adopted from an analogy to the English constitution. It was perceived, however, and could hardly fail to be perceived, that the resemblance was not strong, between the tribunals, clothed with the power of trying impeachments, in this country, and the English House of Lords. This last is not only a branch of the Legislature, but a standing judicature. It has jurisdiction to revise the judgments of all other courts. It is accustomed to the daily exercise of judicial power, and has acquired the habit and character which such exercise confers. There is a presumption, therefore, that it will try impeachments, as it tries other causes, and that the common rules of evidence, and the forms of proceedings, so essential to the rights of the accused, which prevail in other cases, will prevail also in cases of impeachment. In the construction of our American governments, it is obvious, that although the power of judging on impeachments could probably be no where so well deposited, as with the senate, yet it could not but be foreseen, that this high act of judicature was to be trusted to the hands of those who did not ordinarily perform judicial functions; but who, occasionally only, and on such occasions, moreover, as were generally likely to be attended with some excitement, took upon themselves the duty of judges. It must, nevertheless, be confessed, that few evils have been, as yet, found to result from this arrangement. In all the states, in the aggregate, although there have been several impeachments, there have been fewer convictions, and fewer still, in which there is just reason to suppose injustice has taken place. From the experience of the past, I trust we form favorable anticipations of the future, and that the judgment which this Court shall now pronounce, and the rules and principles which shall guide that judgment, will be such as shall secure to the community a rigorous and unrelenting censorship over maladministration in office, and to individuals entire protection against prejudice, excitement, and injustice.

The Respondent is impeached for various instances of alleged misconduct, in his office, as Judge of Probate, for the county of Middlesex. In order that we may understand the duties which he is charged with violating, it is necessary to inquire into the origin and nature of these duties, and to examine the legal history of the Commonwealth, in regard to the officers, who from time to time have executed and performed these duties. It is now two centuries since our ancestors established a colony here. They brought with them, of course, the general notions, with regard to property, the administration of justice, and the peculiar powers and duties of different tribunals, which they had formed in the country which they left; and these notions, and general ideas, they adopted in practice, with such modifications as circumstances rendered necessary. In England, they had been accustomed to see the jurisdiction over wills and administrations exercised in the spiritual courts, by the

bishops or their ordinaries. Here, there were no such courts. Still it was a necessary jurisdiction, to be exercised by some tribunal, and in the early history of the colony, it was exercised by the same magistrates, or some of them, on whom the other portions of judicial power were conferred. Wills were proved, and administrations granted, by the county magistrates, essentially in the same manner as in England by the bishops, or their delegates. It seems that any two magistrates, with the clerk of the county court, might prove a will, and cause it to be recorded in the county court; and might grant administrations, in like manner. *(Ancient Charters*, 204.)

At length, by the act of 1635, *(An. Ch.* 205) it was expressly declared, that the county court, in cases of probate of wills, and the granting of administrations, should have the same power and authority *as the ordinary in England.*

By the provincial charter of 1692, all power and jurisdiction, in the probate of wills and granting administration, was conferred on the governor and council. The governor then became supreme ordinary, and by the provision of the statutes they were to exercise the same power and authority as were exercised by the ordinary in England.

At this time, no statute had regulated fees in the probate office; and yet it is not probable that business was done there, at that time, without fees, any more than at later periods. We must look therefore for some other authority, than a statute permission, for the establishment and regulation of fees, in this office. And as the governor and council possessed the general power of the courts in England, it is material to inquire into the authority and practice of those courts in this particular. There can be no doubt, that in the English courts, fees, in cases of probate and administration, were, from early times, in most cases regulated by custom, and the authority and direction of the courts themselves, without statute provisions. A table of fees, established in 1597, in the time of archbishop Whitgift, may be seen in *Burn's Ecclesiastical Law, vol. 2. p.* 266.

This table sets forth a long list of charges and fees of office accruing in the administration of estates, such as for "administration," which probably means decreeing administration, "commission," which is the letter of administration, "interlocutory decree," "examination of account," "respite of inventory," "caveat," "citation," "quietus," &c. &c. &c. At this time there was no statute which established the fees of office, in cases of administration, except one single provision in the St. 21, Hen. VIII, cap. 5, which enacted, that for granting administration on goods under forty pounds, the judge should receive no more than two shillings and sixpence. It appears from the preamble of that statute, that no previous law was existing, on the subject, and the grievance recited, is, that the bishops and their ordinaries demanded and received greater fees, for the probation of testaments, and other things thereunto belonging, than had been aforetime usual and accustomed. The preamble recites also, that an act of Henry V. had ordained, that no ordinary should take, for the probation of testaments, or other things to the same belonging, any more than was accustomed and used in the time of King Edward the third, *which act did endure but to the next parliament, by reason that the said ordinaries did then promise to reform and amend their exactions:* but inasmuch as the evil was still continued and aggravated, the act proceeded to limit and fix fees of office, for the probate of wills, and for other services respecting testate estates, and contains the single provision above mentioned, and no more, respecting administrations on intestate estates.

It is entirely clear and certain, that the fees of bishops and their ordinaries did not *originate* in the grant or provision of any act of parliament. Such acts were passed only to restrain and limit the amount, and to prevent exaction and extortion. The right to demand and receive fees rested on the general principle of a right to compensation for services rendered; and in the absence of statute limitations, the amount was ascertained by the practice and usage of the courts, being reasonable and proper. Hence it happened, in England, that different fees were paid, and probably still are, in the different dioceses, according to the usage of different courts, and the time when their tables of fees were respectively established. "In the several dioceses there are tables of fees, different, as it seemeth, in the several charges, in proportion to the difference of times wherein they have been established." (2. *Burn*, 269.) This is precisely what has happened, and what, whether allowed to prove it or not, every member of this court knows, now actually exists, in relation to the different counties of this Commonwealth.

It is most material to the Respondent's case to understand clearly, on what ground it is, that, as Judge of Probate, he had a right to receive fees for services performed in his office. There is a difference of opinion, in matter of law, in this respect, between the Managers and ourselves, wide enough, in my judgment, to extend over the whole case. If the House of Representatives be right, in the legal doctrine which their Managers have advanced here, I agree at once the case is against the Respondent, unless, indeed, an indulgence may be allowed to his

infirmity, in not understanding the law, as it is now asserted. I will proceed to state the question, now at issue between the Managers and us, as clearly as I may be able. The Managers contend that all fees of office, in such offices as the Respondent's, arise only from the express *grant* of the legislature; and that none can be claimed, where such grant is not shown. We, on the other hand, humbly submit, that the right, in such offices, to receive fees, is the general right to receive reasonable compensation for services rendered, and labor performed; and is no otherwise affected by statute, than as the *amount* of fees, is, or may be, *limited* by statute.

It is certain, that Judges of Probate, in this state, are required to perform many acts, (such, for instance, as granting guardianship to persons *non compotes mentis)* for which no fees are specifically established by the statute. One of the learned Managers has expressly advanced the proposition, that for such services the judge is entitled to receive no fees whatever. He contends, that the law presumes him to be adequately paid, on a sort of average, for all services by him performed, by the fees specially provided for some. On the contrary, we, very humbly, insist, that in all such cases the judge has a right to receive a just and reasonable fee of office for the service performed; the amount to be settled, on proper principles, and, as well as in any way, by analogy to similar services, for which the amount of fees is fixed by statute. The statute, for example, establishes the fees for a grant of guardianship over minors. It establishes none, for guardianship over *persons non compotes mentis.* The precise difference between the learned Manager and us, is, that they contend, that, in the last case, the judge is entitled to receive no fee at all; while we think, that he has a right to receive, in such case, a reasonable fee; and that what is reasonable may fairly be determined by reference to what the law allows him in the case of guardianship over minors.

I rejoice, Sir, in behalf of my client, that we have here a plain, intelligible question of law, to be discussed and decided. This is a question, in which neither prerogative nor discretion has aught to do. It is not to be decided, by reasons of state, or those political considerations, which we have heard so often, but so indefinitely, and, in my judgment, so alarmingly, referred to, and relied on, in the opening speeches of more than one of the learned Managers. It may possibly happen, Sir, to the learned Managers, to share the fortunes of the gods in Homer's battles. While they keep themselves in the high atmosphere of prerogative, and political discretion, and assail the Respondent from the clouds, the advantage, in the controversy, may remain entirely with them. When they descend, however, to an equal field of mortal combat, and consent to contend with mortal weapons—*cominus ense*—it is probable they may sometimes get, as well as give, a wound. On the present question, we meet the learned Managers on equal terms, and fair ground, and we are willing that our client's fate should abide the result. The Managers have advanced a plain and intelligible proposition, as being the law of the land. If they make it out, they show a good case against the Respondent; if they fail so to do, then their case, so far as it rests on this proposition, fails also. Let, then, the proposition be examined.

The proposition is, as before stated, that for services, which the law requires judges of probate to perform, but for which there is no particular fee established or provided by statute, they can receive no fee whatever.

In the first place, let it be remarked, that, of the various duties and services, required of judges of probate, some grow out of the very nature of their office, and are incidental to it, or arise by common law; others were imposed by statutes passed before the establishment of any fee bill whatever, and others, again, by statutes passed since. The statute, commonly called the fee bill, was passed for the regulation of fees in other courts, and other offices, as well as of the judges and registers of probate. It imposes no duty whatever on any officer. It treats only of existing duties, and of those no farther than to limit fees. It declares, that, "The fees of the several persons hereafter mentioned, *for the services respectively annexed to their names*, shall be as follows," &c. The statute then proceeds to enumerate, among other things, certain services of the judges of probate; but it is acknowledged that it does not enumerate or set forth *all* the services, which the law calls on him to perform.

In our opinion, Sir, this is simply a *restraining* statute. It fixes the amount of fees, *in the cases mentioned*, leaving every thing else as it stood before. I have already stated, that, in England, fees, in the ecclesiastical courts, for probate of wills, and granting administrations, were of earlier date than any statute respecting them, and their amount ascertained, by usage, and the authority of the courts themselves. "The rule is," says Dr. Burn, "the known and established custom of every place, being reasonable." (4. *Burn's Eccles. Law*, 267.)

And if the *reasonableness* of the fee be disputed, it may be tried by jury, whether the fee be reasonable. (1. *Salkeld*, 333.) If this be so, then clearly there exists a right to *some* fee, independent of a particular statute; for if there be no right to *any fee at all*, why refer to a jury to decide *what* fee would be reasonable? But the law is still more express on this point.—"Fees are certain per-

quisites allowed to officers in the administration of justice, *as a recompence for their labor and trouble;* ascertained, either by acts of parliament, or by ancient *usage*, which gives them an equal sanction with an act of parliament." All such fees as have been allowed by courts of justice to their officers, as a recompence for their labor and attendance, are established fees; and the parties *cannot be deprived* of them without an act of parliament." *(Coke, Lit.* 368. *Prec. Chan.* 551. *Jacob's Law Dict.*—"FEES.")

I may add, that fees are recoverable, in an action of *assumpsit*, as for work and labor performed. The doctrine contended for on the other side is contradicted, in so many words, by a well settled rule; viz. that if an office be erected for the public good, though no fee is annexed to it, it is a good office; and the party, for the labor and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a *fee* yet as a compensation, for his *trouble*. *(Moore*, 308. *Jac.* "FEES." (A. E.) *Hard.* 355. *Salk.* 333.)

The universal practice, Sir, has corresponded with these rules of law. Almost every officer in the Commonwealth, whose compensation consists in fees of office, renders services not enumerated in the fee bill, and is paid for those services; and this, through no indulgence, or abuse, but with great propriety and justice. Allow me to mention one instance, which may be taken as a sample for many. Some thousands of dollars are paid, every year, to the clerks of the several Courts of Common Pleas, in this State, for certified copies of papers and records remaining in their offices. The fee bill neither authorises the taking of any such fee, nor limits its amount, nor mentions it, in any way. There are other instances, equally clear and strong, and they show us that all the courts of justice, and all the officers concerned in its administration, have understood the law, as the Respondent has understood it; and that the *notion* of the learned Managers derives as little support from practice, as it does from reason or authority. The learned Managers have produced no one opinion of any writer, no decision of any court, and, as I think, no shadow of reason, to sustain themselves in the extraordinary ground which they have taken; ground, I admit, essential to be maintained by them, but which the Respondent could devoutly wish they had taken somewhat more of pains to examine and explore before, on the strength of it, they had brought him to this bar. I submit it, Sir, to the judgment of this court, and to the judgment of every judge, and every lawyer, in the land, whether the law be not, that officers, paid by fees, have a right to such fees, for services rendered, on the general principle of compensation for work and labor performed; the amount to be ascertained by the statute, in cases in which the statute has made a regulation; and, in other cases, by analogy to the services, which are especially provided for, and by a consideration of what is just and reasonable in the case. With all my respect, Sir, for the learned Managers, it would be mere affectation, if I were to express myself with any diffidence on this part of the case, or should leave the topic with the avowal of any other feeling than surprise, that a judge of the land should be impeached and prosecuted upon the foundation of such opinions as have in this particular been advanced.

Before I proceed further, Sir, I wish to take notice of a point, perhaps not entirely essential to the case. The Respondent, in his answer, has stated, that the jurisdiction of judges of probate consists of two parts, commonly called the amicable or voluntary and the contentious jurisdiction. One of the learned Managers has said, that this distinction can by no means be allowed, and has proceeded to state, if I rightly understood him, that the *voluntary* jurisdiction of the English ecclesiastical courts has not, in any part of it, devolved on, and been granted to, the judges of probate here. As it is not perhaps material for the present discussion, to ascertain precisely what is the true distinction between the *voluntary* and the *contentious* jurisdiction of the ecclesiastical courts, as understood in England, I shall content myself with reading a single authority on the subject. Dr. Burn *(vol. 1, p. 292)* says;— "*Voluntary* jurisdiction is exercised in matters which require no judicial proceeding, as in granting probate of wills, letters of administration, sequestration of vacant benefices, institution, and such like; *contentious* jurisdiction is, where there is an action or judicial process, and consisteth in the hearing and determining of causes between party and party."

It can be now at once seen, Sir, whether any part of the jurisdiction exercised by judges of probate in this State, be *voluntary*, within this definition of the distinction between voluntary and contentious.

After these observations, Sir, on the general nature and origin of fees, accruing in the probate offices, I shall proceed to a consideration of the charges contained in these articles.

And the first inquiry is, whether any misconduct or maladministration in office, is sufficiently charged, upon the Respondent, in any of them. To decide this question, it is necessary to inquire, what is the law governing impeachments; and by what rule questions arising in such proceedings are to be determined. My learned colleague, who has immediately preceded me, has gone very extensively into this part of the case. I have little to add, and shall not detain you by re-

petition. I take it Sir, that this is a *court;* that the Respondent is brought here to be *tried;* that you are his *judges*; and that the rule of your decision is to be found in the constitution and the law. If this be not so, my time is misspent in speaking here, and yours also in listening to me. Upon any topics of expediency, or policy; upon a question of what may be best, upon the whole; upon a great part of those considerations, with which the leading Manager opened his case, I have not one word to say. If this be a *court*, and the Respondent on his *trial* before it; if he be to be tried, and can only be tried *for some offence known to the constitution and the law;* and if evidence against him can be produced only according to the ordinary rules, then, indeed, counsel may possibly be of service to him But if other considerations, such as have been plainly announced, are to prevail, and that were known, counsel owe no duty to their client which could compel them to a totally fruitless effort, for his defence. I take it for granted, however, Sir, that this court feels itself bound by the constitution and the law; and I shall therefore proceed to inquire whether these articles, or any of them, are sustained by the constitution and the law.

I take it to be clear, that an impeachment *is a prosecution for the violation of existing laws;* and that the offence, in cases of impeachment, must be set forth substantially in the same manner as in indictments.—I say *substantially*, for there may be, in indictments, certain technical requisitions, which are not necessary to be regarded in impeachments. The constitution has given this body the power of trying impeachments, without defining what an impeachment is, and therefore necessarily introducing, with the term itself, its usual and received definition, and the character and incidents which belong to it. An impeachment, it is well known, is a judicial proceeding. It is a *trial*, and conviction in that trial is to be followed by forfeiture and punishment. Hence, the authorities instruct us, that the rules of proceeding are substantially the same as prevail in other criminal proceedings. (*2. Wooddeson*, 611. 4. *Bl. Comm.* 259. 1. *H. P. C.* 150. 1. *Chitty's Criminal Law*, 169.) There is, on this occasion, no manner of *discretion* in this court, any more than there is, in other cases, in a judge or a juror. It is all a question of law and evidence. Nor is there, in regard to *evidence*, any more latitude, than on trials for murder, or any other crime, in the courts of law. Rules of evidence are rules of law, and their observance on this occasion can no more be dispensed with than any other rule of law. Whatever may be imagined to the contrary, it will commonly be found, that a disregard of the ordinary rules of evidence, is but the harbinger of injustice. Tribunals which do not regard those rules, seldom regard any other; and those who think they may make free with what the law has ordained respecting evidence generally find an apology for making free also with what it has ordained respecting other things. They who admit or reject evidence, according to no other rule than their own good pleasure, generally decide every thing else by the same rule

This being, then, a judicial proceeding, the first requisite is, that the Respondent's offence, *should be fully and plainly, substantially and formally described to him.* This is the express requisition of the constitution. Whatever is necessary to be proved, must be alleged; and it must be alleged with ordinary and reasonable certainty. I have already said, that there may be necessary in indictments, certain technical niceties, which are not necessary in cases of impeachments. There are, for example, certain things necessary to be stated, in strictness, in indictments, which, nevertheless, it is not necessary to prove precisely as stated. An indictment must set forth, among other things, for instance, the particular day when the offence is alleged to have been committed; but it need not be proved to have been committed on that particular day. It has been holden, in the case of an impeachment, that it is sufficient to state the commission of the offence to have been on or about a particular day. Such was the decision, in Lord Winton's case; as may be seen in *4th Hatsell's Precedents*, 297. In that case, the respondent, being convicted, made a motion to arrest the judgment, on the ground that "the impeachment was insufficient, for that the time of committing the high treason is not therein laid with *sufficient certainty.*" The principal facts charged in that case were laid to be committed "*on or about the months of September, October, or November last*;" and the taking of Preston, and the battle there, which are among the acts of treason, were laid to be done "*about the 9th, 10th, 11th, 12th, or 13th of November last.*"

A question was put to the judges, "whether in *indictments* for treason or felony it be necessary to allege some certain day upon which the fact is supposed to be committed; or, if it be only alleged in an *indictment* that the crime was committed on or about a certain day, whether that would be sufficient." And the judges answered, that it is necessary that there be a certain day laid in the indictment, and that to allege that the fact was committed on or about a certain day would not be sufficient. The judges were next asked, whether, if a certain day be alleged, in an indictment, it be necessary, on the trial, to prove the fact to be committed *on that day;* and they an-

swered, that it is *not* necessary. And thereupon the lords resolved, that the impeachment was sufficiently certain in point of time. This case furnishes a good illustration of the rule, which I think is reasonable and well founded, that whatever is to be proved must be stated, and that no more need be stated.

In the next place, the matter of the charge must be the breach of some known and standing law; the violation of some positive duty. If our constitutions of government have not secured this, they have done very little indeed for the security of civil liberty. "There are two points," said a distinguished statesman, "on which the whole of the liberty of every individual depends; one, the trial by jury; the other, a maxim, arising out of the elements of justice itself, that no man shall, under any pretence whatever, be tried upon any thing but a known law." These two great points our constitutions have endeavored to establish; and the constitution of this Commonwealth in particular, has provisions on this subject, as full and ample as can be expressed in the language in which that constitution is written.

Allow me then, Sir, on these rules and principles to inquire into the legal *sufficiency* of the charges contained in the first article.

And first, as to the illegality of the time or place of holding the court, I beg to know what there is stated, in the article, *to show that illegality?* What fact is alleged, on which the Managers now rely? *Not one.*—Illegality itself is not a fact, but an inference of law, drawn by the Managers, on facts known or supposed by them, but not stated in the charge, nor until the present moment made known to any body else. We hear them now contending, that these courts were illegal for the following reasons, which they say are true, as *facts*, viz:

1. That the register was absent;

2. That the register had no notice to be present;

3. That parties had not notice to be present.

Now, not one of these is stated in the article. No one fact or circumstance, now relied on as making a case against the defendant, is stated in the charge. Was he not entitled to know, I beg to ask, what was to be proved against him? If it was to be contended that persons were absent from those courts who ought to have been present, or that parties had no notice, who were entitled to receive notice, ought not the Respondent to be informed, that he might encounter evidence by evidence, and be prepared to disprove, what would be attempted to be proved?

This charge, Sir, I maintain is wholly and entirely insufficient. It is a mere nullity. If it were an indictment in the courts of law, it would be quashed, not for want of formality, or technical accuracy, but for want of substance in the charge. I venture to say there is not a court in the country, from the highest to the lowest, in which such a charge would be thought sufficient to warrant a judgment.

The next charge in this article is for receiving illegal fees for services performed. I contend that this also is *substantially* defective, in not setting out what sum *in certain*, the Defendant has received as illegal fees. It is material to his defence that he should be informed, more particularly than he here is, of the charge against him. If it be merely stated that for divers services respecting one administration, he received a certain sum, and for divers others, respecting another, another certain sum, and that these sums were too large, (which is the form of accusation adopted in this case) he cannot know for what service, or on what particular item, he is charged with having received illegal fees. The legal and the illegal are mixed up together, and he is only told that in the aggregate he has received too much. In some of these cases, there is a number of items, or particulars, in which fees are charged and received; but in the articles these items or particulars are not stated, and he is left to conjecture, out of ten, or it may be twenty, particular cases, which one it is, that the proof is expected to apply to.

My colleague has referred to the cases, in which it has been adjudged, that in prosecutions against officers for the alleged taking of illegal fees, this general manner of statement is insufficient. It is somewhat remarkable, that ancient acts of Parliament should have been passed expressly for the purpose of protecting officers, exercising jurisdiction over wills and administration, against prosecutions in this form; which were justly deemed oppressive. The st. 25, Ed. 3, cap. 9, after reciting, "that the king's justices do take indictments of ordinaries, and of their officers, of extortion, or oppressions, and impeach them, without putting in certain, wherein, or whereof, or in what manner they have done extortion;"—proceeds to enact, "That his justices shall not from henceforth impeach the ordinaries, nor their officers, because of such indictments of general extortions or oppressions, unless they say, and put in certain, in what thing, and of what, and in what manner the said ordinaries or their officers have done extortions or oppressions."

The charge in this case, ought to have stated the offensive act, for which the fee was taken; and the amount of the fee re-

ceived. The Court could then see whether it were illegal. Whereas the article, after reciting certain services performed by the Respondent, some of which are mentioned in the fee-bill, and others are not, alleges that *for the business aforesaid* the Respondent demanded and received *other and greater fees than are by law allowed.* Does this mean, that he received excessive fees for every service, or was the whole excess charged on one service? Was the excess taken on those particular services, for which a specific fee is given by the statute, or was it taken for those services not mentioned in the fee bill at all? But further; the article proceeds to state, that afterwards during and upon the settlement of said estate, the Respondent did demand and receive divers sums, as fees of office, other and greater than are by law allowed; *without stating at all what services were rendered, for which these fees were taken!* It is simply a general allegation, that the Respondent received from an administrator, in the settlement of an estate, excessive fees; without stating, in any manner whatever, what the excess was, or even what services were performed. I beg leave to ask, Sir, of the learned Managers, whether they will, as lawyers, express an opinion before this Court, that this mode of accusation is sufficient? Do they find any precedent for it, or any principle to warrant it? If they mean to say, that proceedings, in cases of impeachment, are not subject to rule; that the general principles applicable to other criminal proceedings do not apply; this is an intelligible, though it may be an alarming course of argument. If, on the other hand, they admit, that a prosecution by impeachment is to be governed by the general rules applicable to other criminal prosecutions; that the constitution is to control it; and that it is a judicial proceeding; and, if they recur, as they have already frequently done, to the law relative to indictments, for doctrines and maxims applicable to this proceeding; I again ask them, and I hope in their reply they will not evade an answer, will they, as lawyers, before a tribunal constituted as this, say, that in their opinion, this mode of charging the Respondent is constitutional and legal? Standing in the situation they do, and before such a court, will they say, that, in their opinion, the Respondent is not, constitutionally and legally, entitled to require a more particular statement of his supposed offences? I think, Sir, that candor and justice to the Respondent require, that the learned Managers should express, on this occasion, such opinions on matters of law, as they would be willing, as lawyers, here and elsewhere to avow and defend. I must therefore, even yet again, entreat them to say, in the course of their reply, whether they maintain that this mode of allegation would be sufficient in an indictment; and if not, whether they maintain, that in an impeachment, it is less necessary that the Defendant be informed of the *facts* intended to be proved against him, than it is in an indictment. The learned Managers may possibly answer me, that it is their business only to argue these questions, and the business of the Court to decide them. I cannot think however, that they will be satisfied with such a reply. Under the circumstances in which he is placed, the Respondent thinks that the very respectable gentlemen who prosecute him, in behalf of the House of Representatives, owe a sort of duty, even to him. It is far from his wish, however, to interfere with their own sense of their own duty. They must judge for themselves, on what grounds they ask his conviction from this Court. Yet he has a right to ask—and he does most earnestly ask, and would repeatedly and again and again, ask, that they will state those grounds plainly and distinctly. For he trusts, that if there be a responsibility, even beyond the immediate occasion, for opinions and sentiments here advanced, they must be entirely willing, as professional men, to meet that responsibility.

I now submit to this Court, whether the supposed offences of taking illegal fees, as charged in this article, are set forth legally and sufficiently; either by the common rules of proceedings in criminal cases, or according to the constitution of the State.

As to the manner of stating the offence in this article—I mean the allegation that the Respondent refused to give, on request, an account of items of fees received, it appears to me to be substantially right, and I have no remarks to make upon it. The question upon that will be, whether the fact is proved.

All the objections which have been made to the first article, apply equally to the second; with this further observation, that for the services mentioned in this article the fee bill makes no provision at all. The same objections apply also to the third, fourth, and fifth articles.

It seems to us, Sir, that all these charges for receiving illegal fees, without setting out, in particular, what service was done, and what was the amount of excess, are insufficient to be the foundation of a judgment against the Respondent. And especially all the articles, in which he is charged with receiving fees for services not specified in the fee bill; it being not stated, what he would be properly entitled to in such cases, by usage, and the practice of the courts, and there being no allegation that the sum received was an unreasonable compensation for the services performed. In this respect the articles consider that to be settled by positive law,

which is not so settled. The second article, for example, alleges that the Respondent demanded and received, for certain letters of guardianship granted by him over persons *non compotes mentis* "*other and greater fees than are by law allowed therefor.*"—This supposes, then, that *some* fees are allowed by law therefor; yet, this is the very case in which it has been contended by the Managers that *no fee whatever was due;* there being none mentioned in the fee bill. Between the words of the article, and the tenor of the argument, there appears to me to be no small hostility. Both cannot be right. They cannot stand together. There should be either a new argument to support the article, or a new article to meet the argument.

Having made these observations on the legal sufficiency of all the articles which charge the Respondent with holding unlawful Courts, and demanding and receiving unlawful fees, before proceeding to those which advance charges of a different nature against him, allow me to advert to the evidence which has been given, on these five first articles respectively; and to consider what unlawful act has been *proved* against the Respondent in relation to the matters contained in them.

In the first place, it is proved, that the Respondent held a special Probate Court at Groton, October 14, 1816; and at such court granted letters of administration to one Tarbell. This court the register did not attend. With respect to parties concerned in the business then and there to be transacted, they all had notice, as far as appears; and no one has ever been heard to complain on that account.

It has now been contended, Sir, by the learned Managers, that this court was holden unlawfully, because not holden at a time previously fixed by law. They maintain that judges of probate can exercise no jurisdiction, except at certain *terms*, when their court is to be holden.

On the contrary the Respondent has supposed, and has acted on the supposition, that he might lawfully hold his court, for the transaction of ordinary business, at such time and place as he might think proper; giving due and proper notice to all parties concerned. He supposes he might so have done, independently of the provisions of any statute; and he supposes, moreover, that he was authorised so to do, by the express provision of the statute of 1806.

The first inquiry, then, is, whether the probate courts, in this Commonwealth, be not courts which may be considered as always open; and authorised, at all times, to receive applications, and transact business; upon due notice to all parties; or whether on the contrary their jurisdiction can only be exercised, in *term*, or at such stated periods and times as may be fixed by law. It is true, that the common law courts have usually fixed terms, and can exercise their powers only during the continuance of these terms. In England, the termination as well as the beginning of the term is fixed by law. With us, the first day only is fixed, and the courts, having commenced on the day fixed by law, hold on as long as the convenience of the occasion requires.

In early ages the whole year was one continued term. After the introduction of christianity among the Western nations of Europe, the governments ordained that their courts should be always open, for the administration of justice; for the purpose, among other things of showing their disapprobation of the heathen governments, by whom the *dies fasti et nefasti* were carefully, and as they thought, superstitiously regarded. In the course of time, however, the church interfered; and prevailed to rescue certain seasons of the year, which it deemed holy time, such as Christmas and Easter, &c. from the agitations of forensic discussion. The necessities of rural labor afterwards added the harvest months to the number of the vacations. The vacations were thus carried out of the year, and what was left was term. Thus, even with regard to the common law courts, the provisions respecting terms were made, not so much for creating terms as creating vacations. And for this reason it probably is, that as well the termination as the commencement of the term should be established by law.

In respect to the spiritual courts, no such positive regulations, as far as I can learn, appear to have been made. Their jurisdiction is one which seems necessarily to require more or less of occasional as well as stated exercise. The bishop's jurisdiction, over wills and administrations, was not local, but personal. Hence he might exercise it, not only when he pleased, but where he pleased; within the limits of his diocese, or without. He might grant letters of administration, for instance, while without the local limits over which his jurisdiction extends, because it is a personal authority which the law appoints him to exercise. "The power of granting probates is not local, but is annexed to the person of the archbishop, or bishop; and therefore a bishop, or the commissary of a bishop, while absent from his diocese, may grant probate of wills, respecting property within the same; or if an archbishop, or bishop, of a province or see in Ireland happens to be in England, he may grant probate of wills relative to effects within his province or diocese." *(Toller*, 66. 4. *Burn.* 285.)

Notwithstanding this, however, the canons ordain, that the ordinaries shall appoint proper places and times, for the keeping of

their courts; such as shall be convenient for those who are to make their appearance there: this is for the benefit of suitors. The object is that there may be some certain times, and places, when and where persons having business to be transacted may expect to find the judge; and it by no means necessarily takes away the power of transacting business at other times and places. The ordaining of such a rule plainly shews, that before it was made, these judges held their courts when and where they pleased, and only when and where they pleased.

If we recur again to the history of this Commonwealth, we shall find, that what necessity or convenience had established in England, the same necessity or convenience soon established here.

By the colony charter, no provision was made for a court for the probate of wills and granting administrations. In 1639 it was ordained, that there should be records kept, of all wills, administrations, and inventories. *(An. Ch. 43.)*—In 1649 an act was passed requiring wills to be proved at the *county court*, which should next be after thirty days from the death of the party; and that administration should be there taken, &c. *(Ibid. 204.)*

These county courts were courts of common law jurisdiction, and were holden at stated terms. But experience seems soon to have shown, that from the nature of probate jurisdiction, its exercise could not be conveniently confined to stated terms; for in 1652, an act was passed, *authorising two magistrates, with the recorder of the county court, to allow and approve of wills, and grant administrations; the clerk to cause the will or administration to be recorded. (Ibid. 204.)* The reason of passing this act is obvious. The county court consisted of many magistrates. They assembled to form a court, only at stated terms. On this court the law had conferred the powers of probate of wills and granting administrations; and like other business it could of course only be transacted at stated terms. This was found to be an inconvenience, and the law which I have cited was passed to remedy it. So that instead of confining the exercise of the jurisdiction of these courts to stated terms, we find the law has done exactly the contrary. Not only the analogy which they bear with other courts of similar jurisdiction, but our own history, and the early enactments of the colonial legislature all conspire to refute the notions which have been advanced—I cannot but think somewhat incautiously advanced—on this occasion.

The provisions of the constitution, requiring judges of probate to hold their courts on certain fixed days, is perfectly and strictly consistent nevertheless, with the occasional exercise of their powers at other times. The law has had two objects, in this respect; distinct, indeed, but consistent. One is that *there should be certain fixed days*, when it should be the duty of the judges to attend to the business of their offices, and the applications of suitors; the other, that they might, when occasion required, perform such duties, and attend to such applications *on other days*. The learned Managers seem to have regarded these provisions of law as repugnant, whereas they appear to us to consist perfectly well together.

If it were possible, Sir, that we were still mistaken in all this, there is yet the provision of the special law of 1806, which would seem to put an end to this part of the case. This statute has been already stated; its terms are express, and its object plain beyond all doubt or ambiguity. Not only does this act, of itself, afford the most complete justification to the Respondent in this case, but it proves also, either that the Legislature or the learned Managers have misunderstood the requisition of the constitution in regard to fixed days for holding probate courts. My colleagues have put this part of the argument beyond the power of any answer. I leave it where they left it.

With respect to notice to parties, I have already said that it is not at all proved, or pretended to be proved, that there was any person entitled to notice, who did not receive it. It would be absurd and preposterous now to call on the Respondent to give positive proof of notice to all persons concerned. As it was his duty to give such notice, it is to be presumed he did give it, until the contrary appear. Besides, as no omission to give notice is stated in the article, as a fact rendering the court illegal, how is he expected to come here prepared to prove notice?

I have little to add, Sir, to what my learned colleague who immediately preceded me has said respecting the necessity of the register's attending these special courts.—One of the learned Managers, if I mistake not, (Mr. Shaw) has said, that the statute of 1806, which requires notice to parties, requires notice also to the register. I see no sort of reason for such a construction of the act. The words are, that the judge may appoint such times and places for holding his court as he shall deem expedient, giving public notice thereof, or *notifying all concerned*, and has no relation to the officers of the court. Neither the register, nor the crier, nor the door keeper, is, I should imagine, within this province; and yet I suppose one to be as much within it as the other.

The presence of the register cannot be essential to the existence of the court, any more than the presence of the clerk is essential to the existence of any other court.

Like other courts, the court of probate has its clerk, called a register, but he is no more part of the court, than the clerk of the Supreme Judicial Court is a component part of that court.

No provision appears to have been made by the Province laws for the appointment of a register. The ordinary having the whole power over the subject of the probate of wills and granting administrations, might allow a clerk or register to his surrogate, or not, at his pleasure. It was necessary of course that records should be kept, but this might be done by the judge himself, as some other magistrates keep their own records. There are certain statutes which speak of the register's office, but which seem only to mean the *place* where the records are kept. They contain no provision for the appointment of such an officer, nor any description of his duties. (4. W. and M. ch. 2.) It appears, as I am informed, by the Suffolk probate records, that a register was appointed by the governor, by virtue of his power as Supreme Ordinary, immediately after the issuing of the Provincial charter. The first provision made by law for this officer, if I mistake not, is contained in the statute of 1784; (vol. 1. page 155) and the duties of the officer are well described in that act. He is to be the register of wills and letters of administration, and to be *keeper* of the records. His signature or assent is necessary to the validity of no act whatever. He is to record official papers, and to keep the records and documents which belong to the office.

It is quite manifest, from the laws made under the charter, as well as those enacted since the adoption of the present government, that the presence of the register has not been essential to the existence of a legal probate court—the proof of this is, that certain acts or things, by these statutes, may be done by the judge without the register. By 6 of Geo. 1. ch. 3. it is provided, that persons to take an inventory of one deceased, shall be appointed and sworn by the Judge of Probate, *if the estate be in the town where he dwells, or within ten miles thereof*; otherwise by a justice of the peace. (P. L. 222) By 4. Geo. 2. ch. 3. appraisers are to be sworn by the judge, if the estate be within ten miles of his dwelling house. (Ib. 236.)

By the act of March 1784, when a minor lives more than ten miles *from the Judge's dwelling house*, his choice may be certified to the judge by a justice of the peace.

These several laws plainly contemplate the performance of certain acts by the judge, not at probate courts holden at stated times, and without the presence or assistance of the register.

And now, Sir, I have finally to remark, on the subject of holding these special courts, the Respondent is proved to have followed the practice which he found established in the office when he was appointed to it. The existence of this practice is proved, beyond all doubt or controversy, by the evidence of Dr. Prescott.

As to the holding of special courts, therefore, the Defendant rests his justification, on what he conceives to be the general principle of law, on the express provision of the statute, and the usage, which has been proved to exist before and at the time when he came into the office.

At half past one o'clock the Court was adjourned to half past three in the afternoon.

AFTERNOON.

After the usual messages between the two Houses, Mr. WEBSTER resumed his argument at 45 minutes past 3 o'clock.

The charge, Mr. President, in the first article, for taking illegal fees, has been fully considered by other counsel. I need not detain the Court by further comment. It is true, that for what is called a set of administration papers, the Respondent received in this case five dollars fifty eight cents. It is true also, that for the same business, done at a stated court, the fees would have been but three dollars and sixty cents. The reason for this difference is fully stated in the Defendant's answer. But it is also true, that the usual sum at stated courts, viz. three dollars and sixty cents, is made up by the insertion of fees for sundry services not specified in the fee-bill. Indeed, the learned Managers have not, as has been so often before observed, even yet told us what would have been the precise amount of legal fees in this case. They appear to be marvellously shy of figures. If the Court adopt the opinion of the learned Managers, that no fees are due, where none are specially provided, and that for receiving fees in such cases an officer is impeachable, then there is no doubt that the Respondent may be impeached and convicted, for his conduct in regard to every administration which he has granted for fifteen years; and there is as little doubt, that on that ground any judge of probate in the Commonwealth is impeachable; as must be well known to every member of this Court, whether they suffer it to be proved here or not.

It is utterly impossible to know, by this article itself, *in what* it was intended to charge the Respondent with having received illegal fees.—Was it for the order of notice?—But the statute allows no fee for that. Was it for granting administration?—But it is not stated whether it was a litigated case or not, and therefore it cannot be known what he might lawfully receive.

It is not denied, however, that every paper executed by the judge, in this case, and every service performed by him, was proper and necessary for the occasion. Even the learned Managers have not contended that any thing could be dispensed with. If, therefore, the amount had not exceeded the usual sum, it would seem past all controversy, that the Respondent, stood justified, if he is right in the general grounds which have been assumed. The question then is, as to the right to the additional two dollars. And this, I apprehend, stands on precisely the same ground, as his right to fees for services not set down in the fee bill, viz; on the ground of a *quantum meruit*, or reasonable compensation for labor performed. This special court was holden expressly for the benefit of Tarbel, and at his instance and request. He is charged only with the necessary and unavoidable expenses of the court; expenses which must be borne, either by the judge himself, or the party for whose benefit they were incurred. It was not so much an extraordiary compensation to the judge, but a reimbursement of expenses actually incurred by him. Here again he is found only to have followed the established practice of the office. He has done no more than his predecessor had done. It is clearly proved, that that predecessor did habitually hold these special courts on request, and that the necessary expences of proceeding therein before him did exceed those of similar proceedings at the stated courts. There can be no complaint, in this case, of the *amount*. If he had a right to receive any thing, it must be conceded he did not receive too much. A practice of this sort may lead to inconvenience; possibly to abuse; but it did not originate with the Respondent, nor does it appear that abuse has followed it, in his hands. If he were authorized to hold these special courts, and if they were *necessarily* attended with some augmentation of expense, it would seem perfectly reasonable that those for whom the expense was incurred should defray it. The books teach us, that "an officer who takes a reward, which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for otherwise it would be impossible, in many cases, to have the law executed with success." *(Bac. Abr. "Extortion.")* These sums were paid *voluntarily*. The Respondent in no proper sense *demanded them*.—He did not refuse to do his official duty till they were paid. So of those sums paid for services not mentioned in the fee bill. Several of these things might have been done by the party himself, or his counsel; such as drawing petition, bond, &c. Yet it was *usual* to have these papers prepared at the probate office, and to pay for them, together with the other expenses. This being the usual course of things, and the party complying with it, without objection, and paying *voluntarily*, there can be no reason, I think, to call it extortion. When the party applied, in this case, for administration papers, he must be supposed to have applied for what was *usual*. He received what every body else had received for fifteen years, and he paid for what he received at the customary rates, without objection. It onght to be considered therefore as a voluntary payment.

This differs this case altogether from that cited from Coke. There the party refused to do an official act, till an illegal sum was paid. It was an act which the party had a right to have performed—to have it *then* performed—and to have it performed for a stated fee—refusing to do his duty, in this respect, till other fees were paid, the officer doubtless was guilty of extortion. But in this case the money was paid voluntarily for services rendered voluntarily. Most of the services were not, strictly speaking, official services. As before observed, the petition, bond, &c. might have been prepared elsewhere, if the party had so chosen. If he had so chosen, and had produced those papers, regularly prepared and executed, and the judge had then refused him a grant of administration, until he had, nevertheless, purchased a set of these papers out of the probate office, then this case would have resembled the one quoted. As the facts are, I think there is no resemblance.

I have, thus far, endeavored to shew that the Respondent's conduct, in relation to fees, was *legal*. If we have failed in this, the next question is, whether his conduct be so clearly illegal, as to satisfy the Court that it must have proceeded from corrupt motives. And it is to this part of our cases, that we supposed the evidence of what had been usual in other courts, and thought to be legal by other judges would be strictly applicable and highly important.

It was certainly our belief, that as the Respondent is accused of receiving illegal and excessive fees, in cases where fees are not limited by any positive law, the usage and practice of other judges, in similar cases, known to the whole Commonwealth, and continued for many years would be evidence on which the Respondent might rely to rebut the accusation of intentional wrong.—We have shewn to this tribunal, that in an indictment on this same statute, in the Supreme Judicial Court, evidence of this sort was admitted, and the defendant acquitted on the strength of it. We had supposed it a plain dictate of common sense, that where a judge was accused of acting contrary to law, he might shew, if he could, that he

acted honestly, though mistakenly, and, to this end, he might shew that other judges had understood the law in the same way as he had understood it. And if he were able to shew, not only that one judge, but many, and indeed, all judges had uniformly understood the law as he himself had, it would amount to a full defence. The learned Managers have opposed the introduction of this evidence; and have prevailed on this Court to reject it. Setting out with the proposition, that, by law, the Respondent could receive no fees, where none are expressly provided by statute, they have followed up this doctrine to the conclusion, that if fees have been taken in any such case by the Respondent, he must be convicted, although he should be able to shew, as he is able to shew, that every court, and every judge in the State has supposed the law to be otherwise, than the Managers now assert it, and have uniformly acted upon that supposition. I am not, Sir, about to enter into another discussion, on this point. I am persuaded it would be fruitless. The questions which we proposed to put to the witnesses are in writing, and therefore cannot easily be misrepresented. The Court has, on the objection of the Managers, overruled these questions, and shut out the evidence. As a matter decided in the cause, and for the purposes of the cause, we must, of course, submit to the decision. Still the question recurs, if the known usage and practice of the courts, offered no rule or guide, by which the Respondent was to direct his conduct, in relation to fees for services not enumerated in the fee bill—what rule was to direct him? What is the law, which he has broken? We ask for the rule, which ought to have governed his conduct, and has not governed it; we receive for answer nothing intelligible but this, that where the statute has not expressly given fees, no fees are due, and it is illegal and impeachable to receive them. If the Court should be of that opinion, a case is made out against the Respondent. If it should not be of that opinion, as we trust it will not, then we submit that no case has been made out against him, on this charge.

As to the charge of having refused to give Tarbell an account of items or particulars of the fees demanded, it is enough to say the charge is not proved. On his cross examination the witness would not state that he asked for items or particulars. He appears simply to have wished a general voucher, to show what sums he had paid for expenses in the probate office, and to have been told that such voucher was not necessary, as the sums would be of course allowed in his account.

I now ask, Sir, where is the proof of *corruption*, in relation to any of the matters charged in this first article? Where is the moral turpitude, which alone ought to subject the Respondent to punishment? Is there any thing in the case which looks like injustice or oppression? As to the special courts, holden for the convenience of the party, no injury arose from them to any body. The witness himself says they were a great accommodation to him, and saved the estate much money. One learned Manager has said these courts *may* lead to inconvenience and abuse. He has taxed his ingenuity to conjecture, rather than to show, what possible evils might hereafter arise from them. Yet he does this with the statute open before him, which expressly authorizes these courts, and the repeal of which would seem to be the proper remedy to relieve him from his apprehensions.

On the whole Sir, I trust that the Respondent has been able to give a satisfactory answer to every thing contained in the first article. That he is not only not legally proved to be guilty, but that his conduct was in all respects unblameable and inoffensive;—and that he will go from this cause, not only acquitted of the charges in the article, but also, without having suffered, in his reputation, from the investigation which it has occasioned.

At a quarter before 7 o'clock, Mr. Webster gave way to a motion for an adjournment, and the Court was adjourned to 9 o'clock tomorrow morning.

SENATE.

WEDNESDAY, APRIL 25.

COURT OF IMPEACHMENT.

After the usual messages between the two Houses, the Court was opened, and at 10 minutes past 9 o'clock Mr. WEBSTER resumed his argument.

Mr. President, the remarks which have been made on the first article, are generally applicable to the four succeeding, and render it unnecessary to comment on those articles, separately and particularly.

The sixth article turns out to be so little supported by any proof, that I do not deem it necessary to add to what has been said upon it. The testimony of Dr. Prescott, and the date of the letter produced set this long forgotten occurrence in its true light.

The seventh article appears to me to be a mere nullity. It charges no official misconduct whatever. The learned Managers, I suppose, are of the same opinion, otherwise they would have been content with our admission of the article, as it stands, and not have contended so ardently, for the privilege of proving what was not stated. I have found myself, Sir, more than once mistaken, in the course of this trial, but have not felt more sensible, at my own mistakes, on any occasion, than when I found myself wrong in supposing that neither the learned

Managers, nor any other *lawyers*, could be found to contend, that in a criminal case more could be *proved* against a defendant, than had been stated; and that it was not enough for such defendant to admit the truth of the facts in the written allegation against him, precisely as they stood, and to demand the judgment of the court thereon. The constitution says that every man's offence shall be *fully and plainly, substantially and formally* described and set forth. The learned Managers seem so to construe this provision, as that, nevertheless, if facts be not alleged which shew any offence at all to have been committed, still other facts may be found, under the words *unlawfully and corruptly*, which shall amount to an offence. A commentary this, Sir, on the constitution of the Commonwealth, of which I imagine the profession generally will not be emulous of dividing the credit with the Honorable Managers.

This seventh article charges the Respondent with no misbehaviour as a *judge*. The only offence imputed to him is one which he is said to have committed as an *attorney*. These over-shadowing words, "unlawfully and corruptly," beneath the protection of which the learned Managers have sought to shelter themselves, are applied to the Respondent's conduct simply as an attorney at law, and not as judge of probate.

It is proved, in point of fact, that the Respondent performed certain merely clerical labor for a guardian, for which he was paid a reasonable and moderate compensation. The sum thus paid him was allowed, and as we suppose justly allowed, in the subsequent settlement of the guardian's account.

The eighth, ninth, tenth, eleventh, thirteenth and fourteenth articles have been fully considered by my colleagues, and I will not detain the Court with further remarks on those articles.

It is the *twelfth*, of these articles, Sir, on which the learned Managers seem most confidently to rely. Whatever becomes of the rest of the case, here, at least, there is thought to be a tenable ground—Here is one verdant spot, where impeachment can flourish; a sort of Oasis, smiling amid the general desolation, which the law and the evidence have spread round the residue of this accusation.

I confess, Sir, that I approach to the consideration of this article, not without some apprehension. But that apprehension arises from nothing in the real nature of the charge, or in the evidence by which it is supported. My apprehension and alarm arise from this; that in a criminal trial, on a most solemn and important occasion, so much weight should be given to mere *coloring*, and *declamation*, under the form of a criminal accusation. In my judgment, Sir, there is serious cause of alarm, when in a court of this character, accusations are brought forward, so exceedingly loose and indefinite, and arguments are urged in support of them, so little resembling what we are accustomed to hear in the ordinary courts of criminal jurisdiction.

The offence, in this article, whatever it be, instead of being charged and stated in ordinary legal language, is thrown into the form of a *narrative*. A *story*, taken from the mouth of a heated, angry and now *contradicted* witness, is written down at large, with every imaginable circumstance of aggravation, likely to strike undistinguishing minds; and this *story*, thus told, is the very *form* in which the article is brought. Here we have, in the article itself, a narrative of all the evidence; we have a dialogue between the parties, are favored so far as to be shown, by marks of quotation, what sentiments and sentences belong to the respective parties in that dialogue. All convenient epithets, and expletives are inserted in this dialogue. We find the "*urgent and repeated*" demand of the Respondent for fees. We perceive also that he is made to lead the conversation, on all occasions. *He proposed* to advise and instruct; *he proposed* to allow the sum in the account; and it was, again, on *his proposition* so to insert it, that it was paid. He is represented as wanting in manners, and decorum, as well as in official integrity. It is said he *overheard* a conversation; and that therefore he prepared to give his advice, before it was asked. In short, Sir, this article contains whatever is most likely to cause the Respondent to be convicted, before he is heard. I do most solemnly protest against this mode of bringing forward criminal charges. I put it to the feeling of every honorable man, whether he does not instinctively revolt from such a proceeding?—In a government so much under the dominion of public opinion, and in a case in which public feeling is so easily excited, I appeal to every man of an honorable and independent mind, whether it be not the height of injustice to send forth charges against a public officer, accompanied with all these circumstances of aggravation and exasperation? Here the evidence, as yet altogether *ex parte*, the *story* told by a willing, if not a prejudiced, witness, goes forth with the charge, embodied in the charge itself, without any distinction whatever between what is meant to be charged, as an offence, and the evidence which is to support the charge. For my own part, Sir, I can conceive of nothing more unjust. Would it be tolerated for one moment in a court of law, I beg to ask, that a prosecutor departing from all the usual forms of accusation, should tell his own

story, in his own way, mix up his evidence, with his charges, and his own inferences, with his evidence, so that the accusation, the evidence, and the argument, should all go together?—A judge would well deserve impeachment and conviction who should suffer such an indictment to proceed.

In this case, the whole matter might have been stated in five lines. It is simply this, and nothing more, viz; that the Respondent wishing, as an attorney, to obtain certain fees from a guardian, promised, if they were paid, to allow them in the guardianship account, as judge; and being paid he did so allow them. This is the whole substance and essence of the charge.

Notwithstanding our entire confidence in this Court, we cannot but know that the Respondent comes to his trial on this article under the greatest disadvantages. There is not a member of the Court, nor a reading man in the community, who has not read this charge, and thereby seen at once the accusation, and the evidence, which was to support it. The whole story is told, with all the minute circumstances, and no ground is left, for the reservation of opinion, or whereupon charity itself can withhold its condemnation. Far be it from me, Sir, to impute this to design. I know not the cause; but so far as the Respondent is concerned, I know it had been just as fair and favorable to him, that the original *ex parte* affidavit, upon which the article was founded, should have been headed as *No.* 12, and inserted among the articles of impeachment. This Sir, is the true ground of the alarm which I feel, in regard to this charge; an alarm, I confess, not diminished by perceiving that this article is so great a favorite with the learned Managers; for when obliged to give up one and another of their accusations, they have asked us, with an air of confidence and exultation, whether we expect them to give up the twelfth article also.

I will now Sir, with your permission proceed to consider whether this article states any legal offence. Stripped of every thing but what is material, it appears to me to amount to no more than this; viz. 1. That the Respondent gave professional advice to a guardian, about the concerns of his ward, and recived fees for it. 2. That he allowed those fees in the guardianship account. If this be the substance of the article, then the question follows the division which I have mentioned, and is, 1. whether he had a right to give such advice, and to be paid for it; and, 2. whether he had a right to allow the sum so paid in the guardian's account. I think these are the only questions to be considered. It cannot be material, certainly, whether *Ware*, the guardian, paid the fee willingly or unwillingly. The fact is true, that the Respondent received it. If he had no right to it, then he must take the consequence; if he had a right to it, then there was nothing wrong but *Ware's* want of promptitude in paying it. Nor is it of any importance, supposing him to be right in allowing this fee in the guardian's account, whether he interlined the charge, in an account already drawn out, or had the account drawn over, that it might be inserted. Here again, we find a circumstance of no moment in itself, put forth to be prominent and striking, in this charge, and likely to produce an effect. It is said the sum was allowed by *interlineation;* as if the Respondent had committed one crime to hide another, and had been guilty of *forgery*, to cover up *extortion*. Sir, not only for the sake of the Respondent, but for the sake of all justice, and in behalf of all impartiality and candor, I cannot too often or too earnestly express my extreme regret, at the manner of this charge. On a paper not yet finished and recorded what harm to make an alteration, if it be of a thing in itself proper to be done? —Is it not done every day, in every court? —Not only affidavits, processes, &c. but also minutes, decrees and judgments of the Court, before they are recorded, are constantly altered *by interlineation*, by the Court itself, or its order. The paper was in this case before the judge. It had not been recorded. If any new claim had then been produced, fit to be allowed, it was proper to allow it, and certainly not criminal to insert the allowance *by interlineation*.

If, Sir, the substance of every thing done by the Respondent in this case was lawful, then there never can justly be a criminal conviction, founded on the mere manner of doing it; even though the manner were believed to be as improper and indecorous as Ware would represent it. There is therefore no real inquiry, in this case, as I can perceive, but whether the Respondent had a right to give advice, and to be paid for it; and whether he had a right to allow it in the account.

And, in the first place, Sir, had the Respondent a right to give professional advice to this guardian, respecting the estate of his ward?

It has frequently, perhaps as often as otherwise happened, that Judges of Probate have been practising lawyers. The statute book shows, that it has all along been supposed that this might be the case. There are acts, which declare that in particular, specified cases, such as appeals from their own judgments, they shall not act as counsel; implying of course that in other cases they are expected so to act, if they see fit. Until the law of 1813, there was nothing to prevent them from being counsel for executors, administrators and guardians, as well as any other clients. My colleague who first ad-

dressed the Court has fully explained the history and state of the law in this particular. There being then no positive prohibition, is there any thing in the nature of the case, that prevents, or should prevent, in all cases, a judge of probate from rendering professional assistance to executors, administrators or guardians. I say in all cases, and supposing no fraudulent or collusive intention. The legislature has now passed a law on this subject, which is perhaps very well, as a general rule, and now, of course, binding in all cases. But before the passing of this law, it can hardly be contended, that in no case could a judge of probate give professional advice to persons of this character.—I admit, most undoubtedly, Sir, that if a case of collusion, or fraud were proved, it would deserve impeachment. If the judge and the guardian conspired to cheat the ward, a criminal conviction would be the just reward for both. They might go into utter disgrace together, and nobody would inquire which was the unjust judge, and which the fraudulent guardian; "which was the justice, and which was the thief." But in a case of fair and honest character, where the guardian needed professional advice, and the judge was competent to give it, I see no legal objection. No doubt a man of caution and delicacy would generally be unwilling to render professional services, upon the value of which he might be afterwards called upon officially to form an opinion. He would not choose to be under the necessity of judging upon his own claim. Still there would seem to be no legal incompatibility. He must take care only to judge right. In various other cases, judges of probate are or may be called on to make allowances for monies paid to themselves. It is so in all cases of official fees. It might be so, also, in the case of a private debt due from the estate of a ward to a judge of probate. If, in this very case, there had been a previous debt due from *Ware's* ward to the Respondent, might he not have asked *Ware* to pay it?—Nay might he not have "*demanded*" it: might he not even have ventured to make an "*urgent and repeated request*," for it?—And if he had been so fortunate as to obtain it, might he not have allowed it in Ware's guardianship account?—And although he had been presumptuous enough to insert it *by interlineation*, among other articles in the account, before it was finally allowed and passed, instead of drawing off a new account, would even this have been regarded as flagrant injustice, or high enormity?—Now I maintain, Sir, that the Respondent had in this case a right to give professional advice; and a right to be paid for it; and, until paid, his claim was a *debt*, due him from the ward's estate, which he might treat like any other debt. He might receive it, as a debt, and then as a debt paid allow it in the guardian's account.

As before observed, the first question is, whether he could rightfully give this advice. It was certainly a case in which it was proper for the guardian to take legal advice of some body. The occasion called for it, and we find the estate to have been essentially benefitted by it. It is among the clearest duties of those who act in situations of trust, to take legal advice, whenever it is necessary. If they do not, and loss ensues, they themselves, and not those whom they represent, must bear that loss. There can be no clearer ground, on which to make executors, administrators, and guardians personally liable for losses which happen to estates under their care, than negligence in not obtaining legal advice, when necessary and proper. If, instead of giving this fee to the Respondent, the guardian had given it to any other professional man, would any body have thought it improper?—I presume no one would. Then, what was there, in the Respondent's situation, which rendered it improper for him to give the advice? It concerned no matter that could come before him—It was wholly independent of any proceeding arisen, or that could arise, in his court. It interfered in no way with his judicial duty, any more than it would have done to have given the same advice to the ward himself, before the guardianship. He had then as good right to give this advice to the guardian, as he would have had to have given it to the ward.

And, Sir, in the second place, I think it plain, that if he had a right to give the advice, and to be paid for it, he had not only the right but was bound to allow it in the guardian's account. This article is attempted to be supported altogether by accumulating circumstances, no one of which bears resemblance to any thing like a legal offence. Is the Respondent to be convicted for having given the advice? "No," it is said, "not that alone, but he demanded a fee for it." Is he to be convicted then, for giving adviee, and for demanding a fee for it, it not being denied that it was a fit occasion for some body's advice?—"No, not convicted for that alone, but he *insisted* on a fee, and was *urgent*, and pressing for it." If he had a right to the fee, might he not *insist* upon it, and be urgent for it, till he got it, without a violation of law? "But then he promised to allow it in the guardian's account, and obtained it by means of this promise, and did afterwards allow it." But if it ought to be paid, and the guardian paid it, ought it not to be allowed in his account, and could it be improper for the Respondent to say he should so allow it, and actually so to allow it? "But did he not allow it by *interlineation*?"

What sort of interlineation? The account was before him, unrecorded; this came forward, as a new charge: and for convenience and to save labor, it was inserted among other charges, without a new draft; and this is all the interlineation there is in the case.

I now ask you, Sir—I put it to every member of this Court, upon his oath and his conscience, to say *on which of these circumstances the guilt attaches. Where is the crime?* If this charge had been carried to the account *without interlineation*, would the Respondent have been guiltless?—If not, then the interlineation does not constitute his guilt. *If the fee had been paid to some one else, and then allowed, in the same manner it was allowed*, would the Respondent have been guiltless? If so, *then the crime is not in the manner of allowing the charge.* If the guardian had *urged and pressed* for the Respondent's advice, and in receiving it had paid for it willingly and cheerfully, and it had been properly allowed in the account, would the Respondent then have been guiltless? *If so, then his mere giving advice, and taking fees for it, of a guardian, does not constitute his crime.* In this manner, Sir, this article may be analyzed, and it will be found that no one part of it contains the criminal matter—and if there be crime in no one part, there can be no crime in the whole. It is not a case of right acts done with wrong motives, which sometimes may show misconduct, all taken together, although each circumstance may be of itself indifferent. Here is official corruption complained of. We ask, in what it consists. We demand to know the legal offence which has been committed. A narrative is rehearsed to us, and we are told that the result of that must be conviction; but on what legal grounds, or for what describable legal reason, I am yet at a loss to understand.

The article mentions another circumstance, which whether true or false, must exceedingly prejudice the Respondent, and yet has no just bearing on the case. It is said the Respondent told Ware, that if he would pay this fee, the "overseers need know nothing about it." Now, Sir, what had the overseers to do with this?—no more than the town crier. Those parts of the account which consisted of expenses incurred in their neighborhood, were properly enough, though not necessarily, subjected to their examination. They had an interest in having the account right, and their approbation was a convenient voucher. But what had they to do, with the propriety of the guardian's taking legal advice, for the benefit of his ward? They could not judge of it, nor were they to approve or disapprove his charge for obtaining such advice. Why, then, I ask, Sir, was this observation about the overseers introduced, not only as evidence, but into the body of the charge itself, as making a part of that charge? What part of any known legal offence does that observation, or others like it, constitute? Nevertheless, Sir, this has had its effect, and in my opinion a most unjust effect.

I will now, Sir, beg leave to make a few remarks on the evidence adduced in support of this article. Of those facts which I have thought alone material, there is no doubt, nor about them any dispute. It is true, that the Respondent gave the advice, and received the fee, and allowed it in the account. If this be guilt, he is guilty. As to every thing else, in the articles—as to all those allegations which go to degrade the Respondent, and in some measure affect his reputation, as a man of honor and delicacy—they rest on *Ware*, and on Ware alone. Now, Sir, I only ask for the Respondent the common advantages allowed to persons on trial for alleged offences. I only entreat for him from this Court the observance of those rules which prevail on all other occasions, in respect to the construction to be given to evidence, and the allowances which particular considerations render proper.

It is proved, that this witness has had a recent misunderstanding with the Respondent, and that he comes forward, only since that misunderstanding, to bring this matter into public notice.—Threats of vengeance, for another supposed injury, he has been proved to have uttered more than once.—This consideration alone, should lead the Court to receive his evidence with great caution, when he is not swearing to a substantial fact, in which he might be contradicted, but to the *manner* of a transaction. Here is peculiar room for misrepresentation, and coloring, either from mistake or design. What a public officer *does*, can be proved; but the mere *manner*, in which he does it, every word he may say, every gesture he may make, cannot ordinarily be proved; and when a witness comes forth who pretends to remember them, whether he speaks truth or falsehood, it is most difficult to contradict him. It is in such a case therefore that a prejudiced witness should be received with the utmost caution and distrust.

There is, Sir, another circumstance of great weight.—*This is a very stale complaint. It is now nearly six years, since this transaction took place.* Why has it not been complained of before?—There is no new discovery. All that is known now, was known then. If *Ware* thought of it then, as he thinks of it now, why did he not complain then? What has caused his honest indignation so long to slumber, and what should cause it to be roused only by a quarrel with the Respondent?

Let me ask, Sir, what a grand jury would say to a prosecutor, who, with the full knowledge of all the facts, should have slept over a supposed injury for six years, and should then come forward to prefer an indictment?—What would they say especially if they found him apparently stimulated by recent resentment, and prosecuting, for one supposed ancient injury, with the heat and passion excited by another supposed recent injury? Sir, they would justly look on his evidence with suspicion, and would undoubtedly throw out his bill. Justice would demand it; and in my humble opinion justice demands nothing less on the present occasion.

But, Sir, there is one rule of a more positive nature, which I think applicable to the case; and that is, that a witness detected in one misrepresentation is to be credited in nothing. This rule is obviously founded in the plainest reason, and it would be totally unsafe to disregard it. Now if there be any one part of *Ware's* testimony, more essential than all the rest, as to its effect in giving a bad appearance to the Respondent's conduct, it is that in which he testifies that the Respondent *volunteered*, in the case, and offered his advice before it was asked. This is a most material part of the whole story; it is indispensable to the *keeping* of the picture which the learned Managers have drawn.—And yet, Sir, in this particular, *Ware* is distinctly and positively contradicted by Grout. Now, Sir, if we were in a court of law, a jury would be instructed, that if they believed Ware had wilfully deviated from the truth, in this respect, nothing which rested solely on his credit would be received as proved. We ask for the Respondent, in this, as in other cases, only the common protection of the law. We require only that those rules, which have governed other trials, may govern his; and according to these rules, I submit to the Court, that it cannot and ought not to convict the Respondent, even if the facts sworn to would, if proved, warrant a conviction, upon the sole testimony of this witness. Even if we were sure that there were no other direct departure from the truth, yet in the whole of his narrative, and the whole of his manner, we see I think indications of great animosity and prejudice. If the whole of this transaction were to be recited by a friendly, or a candid witness, I do not believe it would strike any body as extraordinary. Any mode of telling this story which shall confine the narrative to the essential facts, will leave it, in my humble opinion, if not a strictly proper, yet by no means an illegal or impeachable transaction. Let it be remembered that a great part of his story is such, as cannot be contradicted, though it be false, in as much as it relates to alleged conversations between him and the Respondent when nobody else was present. Wherever the means naturally exist of contradicting or qualifying his testimony, there it is accomplished. Whatever circumstance can be found bearing on it, shows that it is in a greater or less degree incorrect. For example, Ware would represent that it was an important part of this arrangement to keep the payment of the fee from the knowledge of the overseers. This was the reason why the charge was to be inserted in the existing account, by interlineation. Yet the evidence is, that a complete copy of this very *interlined* account was carried home by *Ware*, where the overseers could see it, and would of course perceive exactly what had been done. This is utterly inconsistent with any purpose of secrecy or concealment.

Making just and reasonable allowances, for the considerations which I have mentioned, I ask, is any case *proved*, by the rules of law, against the Respondent? And further, Sir, taking the facts only which are satisfactorily established, and supposing the Respondent's conduct to have been wrong, is it clearly shown to have been intentionally wrong. If he ought not to have given the advice, is it any thing more than an error of judgment? Can this Court have so little charity for human nature, as to believe that a man of respectable standing could act *corruptly* for so paltry an object? Even although they should judge his conduct improper, do they believe it to have originated in corrupt motives? For my own part, Sir, notwithstanding all that prejudices and prepossessions may have done, and all that the most extraordinary manner of presenting this charge may have done, I will not believe, till the annunciation of its judgment shall compel me, that this Court will ever convict the Respondent upon this article.

I now beg leave to call the attention of the Court to one or two considerations of a general nature, and which appear to me to have an important bearing on the merits of this whole cause.—The first is this, that from the day when the Respondent was appointed judge of probate down to the period at which these articles of impeachment close—from the year 1805 to 1821—there is not a single case, with the exception of that alleged by Ware, in which it is even pretended that any *secrecy* was designed or attempted by the Respondent: there is not a single case, in which he is even accused of having wished to keep any thing out of sight, or to conceal any fact in his administration, any charge which he had made, or any fee which he had taken. The evidence, on which you are to judge him, is evidence furnished by himself; and instead of being obliged to seek for testimony in sources beyond the Respondent's control, it is his own avowed

actions, his public administration, and the records of his office, which the Managers of the prosecution alone have been able to produce. And yet he is charged with having acted *wilfully* and *corruptly* as if it were possible that a magistrate, in a high and responsible station, with the eyes of the community upon him, should for near twenty years pursue a course of corrupt and wilful maladministration, of which every act and every instance was formally and publicly put on record by himself, and laid open in the face of the community. Is this agreeable to the laws of human nature? Why, Sir, if the Respondent has so long been pursuing a course of conscious, and wilful, and corrupt mal-administration, why do we discover none of the usual and natural traces of such a course —some attempt at concealment, some effort at secresy; and in all the numberless cases, in which he had opportunity and temptation, why is not even a suspicion thrown out, that he has attempted to draw a veil of privacy over his alleged *extortions*?—Is it in reason that you should be obliged to go to his own records for the proof of his pretended crimes? And can you, with even the color of probability, appeal to a course of actions unsuspiciously performed in the face of heaven, to support an accusation of offences in their very nature private, concealed, and hidden?

Another consideration of a general nature to which I earnestly ask the attention of this Hon. Court, is this, that after all these accusations, which have been brought together against the Respondent, in all these articles of impeachment, and with all the industry and zeal, with which the matter of them has been furnished to the Hon. Managers, he is not accused nor was suspected of the crime, most likely to bring an unjust judge to the bar of this Court. Show me the unjust judgment he has rendered, the illegal order he has given, the corrupt decree he has uttered, the act of oppression he has committed. What, Sir, a magistrate, charged with a long and deliberate perseverance in wilful and corrupt administration, accused of extortion, thought capable of accepting the miserable bribe of a few cents or a few dollars, for illegal and unconstitutional acts—and that too in an office, presenting every day the most abundant opportunities, and if the Respondent were of the character pretended, the most irresistible temptation to acts of lucrative injustice; and yet, not one instance of a corrupt, illegal, or oppressive judgment! I do ask the permission of this Hon. Court and of every member of it to put this to his own conscience. I will ask him, if he can now name a more able and upright magistrate, as shown in all his proceedings and judgments, in all the offices of probate in the State? One whose records are more regularly and properly kept, whose administration is more prompt, correct, and legal,—whose competency to the duties is more complete, whose discharge of them is more punctual? I put this earnestly, Sir, to the conscience of every member of this Hon. Court. I appeal more especially to my honorable friend, *(Mr. Fay)* entrusted with a share of the management of this prosecution, and who has been for twenty years an inhabitant of the county of Middlesex. I will appeal to him, Sir, and I will ask him, whether if he knew, that this night his wife should be left husbandless and his children fatherless, there is a magistrate in the State, in whose protection he had rather they should be left, than in that of the Respondent? Forgetting, for a moment that he is a prosecutor, and remembering only that he is a citizen of the same county, a member of the same profession, with an acquaintance of twenty years standing, I ask him if he will say that he believes there is a county in the State, in which the office of Judge of Probate has been better administered for twenty years, than it has been in the county of Middlesex by this Respondent. And yet, Sir, you are asked to disgrace him. You are asked to fix on him the stigma of a corrupt and unjust judge, and condemn him to wear it through life.

Mr. President, the case is closed? The fate of the Respondent is in your hands. It is for you now to say whether, from the law and the facts as they have appeared before you, you will proceed to disgrace and disfranchise him. If your duty calls on you to convict him, convict him, and let justice be done! but I adjure you let it be a clear undoubted case. Let it be so for his sake, for you are robbing him of that, for which with all your high powers, you can yield him no compensation; let it be so for your own sakes, for the responsibility of this day's judgment is one, which you must carry with you through your life. For myself, I am willing here to relinquish the character of an advocate, and to express opinions by which I am willing to be bound, as a citizen of the community. And I say upon my honor and conscience, that I see not how, with the law and constitution for your guides, you can pronounce the Respondent guilty, I declare, that I have seen no case of wilful and corrupt official misconduct, set forth according to the requisition of the constitution and proved according to the common rules of evidence. I *see* many things imprudent and ill judged; many things that I could wish had been otherwise; but corruption and crime I do not see. Sir, the prejudices of the day will soon be forgotten; the passions, if any there be, which have excited or favored this prosecution, will subside: but

the consequence of the judgment you are about to render will outlive both them and you. The Respondent is now brought, a single unprotected individual, to this formidable bar of judgment, to stand against the power and authority of the State. I know you can crush him, as he stands before you, and clothed as you are with the sovereignty of the State. You have the power "to change his countenance, and to send him away."—Nor do I remind you that your judgment is to be rejudged by the community; and as you have summoned him for trial to this high tribunal, you are soon to descend yourselves from these seats of justice, and stand before the higher tribunal of the world. I would not fail so much in respect to this Hon. Court, as to hint that it could pronounce a sentence, which the community will reverse. No Sir, it is not the world's revision, which I would call on you to regard; but that of your own consciences when years have gone by, and you shall look back on the sentence you are about to render. If you send away the Respondent, condemned and sentenced, from your bar, you are yet to meet him in the world, on which you cast him out.—You will be called to behold him a disgrace to his family, a sorrow and a shame to his children, a living fountain of grief and agony to himself.

If you shall then be able to behold him only as an unjust judge, whom vengeance has overtaken, and justice has blasted, you will be able to look upon him, not without pity, but yet without remorse. But, if, on the other hand, you shall see whenever and wherever you meet him, a victim of prejudice or of passion, a sacrifice to a transient excitement; if you shall see in him, a man, for whose condemnation any provision of the constitution has been violated, or any principle of law broken down; then will he be able—humble and low as may be his condition—then will he be able to turn the current of compassion backward, and to look with pity on those who have been his judges. If you are about to visit this Respondent with a judgment which shall blast his house; if the bosoms of the innocent and the amiable are to be made to bleed, under your infliction, I beseech you to be able to state clear and strong grounds for your proceeding. Prejudice and excitement are transitory, and will pass away. Political expediency, in matters of judicature, is a false and hollow principle, and will never satisfy the conscience of him who is fearful that he may have given a hasty judgment. I earnestly entreat you, for your own sakes, to possess yourselves of solid reasons, founded in truth and justice, for the judgment you pronounce, which you can carry with you, till you go down into your graves; reasons, which it will require no argument to revive, no sophistry, no excitement, no regard to popular favor, to render satisfactory to your consciences; reasons which you can appeal to, in every crisis of your lives, and which shall be able to assure you, in your own great extremity, that you have not judged a fellow creature without mercy.

Sir, I have done with the case of this individual, and now leave him in your hands. But I would yet once more appeal to you as public men; as statesmen; as men of enlightened minds, capable of a large view of things, and of foreseeing the remote consequences of important transactions; and, as such, I would most earnestly implore you to consider fully of the judgment you may pronounce. You are about to give a construction to constitutional provisions, which may adhere to that instrument for ages, either for good or evil. I may perhaps overrate the importance of this occasion to the public welfare; but I confess it does appear to me that if this body give its sanction to some of the principles which have been advanced on this occasion, then there is a power in the State above the constitution and the law; a power essentially arbitrary and concentrated, the exercise of which may be most dangerous. If impeachment be not under the rule of the constitution and the laws, then may we tremble, not only for those who may be impeached, but for all others. If the full benefit of every constitutional provision be not extended to the Respondent, his case becomes the case of all the people of the Commonwealth. The constitution is their constitution. They have made it for their own protection, and for his among the rest. They are not eager for his conviction. They are not thirsting for his blood. If he be condemned, without having his offences set forth, in the manner which they, by their constitution have prescribed; and proved, in the manner which they, by their laws have ordained, then not only is he condemned unjustly, but the rights of the whole people disregarded. For the sake of the people themselves, therefore, I would resist all attempts to convict by straining the laws, or getting over their prohibitions.—I hold up before him the broad shield of the constitution; if through that he be pierced and fall, he will be but one sufferer, in a common catastrophe.

Mr. Webster having ended at 25 minutes past 11, Mr. SHAW rose:—

Mr. President, in common with the Hon. Managers with whom I am associated, I trust that I am sufficiently impressed with the magnitude and importance of the transaction in which we are now engaged. I am well aware of the dignity of the high tribunal before which I stand, of the duty of the constitutional accusers by whom this prosecution is instituted, of the elevated

persona and official character of the accused, of the nature of the offences imputed to him, and the deep and intense interest, which is felt by the community, in the result of this trial. It is perhaps true, that these transactions may be recorded and remembered, that the principles advanced, and the decisions made in the course of this trial, will continue to exert an influence on society, either salutary or pernicious, long after all those of us, who either as judges or as actors, have a share in these proceedings, shall be slumbering with our fathers. And yet I do not know that these considerations, serious and affecting as they certainly are, can afford any precise or useful practical rule, either for the conduct or decision of this cause. In questions of policy and expediency, there is a latitude of choice, and the same end may be pursued by different means. But in the administration of justice, in questions of judicial controversy, there can be but one right rule. Whether therefore the parties are high or low, whether the subject in controversy be of great or of little importance, the same principles of law, the same rules of evidence, the same regard to rigid and exact justice, must guide and govern the decision. "Thou shalt do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty, but in righteousness shalt thou judge thy neighbor;"—is an injunction delivered upon the highest authority and enforced by the most solemn of all sanctions.

Nor am I aware that powerful and animated appeals to your compassion or resentment, can have any considerable or lasting influence; they may indeed afford opportunity for the display of genius and eloquence, excite a momentary feeling of sympathy and admiration, and awake and command attention. Beyond this, their influence would be pernicious and deplorable. If the charges brought against the Respondent are satisfactorily proved, justice, that justice due to the violated rights of an injured community, that justice deserved by the breach of the most sacred obligations, demands a conviction, from which no considerations of compassion can or ought to shield him. On the contrary, if these charges are not substantiated, or do not import criminality, no feelings of resentment, no prepossessions of guilt, however thoroughly impressed, can prevent his acquittal. The question therefore comes to precisely the same point, as in every other case of criminal accusation, that of guilt or innocence. In discharging that part of the duty of this occasion, which has unexpectedly devolved on me, I am oppressed with a feeling of anxiety, which it is impossible to express, and quite in vain to disguise. The extent and variety of the legal and constitutional principles, which have been brought under discussion, the number of the charges contained in these articles, with the mass of evidence introduced in relation to them, the rare combination of talent, eloquence and legal information, which the Respondent has called to his aid in conducting his defence, all admonish me of the great weight of responsibility, which rests upon the Managers of this prosecution.

Regarding this however, as a duty, a great public duty, from which I dare not shrink, relying upon your indulgence and that of the Hon. Court, I shall proceed in the discharge of it, in the best manner in my power.

This is a prosecution founded on a complaint made by the House of Representatives, and conducted in the most solemn form, known to the constitution—that of impeachment. It embraces the discussion of principles, in which the people of this Commonwealth have a deep interest. The pure, upright and unsuspected administration of justice, in all its departments, affording at once security and satisfaction to every citizen, lies at the foundation of all those civil and social rights, which it was the main design of the constitution to preserve and perpetuate. With a view to so important and vital an interest, this prosecution has been brought forward, by the House of Representatives. But I trust Sir, it is scarcely necessary in behalf of that House and the Managers, distinctly to disavow and disclaim all feeling of resentment; all partial, sinister or vindictive motives, in the conduct of this prosecution. The office of accuser is certainly a painful and irksome one, and to most of us happily a rare and unusual one. But a slight recurrence to the circumstances attending this proceeding will show, that the course adopted by the House of Representatives was inevitable; one which admitted of no alternative; which was required by an imperious sense of duty. At the last session of the Legislature, complaints came to that House, respecting the official conduct of the Respondent, which were of a nature to demand an immediate and thorough investigation. An inquiry was instituted by a committee furnished with authority to send for persons and papers. By this means, information was communicated and facts were disclosed, which demanded the prompt and vigorous interposition of the constitutional powers of the House of Representatives for the purpose of bringing the Respondent to an open and impartial trial. This alone, if innocent, could enable him to wipe away the foul stains attached to his official reputation, and to reinstate himself in the confidence and good opinion of his fellow-citizens. On the contrary, if guilty, this alone could af-

ford an adequate means of punishing the flagrant misconduct of the Respondent, stripping him of those delegated powers, which he had wantonly abused, and vindicating the purity and integrity of justice. The House of Representatives therefore could not for a moment hesitate as to their course of proceeding. The trouble and expence of such a prosecution, though distinctly foreseen, could scarcely require a moment's consideration; they were but as the dust of the balance, in comparison with the great object in view. The time and manner in which this trial is had, the prospect of its speedy decision, are certainly subjects of congratulation. Scarcely two months have elapsed since these charges were preferred; and yet ample time has been allowed to the Respondent to prepare for his defence. It is to be hoped that this precedent will serve to redeem the process of impeachment, from the imputation of unwarrantable and almost interminable delay, which has sometimes been attached to it, and display it in the exercise of those salutary powers, for which it was designed.

One of the learned counsel for the Respondent, has suggested that the Respondent has some reason to complain of circumstances attending this prosecution, which in his view might serve to prejudice him in the opinion of his judges. It is stated that reports have been in extensive circulation in the community injurious to his reputation, that circumstances of his case have even been alluded to in publications, and a single paragraph to that effect from a newspaper in the interior was read. For none of these things certainly are the House of Representatives responsible. So cautious were they of giving premature publicity to these charges, before the Respondent could have opportunity to know and to answer them, that they expressly declined printing the report and the articles of impeachment, even for the use of their own members and Managers. But whatever may be the origin and extent of such rumors and anonymous imputations, they can have no influence here. At a time when slanderous tongues, and pens, and presses are busy with the names of men, most eminent in society, for purity and irreproachable integrity, the Respondent would indeed be above the lot of humanity if he could hope to pass unnoticed. But mere statements and suggestions, whatever may be their import, whether whispered in secret or circulated in public journals, can make no impression on the minds of men of firmness and discernment, of men who know and appreciate the value of official reputation, and above all, of men who are bound by their oaths to decide according to evidence.

With regard to the principles upon which this impeachment is to be conducted, we shall not essentially differ with the learned counsel for the Respondent, in the views they have taken. These principles are to be derived partly from the common law of England, in which most of our legal principles and practices have their origin, and partly from the provisions of our own constitution. The article in the constitution under which this tribunal is organized, provides that the Senate should be a court for the trial of all impeachments made by the House of Representatives against any officer, or officers of this Commonwealth, for misconduct and maladministration in their offices.

Some difference of opinion may arise, as to the true construction and effect of these words, *misconduct* and *mal-administration* in office, as they stand in this clause of the constitution, proceeding partly from the ambiguity and want of technical precision in the words themselves, and partly from their connection with the other words in the same paragraph. The latter clause provides, that the party so convicted (*i. e.* on impeachment,) shall be nevertheless liable to indictment, trial, judgment and conviction, according to the laws of the land.

Perhaps the most reasonable construction of these provisions in the constitution taken together, is, that proceedings by impeachment and by indictment are had *alio intuitu*, designed and intended for distinct purposes; the one to punish the officer, and the other the citizen. It is obvious that a person in official station, is bound in common with all other citizens, to obey the laws of the land, and is answerable to the ordinary tribunals for any violation of them. But the constitution establishes a broad and marked distinction between official delinquency, and offences against social duty. Criminal acts therefore may be committed by an officer, of such a nature as to render him liable to indictment and punishment in the courts of justice, and at the same time being in obvious violation of his official duty, may render him liable to impeachment. Again, other acts may be supposed, which, as breaches of the laws, would render an officer liable to indictment and punishment, but which not in any way affecting his official character and duty, would not render him liable to impeachment. The position is equally sound, that acts may be committed by a public officer, in direct violation of his official duty which would amount to misconduct and maladministration in office within the intent of the constitution, and which would consequently render the officer liable to impeachment, and yet of such a nature that the ordinary tribunals would not take notice of and punish them, in their usual course of proceedings, and according to the laws of the land, and for which therefore the offender would not be indictable. If this construction be true, an act may be punishable both

by indictment and impeachment, or the one, or the other exclusively, according to its nature and circumstances.

By the constitution, which is a law of the highest nature, every officer, is bound to take an oath, faithfully and impartially to perform and discharge all the duties incumbent on him as such officer, according to the best of his abilities and understanding, agreeably to the rules and regulations of the constitution, and the laws of this Commonwealth.

To perform these duties faithfully and impartially, he must understand them, and he must use due diligence to acquaint himself with them. I should therefore hold that any gross and continued neglect of the ordinary means of information, as if an officer were to disregard those public statutes which are made from time to time, and, the knowledge of which would be necessary to the intelligent and proper discharge of the duties of his office, or if the judge of an inferior court should wilfully neglect to inform himself of those adjudications of superior courts, which as precedents ought to bind and govern him ; or in any way should wilfully neglect the means of qualifying himself for the faithful and intelligent performance of his duties, such neglect would be misconduct punishable by impeachment. 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 misbehaviour, 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 offence 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*. It is however useless to speculate further upon questions, however interesting to the character of the Commonwealth and the principles of its constitution, which do not arise immediately in the case now under consideration.

But sir, it has been urged upon you in the course of this trial, and reiterated again and again, with as much confidence as if it were a conceded point, that the Managers here claim to come before you, with loose, general and undefined charges against the Respondent, relying rather upon a general temper of dissatisfaction abroad, than upon any proof of criminality in his conduct, and that after all, this prosecution is little more than an appeal to your discretion or your resentment, to remove the Respondent from office, because he has happened to become unpopular and obnoxious. Upon this assumption much of the argument and eloquence of the learned gentlemen on the other side, have been exhausted ; and they have contended with a laudable, but in our view, rather a misplaced and unnecessary zeal, against the introduction of arbitrary and oppressive principles. Sir, I am at a loss to discover in what part of these proceedings, the learned gentlemen have perceived any ground for imputing any such views to the Managers of this impeachment. It would surely be a paltry and inglorious triumph, one which the House of Representatives and the Managers would earnestly and sincerely deprecate, should they succeed in attaining the object of the present prosecution, at the hazard of sanctioning principles, and establishing a precedent, which would impair the rights and jeopardize the liberties of themselves, their constituents and their posterity. It is true, that by another course of proceeding warranted by a different provision of the constitution, any officer may be removed by the Executive, at the will and pleasure of a bare majority of the Legislature ; a will, which the Executive in most cases would have little power and inclination to resist. The Legislature, without either allegation or proof, has but to pronounce the *sic volo, sic jubeo*, and the officer, is at once deprived of his place, and of all the rank, the powers and emoluments belonging to it. And yet perhaps, this provision, whether wise or not I will not now stop to consider, is hardly sufficient to justify the extraordinary alarm which has been so eloquently expressed for the liberty and security of the people, or to affix upon the constitution the charge of containing features more odious and oppressive than those of Turkish despotism. The truth is, that the security of our rights depends rather upon the general tenor and character than upon particular provisions of our constitution. The love of freedom and of justice—so deeply engraven upon the hearts of the people, and interwoven in the whole texture of our social institutions—a thorough and intelligent acquaintance with their rights—and a firm determination to maintain them—in short those moral and intellectual qualities, without which, social liberty cannot exist, and over which despotism can obtain no controul—these stamp the character and give security to the rights of the free people of this Commonwealth. So long as such a character is maintained, no danger perhaps need be apprehended from the arbitrary course of proceeding, under the provision of the constitution, to which

I have alluded. But Sir, we have never for a moment imagined, that the proceedings on this impeachment could be influenced or affected by that provision. The two modes of proceeding are altogether distinct, and in my humble apprehension were designed to effect totally distinct objects. No Sir; had the House of Representatives expected to attain their object, by any means short of the allegation, proof and conviction of criminal misconduct, an address and not an impeachment would have been the course of proceeding adopted by them. We readily therefore agree, that here is no question of expediency, of fitness or unfitness; but one of judicial inquiry, of guilt or innocence. We make no appeal to the will or discretion, but address ourselves solely to the understanding, the judgment and the consciences of the Judges of this Honourable Court. We also cheerfully accede to the proposition that this is a court of justice, of criminal jurisdiction, possessing all the attributes and incidents of such a court.

It was observed, rather casually, by one of my learned colleagues in the opening, that this court had no known and established rules of proceeding. How is the fact? In searching the journals of the Senate four cases only of impeachment appear to have happened, during the forty years which have elapsed, since the organization of this government. It is therefore not singular, that with so few precedents, no rules of practice or forms of proceeding should be established or known. Legislation is the ordinary duty of this Senate; but the powers of a judicial court being vested in it, though in practice usually dormant, must be called forth from time to time, as occasion requires their exercise, in such form as the Senate itself may deem expedient. It is then true, that the forms of proceeding in this court, and its rules of practice, are within its own breast, to be adopted and promulgated at its own discretion. This is the whole extent of the observation, that this court is controlled and governed by no known rules. But it has not been, and it cannot be contended, that in its decisions and adjudications, this court is not governed by established laws. These may be either positive and express, or they may depend upon reasoning and analogy. It would be idle to expect a rule applicable to every case, in the text of the statute book. Laws are founded on certain general principles, and the relations of men in society It is the province of this court, as of all other judicial tribunals, to search out and apply these principles to the particular cases, in judgment before them; and in doing this, in addition to general reasoning, they will avail themselves of all the aid to be derived from books of established authority in the principles of the common law, the decisions of eminent judges, and the analogous provisions in the codes of other countries. Laws thus derived necessarily resulting from the nature and constitution of society, are of the highest authority, and when discovered, are binding upon the judgment and the consciences of judges, from the obligation of which they can no more escape, than the planets from the operation of those physical laws, by which they are governed and regulated.

In regard to the form of articles of impeachment little aid can be derived from common law precedents. One general rule however appears to be well established, which is, that in articles of impeachment the same strictness and precision is not required, as in case of indictments. If this rule is founded in considerations of propriety, under the common law of England, its fitness here is still more obvious. There, the object of an impeachment is not merely to animadvert on the official misconduct of the Respondent, but it embraces the whole extent of the offence charged, with a view to the whole punishment due to such offence, and the judgment upon it, may either be capital or any punishment short of death. It has therefore all the object and effect of an indictment. Here the object is to inquire into, and decide upon the official misconduct of the accused, and the only reasonable rule with regard to form, is that the articles shall set forth all those acts, which constitute such official misconduct, with sufficient certainty and precision to enable the court and the accused to understand the nature and extent of the offence charged.

The general principle of law, upon which we rely in support of this prosecution is, that any wilful violation of law, or any wilful and corrupt act of omission or commission, in execution, or under color of that office, the duties of which the Respondent has sworn to perform and discharge faithfully and impartially, according to the best of his abilities and understanding, agreeably to the constitution and laws of this Commonwealth, is such an act of misconduct and mal-administration in office, as will render him liable to punishment by impeachment. Such oath of office, being prescribed by the supreme law, in addition to the religious obligation upon the conscience of the officer, imposes a legal obligation, as binding and explicit as if the constitution had provided in other words, that every officer, acting under it should so perform and discharge the duties of his office, under pain of impeachment. But what those duties are, must be a subject of inquiry in each particular case, and must be ascertained by reference to express laws relating to such office, or to the principles of the common law, and those general and obvious rules resulting from the nature, purposes and powers of the office in question.

The office of Judge of Probate, is a high judicial office, one of great dignity, utility and importance, the pure, upright and faithful execution of which is essential to the best interests of society. In the probate court, by far the greater proportion of all decrees are made *ex parte*, affecting the rights of the widow, the orphan, the infant, the idiot and lunatic; of all those whom the law regards as utterly helpless, and whose rights therefore, it is the peculiar province of the court to watch over and protect. A judge of probate is to be regarded as standing in one of the most interesting relations in society, exercising a paternal as well as judicial jurisdiction, and one therefore, in which corruption, oppression, and misconduct are deserving of the severest punishment. With these general views of the nature and objects of this prosecution, I propose to consider the articles more particularly, and apply the evidence which has been adduced in support of them.

The first article charges that the Respondent, under color of holding a probate court, but not at a probate court held according to law, transacted certain probate business and corruptly demanded and received therefor as fees of office, larger fees than by law allowed.

The demanding and receiving excessive fees, by an officer, is technically called extortion. I beg leave to differ in some respects from the learned counsel for the Respondent, in their views of this subject. Too much stress appears to be laid upon the mere etymology of the word, from which it is supposed that some restraint must be imposed upon the party paying, or some duress or coercion practised, to induce the payment, in order to constitute extortion. This notion is not warranted by the authorities, all of which concur in this, that when money is demanded and received by color of office, where none is due, or more than is due, it is extortion. It is not requisite that the party paying should resist, or even object to the payment. He may or may not know that the demand is extorsive. He may yield through ignorance, or he may prefer acquiescing in an illegal and unjust demand, to the trouble and risk of an altercation with an officer, whose good will it is his interest to conciliate. But the officer, is bound at his peril to take notice what his fees are, and to ask and receive no more than the law will warrant. It is however urged that when money is paid voluntarily to an officer, to stimulate him to the more prompt discharge of his duty, the receiving it is not extortion. This proposition however well founded, can never apply to the case of a judicial officer. Justice when due, can neither be sold nor delayed. But the distinction in case of a ministerial officer, is this, that when money is offered and received as a gratuity without any demand on the part of the officer, this is not extortion.—And this is an answer to the case put of a clergyman, in marrying a couple. No fee whatever is usually asked or demanded; and whatever is offered and received whether more or less than the legal fee is taken by way of gratuity or present. But when on being asked, the officer states a sum as his fee, which is more than the law allows, although such sum is paid without objection or apparent reluctance, such payment is not voluntary or gratuitous, within the meaning of the law; the money is taken, is asked or demanded, and received under color of office, which brings it directly within the definition of extortion.

If the supposed court of probate stated in this article were illegal and irregular, then any fees taken, for probate business, would be by color of office, and without authority of law. I understood it to be distinctly and expressly admitted, by the learned gentleman who opened this defence, that if these special courts were illegal, the taking of any fees, would be unquestionably illegal. This admission is perhaps stated more strongly than intended; but whether admitted or not, we take it to be a sound position.

It is not my intention at this time to add much to the observations, which I had the honor of submitting some days since, upon the nature and constitution of courts of probate in this Commonwealth, for the purpose of showing that the special courts, held by the Respondent at his office, in Groton, without the aid and presence of a Register, were irregular and illegal. The authorities upon this point are fully before the Court, and I shall not recapitulate them. Whether a court of probate, is, or is not, a court of record, according to the common law definition, it is clearly provided and implied, both by the rules of the ecclesiastical courts in England, and the laws of this State, that all legal and judicial proceedings therein, are to be authenticated and recorded by a Register. I cited the other day, from Dr. Gibson, the canon of 1603, to which I again ask the attention of the Court, together with the commentary thereon, which is precisely in point. Our own statute law, providing that the Register of probate shall be under bond, and under oath, and further providing that the judge may appoint a Register for the time being, when the regular Register is necessarily detained by sickness, or other cause, certainly implies that a register is necessary to the regular organization of the court. The propriety and fitness, if not the absolute necessity of such a regulation, is obvious. The disposition of large estates, and other very important rights depend upon the decrees and proceedings of the pro-

bate court, and all parties interested in them have a right to rely upon the records of that court, for authentic information respecting them. But unless these proceedings are duly recorded, at the time when they take place, such information cannot be obtained, and the utmost confusion may ensue. I will not trouble the court with many cases, when this would happen; two or three are sufficient, to illustrate my view. Whilst the judge is granting a letter of administration at Groton, a will may be regularly filed in the probate office according to law; by which means an administrator, without right or proper authority, might possess himself of the whole estate of a deceased person, to the great injury of the persons lawfully entitled to it. Again the judge at a special court, might grant letters of guardianship over a person non compos, or spendthrift, whereby his power of making contracts would be suspended, and yet this fact which ought to be matter of record, being known only to the judge, and the evidence of it retained in his custody, a person having inquired at the probate office, and even obtained the certificate of the register that no such guardianship had been granted, might enter into contracts with the person thus incapacitated from contracting, which would be ruinous. But it cannot be necessary to multiply instances; it is sufficient if the law has provided by positive regulation or necessary implication, that the official acts and doings of a judge of probate, shall be regularly authenticated and recorded by the register of probate, for whose appointment, attendance and compensation the law has fully provided.

It is therefore obviously the duty of the judge, if pursuant to the authority given him, he proposes to hold a court, at any other time and place than those provided by law, or to which the court stands regularly adjourned, to give notice to the register, that he may attend. The judge is bound to take notice of the duties of the register, and of the laws and regulations respecting them; and if he conducts his courts in such a manner as to prevent the register, from the regular and proper discharge of the duties of his office, such proceedings are irregular. The Court will recollect the case of Judge Addison, of Pennsylvania, who was tried and convicted on impeachment when the charge was, a supposed usurpation of power, in preventing his colleague by an exertion of authority, from exercising the right which he was supposed to possess.

It has however been objected that the article, does not allege that the register was not present. Like most of the objections to the form of these articles, this we apprehend has little weight. The article alleges, that the Respondent, professing to exercise the functions of his office, but not at a probate court held according to law, did certain acts, and under color thereof took certain fees. In answer to this allegation the Respondent has endeavored to show that this was a legal and regular probate court, and has argued strenuously in support of that proposition. To rebut this argument, we show and rely upon the fact, that at this supposed court, the register was not present, that he was not summoned or notified of the holding such court, that no special register was appointed, nor does it appear that a case existed authorizing the judge to appoint one. Unless a probate judge can be considered as always holding his court, at all times and places, the article alleges enough to show *prima facie*, that this proceeding did not take place at a probate court. Then the burthen is upon the Respondent, to show the regularity of these proceedings, and to prove that such court was regularly organized and legally held. Unless this is satisfactorily established, we maintain that the taking of any fee under color of these proceedings was illegal and extorsive

Before proceeding to the further consideration of this article, respecting the amount of fees taken, it seems proper shortly to advert to an argument, which if well founded would put an end not only to this, but to all the other articles, founded upon the allegation of taking illegal fees, and indeed would deprive this Court of its jurisdiction in all cases of extortion by judicial officers. The position is, that the taking of fees, is an act done by the Respondent in his individual and not judicial capacity; and therefore if excessive and illegal, although an act of extortion which might be punishable by indictment, yet is not official misconduct punishable by impeachment. It is stated that this proposition is founded upon reasoning so abstruse and technical that it is difficult to comprehend and illustrate it. It rather however appears to be so extraordinary and untenable, that it is difficult to find argument to support it.

This position is founded upon an authority (Rex *vs.* Loggen) which I cited, the other day; but it will be found on examination, that the authority does not by any means support the proposition, which it is relied on to establish. The defendant in that case, Dr. Loggen, was indicted for extortion, in taking a fee for the probate of a will which had been before proved in the prerogative court, such second probate being held to be unnecessary and useless. One ground of defence was, that he was acting in a judicial capacity, and if he made a mistake and decided wrong, still it was an error of judgment, for which he could not be responsible. The objection was overruled, on the ground that the taking the fee, which was the gist of the charge

was a ministerial and not a judicial act, and if he took a fee when none was due, he was responsible. This authority warrants the distinction between the judicial and ministerial act. But this distinction will not aid the Respondent. His learned counsel seek to establish the distinction, between his individual and official capacity, and unless the authority establishes this distinction, it cannot avail him. But so far from this, it directly establishes the contrary, by holding that the taking of the fee in the case cited was a ministerial act of the officer. But the ministerial as well as the judicial acts of an officer, are equally official acts ; and a judge therefore whether he acts corruptly in the one character, or oppressively in the other, is guilty of misconduct in office, for which he is answerable in this Court upon articles of impeachment.

Supposing however that the same business had been done at a regular probate court, then we contend that the amount of fees demanded a d received by the Respondent, was greate han allowed by law ; taken and receive l under color of office, and therefore extorsi .

When the law has annexed a fee to a particular service, the officer is undoubtedly bound by it. And t is immaterial whether the statute contains negative words or not. It imposes a penalty on taking higher fees, than those prescribed, which is equivalent to any prohibitory w rds, which could have been used. Some computations have been made, for the pur ose of showing what would have been the egal fees, for the services stated in this article. But one ground of complaint is, that the fee bill has been habitually disregarded, in estimating these. The register states that he has been four years in office, and that he does not know, how the usual aggregate of fees is made up, and if he were called on for a bill of the items, he could not give it. It has been urged, that this article is defective and insufficient, because it does not state what would have been the Respondent's legal fees, thereby shewing the excess taken.— The impossibility of doing this, has arisen from the loose and improper mode, in which the Respondent himself has conducted this business, more particularly at the special courts, to which these charges relate. At these courts, the judge has claimed and received, not only his own fees but the Register's, the latter of which ar in some degree uncertain, being not only for services done at the time, but to be done afterwards, and for some of them, as for recording and copying, the compensation is *pro rata*. But if the court is regularly constituted without a register, why charge any fees for register? or why charge the full fees as if he were present ? I am told from the other side, because, he has as much to record. True but recording is not the only service, required of him, and for which fees are claimed and paid ; but he has services to perform in court, in drawing up papers. And the full fees are claimed for the register though he is not present, and does not perform the services. It is this practice of demanding and taking fees, in the gross, without distinguishing the particular services, for which they were taken, and without distinguishing those of the judge and register, which renders it impossible in any given case, to state precisely what should have been the legal fees. Showing it to be clearly excessive is sufficient. Another principle, upon which we rely is, that when the law requires the performance of a service, to which a fee is annexed, all auxiliary acts, necessarily incidental to the performance of the principal service, are included, for which no additional fee can be lawfully taken. Any other construction would lead to intolerable extortion, against which it would be impossible even for the legislature to provide any security ; because scarcely any act of official duty, is so simple, that some incidental service might not be required, for which an officer might claim fees.

That when new and distinct services are required of an officer, deriving his compensation wholly from fees, and to which services no fee is annexed, such officer may lawfully claim and receive a reasonable fee, is a proposition against which I am not disposed to contend. And a remark, which I made on a former occasion I apprehend has been somewhat over-stated. I observed that a case might be supposed, where the Legislature might impose new duties, on an officer, without intending to allow additional fees, on the ground that the aggregate of fees would be considered as an adequate compensation for the aggregate of services. And I illustrated this remark, by alluding to the habitual practice of imposing new duties on officers paid by salary, without increasing such salary. I agree however that such would not be the construction, unless it should appear to be the intent of the Legislature.

But although the law may require such services, and annex no fee, it would be a loose and dangerous doctrine, to hold that such officer, might charge *ad libitum*, more especially when fees for such services, are mixed with the legal fees, and the whole taxed at one sum without distinction. The officer must demand a reasonable fee only at his peril ; and in determining whether reasonable or not, a reference to fees allowed for services most nearly analogous, would afford a safe and useful rule.

It is stated by the register, that the usual fees for Judge and Register, on what is cal-

led a set of administration papers, to wit, petition, decree, letter, warrant of appraisment and blank notices is $3,60. It is stated by the witness Mr. *Tarbell*, that in the present case, he paid for the same services, $5,58. It was very properly conceded, that the smallness of the sum, if taken wilfully and corruptly, is rather an aggravation than an excuse for the offence. It is by small and almost imperceptible encroachments, by demands, too insignificant, in the first instance, to be an object of remark or opposition, that great abuses creep into public offices. As to what are reasonable fees, we think the Respondent's own practice for a course of years, is at least good evidence of his own construction of the law ; and therefore when it is proved that he has exceeded in his demand, the sum usually taken by himself, it is conclusive evidence of extortion, unless he can show some good and satisfactory reason for the difference. We complain, that allowing for the sake of argument, that he has a right to construe the law, in determining what is a reasonable fee, yet that he has violated the law thus prescribed to himself. When we find the Respondent, uniformly charging a certain sum for certain services, in open, public probate court, for a course of years, and for the same services done more privately at his own office, uniformly charging more, though apparently according to no settled rule, it raises a suspicion of corrupt and oppressive conduct, which it is incumbent on him to remove. Let us then proceed to examine the reasons assigned for this difference. The first is, that the latter is attended with additional expence, because duplicates of papers must be made to enable the register to make up his record. This appears plausible, but is not supported in fact. It is manifest that no copy need be kept, except of those papers, which issue from the office. The originals of all others, are retained by the Judge. In the case supposed, one paper only emanates from the office, namely the letter of administration. For granting the original of that paper, the law allows 20 cents ; a copy therefore could not reasonably be charged at $1,93. I am told that the warrant of appraisement issues from the office ; it is true it does so, but it is testified by the register, that that document is never recorded, till it is returned with the inventory, and therefore that it need not be, and in fact in these cases, is not copied or taken in duplicate.

Another excuse is, that the holding of a special court is a new call on his time and attention, or in other words, that it is more troublesome and laborious, to perform the same official duties at his office, than in ordinary probate court. I deny the truth of this position in point of fact. The witness states that he was accustomed to write a line to the Respondent, or call on him to know when it would be convenient for him to attend. This course, enabled him to appropriate his leisure time, to the duties of his office, and to dispatch them with more ease and facility, than when pressed with the general mass of probate business. But if true in point of fact, this would form no excuse. The law is uniform with regard to the fees, whether the services be performed at one time and place or another ; and the judge can no more make this an excuse for exceeding the lawful fees than that of travelling to a remote part of the county. The law annexes the fee to the service done in probate court ; if therefore the court was as contended, a regular probate court, the law with all its allowances and prohibitions, attaches to the services done there, and becomes binding and obligatory on the Respondent. If this excuse should be deemed unavailing, the Respondent is then driven to the broad, but as I apprehend dangerous and untenable ground, that the law having invested him with the discretionary power of holding special courts, at such times and places, as the accommodation of the community or the interest of individuals may require, he may lawfully take money to induce him to exercise this discretion, in any particular case. In other words, that the high judicial discretion vested in him by law, for purposes of public convenience, may be made subservient to his own private emolument. It is maintained that if a court is held for the accommodation of an individual suitor, the judge may lawfully take any sum for such accommodation, which he may think reasonable. Where is this doctrine to stop, and to what corruption and abuses, would it not lead ! A judge possesses large discretionary powers, in other cases, to which, if correct, the same reasoning would apply. He may adjourn, at such time as he thinks expedient. Supposing on the first day after opening his regular court, in a remote part of the county when there is a press of business, he should think fit to adjourn, on the ground that his private business required his attention. Might he lawfully receive a large sum of money of the suitors, to induce him to exercise his discretionary power and continue his court ? In short, if business at the special courts, is to be paid for liberally, and upon a scale of what the judge might think reasonable for extra time and attention, and business at regular courts of probate is paid for according to the humbler standard of the fee-bill, would it not soon be in the power of the judge to render the transacted business in the latter courts, so irksome and vexatious, as to induce all suitors to resort to the special court without regard to the enhanced expence ? If a Judge of Probate, may sell his discretion, and turn his judicial power to profit, why may not the same thing be done

by the judges of common law courts? It is no answer to say that they are paid by salaries, and not by fees. They are bound to do their duty, and they have an equal right to say, that they will do no more without compensation. They too have large discretionary powers, and by adjournment may hold sessions at such times and places, as the public good requires. Suppose an individual suitor, having an important cause, depending upon the decision of a question of law before the Judges of the Supreme Court, should pay them a fee to induce them to hold an extraordinary session for his accommodation. It would be no apology to say that such individual could well afford to pay the extra sum, that in fact it would be for his advantage to pay it, rather than wait the delay of the ordinary course of business. Such a transaction it is quite manifest, would fix a stigma upon the reputation of the court, which years of the purest administration of justice, and the most assiduous discharge of official duty, could not obliterate. The true principle is, that when discretionary authority is vested by law, in a high judicial office, he is bound to exercise it singly with a regard to his sense of public duty. In the case of holding a court for instance, if a case happen in which he thinks it his duty, pursuant to the power given him by law, to hold such court, he is bound to hold it, and to receive such compensation as the law provides, and no more; if he does not think it a duty incumbent upon him to hold such court, without regard to profit, it would be an abuse of his power to hold it at all. I have dwelt the longer on these alleged excuses, for taking excessive fees at special courts, beyond those usually and uniformly taken at ordinary courts, because they apply to the whole class of laws, stated in these articles. I hold therefore that if there had been a distinct agreement and understanding, between the judge and suitor, that an additional compensation should be allowed for transacting business, at a special court, such agreement would have been unlawful and corrupt, and on the part of the judge an act of gross official misconduct. But in the case stated in this first article, it is proved that no such agreement or understanding existed. Mr. Tarbell on examination stated that he was not aware that he was to pay any thing more than the usual, regular and legal fees. He paid the sum of $5,58, being the sum claimed by the Respondent, as and for probate fees. Whatever ground the Respondent may now claim to have had, for charging extra services, he made no such claim at the time, he demanded and received the whole sum stated, as official dues, being more than the sum allowed by law, or by his own construction of the law; this evidence therefore fully establishes the offence charged. For the sake of precision, I have confined my remarks principally to the case of the first charge of $5,58. It will however be recollected, that the witness paid in the whole, the sum of thirty-two dollars and seven cents; that it was stated by the Register that the usual fees for the like services, would be $24.67, making an excess of $7,40.

These are all the remarks I have to make in relation to the first article, except a single observation upon the subject of a receipt. The witness states that he could not reconcile the sum paid, with the fee-table, that he asked the judge for a receipt, which he declined giving him, saying he did not care to give one, or it was not usual. He states that he does not know that he used the word, "items," or "particulars," but he wanted a receipt to show what sum he had paid, and what he had paid it for. He had a right to demand a bill of particulars, he did ask for a bill, and it is a reasonable conclusion that he asked for such a bill as the law entitled him to receive. If the Respondent declined or evaded giving it, we leave it to this Court to say, whether such denial proceeded from a consciousness that he had taken higher fees, than the law allows, and that such bill would not bear examination.

Mr. S. proceeded to state the charge in the second article and recapitulate and apply the evidence, with a view of showing that, the sum of $29,10, or $32,10 was demanded and paid, as probate fees; that the usual charge for like services was $19,80; that it was not necessary to retain copies of any papes, except the three letters of guardianship; that 20 cents each only could be charged for them if originals; that it would be unreasonable to charge more for copies making in the whole $20,40; that the attempt to excuse the excess as a sum taken for counsel was probably an after-thought resorted to, for the purpose of this defence; that supposing him to have a right to charge for counsel, sitting as a judge, his claim would be on the town of Pepperell at whose instance it was given, and not on the paupers; that in point of fact, no claim was made for compensation as counsel; that the whole sum was demanded and received, as and for probate fees, and was therefore taken corruptly and extorsively.

At 20 minutes past 1 o'clock the Court was adjourned to half past 3 in the afternoon.

AFTERNOON.

After the usual messages between the two Houses were delivered, the Court was opened, and Mr. Shaw resumed his argument by endeavouring to show that the third article was similar in character, except that the excess of fees taken was somewhat larger than in the other cases. The whole amount received was $14,70, for services, which according to the usual, mode of charging would

amount to $33,35, making an excess of $11,35.

Mr. S. proceeded to make similar remarks upon the 4th and 5th articles, observing generally, that though there appeared in all these cases an excess of fees taken, beyond the accustomed charges, yet there appeared to be no uniform mode of charging. These witnesses having severally been asked, whether they made any complaint of oppression, Mr. S. remarked that executors, administrators and guardians are not the persons principally injured, that they act merely in trust for others, whose complaints cannot be heard; that in general they are not supposed to know whether the fees claimed by a judge are right or wrong; that so long as they are assured of having such charges, allowed in their accounts, it is not to be presumed that they would complain; that their acquiescence therefore affords no proof of the correctness of such charges. Mr. S. then proceeded as follows.

I beg leave, Mr. President, for purposes of convenience, now to consider the 7th article, embracing a class of cases, which in my humble view demands the deliberate attention of this Court. The article alleges that the Respondent, sitting and acting as judge, acted as the attorney and counsel of Samuel Whiting, a guardian accounting before him, and for his services as such attorney, unlawfully and corruptly demanded and received the sum of fifteen dollars, and as judge, allowed the same in said Whiting's guardianship account.

The Respondent in his answer has endeavored to justify this proceeding on the ground that until the passing of the late law, a judge of probate had an unlimited right to act as counsel and attorney, for executors, administrators and guardians, appointed by and responsible to himself, not merely in other courts, but in matters pending before him as judge, unless in cases where adverse parties were in actual litigation—in judicial controversy before him. From the correctness of this position I must beg leave to dissent. I have already remarked upon the supposed distinction between the contentious and the amicable jurisdiction of the probate court, and have endeavored to show that this distinction in the jurisdiction of the ecclesiastical courts of Great Britain, is not applicable to the courts of probate, in this Commonwealth. In nearly every case pending before a judge of probate, although there may not be adverse parties present, there are adverse interests existing. Every allowance to a guardian or other person rendering an account, is a diminution of the fund, holden by such person as trustee. It is peculiarly the province and duty of the judge, to protect the interest of the minors, heirs, creditors, and other persons intersted in those funds. All of them though in most cases, from their helpless and imbecile condition, they are unable to appear and assert their rights, have interests adverse to those of the guardian or other trustee, upon which interests the court is to adjudge. You have been called upon to consider the relative situation of the parties in such case. When a guardian, for instance, is appointed, he is to give bond to the judge for the faithful discharge of his duties, and the judge is legally authorized and required to call him to an account, for all his expenditures and other official acts. If he pays money of his ward for legal advice, he does it at the peril of being able to satisfy the judge, that such expenditure was proper and justifiable. It is not by bare possibility only that such official acts are to come before the judge; if he continue to hold his office, they must necessarily come before him, for his judicial consideration. He will then be called upon, in the absence of parties adversely interested, whom the law regards as incapable of asserting their own rights, impartially to adjudicate upon the fitness of proceedings, which he, in another capacity, has himself advised and directed, for the doing which he has been retained and paid, and is moreover to decide upon the reasonableness of his own compensation. Besides, it is to be considered that the judge has an unlimited power of making allowances to the guardian, for his own services. If then the guardian may retain and pay the judge without limitation, and the judge may lawfully make allowances *ad libitum* to the guardian, and the whole may be charged upon the funds of the infant or lunatic ward, and the account is to be settled and closed by the judge and guardian alone, does it not present a temptation to collusion, to which no man of honourable feelings would expose himself, and which cannot be warranted by law? No sir, a man who permits himself to be retained by another, is thereby disqualified from acting judicially upon his conduct. He is deprived of that perfect independence, that equilibrium of mind and feeling, which are essential to the pure, upright and impartial administration of justice. If the Respondent by being retained and taking fees as counsel, in this and the like cases charged, has wilfully and repeatedly, and I may say almost habitually violated the duties of his office, which he is sworn to discharge faithfully and impartially, he is as manifestly guilty of misconduct and mal-administration in office, as if he had violated the most positive enactments of the statute law.

With regard to the accusation contained in the sixth article of this impeachment, it does unquestionably charge the Respondent with an offence of a most grave and serious character. And if we have in any degree

duly appreciated the nature of this charge, and the weight of evidence brought in support of it, we believe it to be most substantially proved. There may perhaps be a mistake in date as to the first retainer. But the substance of the charge is, that being judge of probate, he was retained, in fact acted as counsel and attorney, drew a petition and instituted proceedings before himself, in a matter in judicial controversy, of great interest and importance to the parties, rendered an interlocutory decree upon these proceedings in his judicial capacity, and assigned a day for entering a final judgment, for which services, after these proceedings were finished he received a fee of fifty dollars. The answer to this grave charge is, that although these proceedings were in the form of judicial proceedings, yet in fact that they were had by agreement and consent of parties, with a full knowledge that the Respondent could not with propriety take judicial cognizance of the subject; that he informed them, that he was indisposed so to do; that notwithstanding such notice, they knowing his situation as attorney for one of the parties, consented to his appointing and swearing the appraisers, and to all the proceedings in the case. Unless this excuse is fully and satisfactorily established by the Respondent, on whom for this purpose the burthen of proof rests, the charge remains without answer and without justification.—The reply made by the Managers, to this excuse, is that in point of law, there was no necessity of bringing this process before the probate court; that both the C. P. and the Sup. J. C. had original concurrent jurisdiction of the case, in either of which courts the same proceedings might have been instituted in the first instance; that in fact, if the parties were agreed upon the subject of this partition, no legal proceedings, either formal or actual were necessary to carry such agreement into effect; that the alleged agreement is an unusual and extraordinary one; that it is not recollected by either of the witnesses now before this Court who must have been the parties to it, had any such agreement existed; on the contrary, that they do recollect circumstances totally inconsistent with the existence of such an agreement; that although a final decree was not made, yet a decree upon the main question was in fact made and entered up, and a day assigned for a final decree; that the imperfect recollection of one witness not immediately concerned as to an agreement and compromise, may be satisfactorily accounted for by the fact, that at a late stage of the proceeding and just before its final termination in a judicial course, the subject was settled by an arrangement then for the first time mutually agreed on, and this not on account of the delicate situation of the judge, but with a view to prevent the property of one of the parties from being subject to attachment. The solemn proceedings of a court of justice, duly recorded, are to be taken, *prima facie* at least, to be what they purport to be. The cause in question, appears to have been conducted in the usual course of causes in judicial controversy;—and there is no evidence in the case, to warrant the extraordinary character attempted to be given to it, by the Respondent. Indeed, the amount of the fee alleged and proved to have been taken by him, is sufficient to prove that it was not a case of mere adjustment by agreement of parties. The necessary inference is, from a full examination of the evidence, that no such notice was given to the parties of the Respondent's situation, that no such understanding and agreement subsisted between them as set forth in his answer; and that the evidence of this alleged excuse, has entirely and completely failed.

Without dwelling upon the several intermediate charges the evidence of which is fully before the court, I shall proceed at once to the consideration of the 12th article of this impeachment. My learned friends have widely differed, in their view of this article. One of them maintains that it imputes no substantial charge of guilt; whilst another asserts, that the facts here alleged, *if proved* fix a stain upon the character of the Respondent, which must render him forever infamous. Without attempting to reconcile this difference, permit me Sir, to state the case, as proved. Col. Alpheus Ware, as guardian of one Breck, a person *non compos*, made out and prepared his guardianship account, for the purpose of settling it with the judge of probate, charging himself with certain property, claiming credit for services and disbursements, and stating a balance in his hands. This account he properly submitted to the selectmen of Sherburne, as a party having an interest therein, because the ward and his family were, or without this property would be paupers, for whose support that town was liable. Upon this account the Selectmen of Sherburne, wrote a certificate, stating that they had examined it, were satisfied that it was just and ought to be allowed. This account Ware carried to the Judge, who passed it as it then stood, passed a decree which is in the case, stating that the same was allowed as assented to, or approved by the Selectmen of Sherburne, ordered it to be recorded, and delivered it to the Register for that purpose, who gave the accountant the usual certificate stating the balance of the account. A conversation then took place, between Grout, one of those selectmen, Ware and the judge, respecting the estate in question in consequence of which this

Respondent thought himself entitled to a fee of $5 from Grout as the representative of the town of Sherburne, because that town, as before stated, was interested in the fund in the hands of the guardian. Grout refused to pay this demand, for reasons stated in his deposition, taken by the Respondent; refused to consent that Ware should pay it and charge it in the account of his ward. Subsequently, upon Ware's consenting to pay it, the Respondent interlined it as a charge allowed in the account already settled and passed; altered the balance to conform, and rendered a decree or suffered the decree already rentered to stand, importing as it now does, that the account was approved by the selectmen of Sherburne. This is the exact state of the case, without relying on any of those circumstances, whic are supposed to give a coloring to the transaction; and in whatever form the story is told, this is the substance. We have been strenuously called on to state what offence this is to be denominated. The offence consists in altering and thereby falsifying a paper, signed by other persons having an interest therein, without their consent, and expressly against the consent of one of them, in a material part, and thereupon wilfully and corruptly entering a decree false in point of fact. By whatever appellation other gentlemen may think proper to denominate this offence, we call it, and it is sufficient for the purposes of this prosecution to call it, a great misprision—a misdemeanor— misconduct and mal-administration in office.

My learned friends, in their defence of the Respondent upon this article appear to have relied principally upon impeaching the testimony of the witness, Col. Ware. It is however obvious that all the substantial facts of this charge, are proved by the papers from the files of the probate office, and the testimony of their own witness Mr. Grout, independently of the testimony of Ware. The account is exhibited, showing the interlineation of the item, and the alteration of the balance, in the hand-writing of the Respondent; the decree states that the account was allowed and passed with the consent of the selectmen of Sherburne; and Mr. Grout testifies that he refused to consent that said sum of five dollars should be paid by Ware and charged in the account. That the Respondent had a design to conceal this transaction from those selectmen, is fully proved by the circumstance of his irregularly inserting this item in an account already certified, sworn to, passed and delivered to the Register for record, and which in the due course of business would never again come before them, instead of making it an item in a future account, which must come to their knowledge, and to which they might and probably would object— Considering therefore the main facts of this charge to be fully proved, without reliance upon Ware, still however it is not only due to the cause, but an act of justice to this witness, to take some notice of this attempt to impeach his testimony. This witness appears to be an honest and respectable citizen brought here by the compulsory process of the court, to tell what he knows; and his character ought not to be wantonly and unjustly assailed, because it happens to be necessary to the Respondent's defence. He is said to entertain a deadly hatred towards the Respondent, to be actuated by feelings of dark, malignant, cowardly revenge. These are the very words. Language can furnish no epithets, importing a more diabolical spirit. Can the imputation of such a temper be justified by evidence, that the witness has expressed some anger and resentment, on being sued by the Respondent? This surely is not uncommon among parties litigant. But who ever imagined, that the natural hostility between adverse parties, contending for their rights in a civil suit, although warmly expressed, was of such a character as would induce them to gratify the most savage malice, by the grossest perjury? Is it more satisfactorily established by the loose testimony that in a recent conversation, the witness stated that he thought he could get the Respondent indicted, or expressed an opinion that he was liable to indictment? Every prosecutor, in laying a complaint before a grand jury expresses a similar opinion respecting the party complained against. Is every such complainant to be charged with brutal malice, to be suspected of perjury, and impeached and pronounced unworthy of belief?

Another reason is, that if the Respondent is guilty, the witness was an accomplice in his guilt. Can this charge be seriously urged by the Respondent? Does the witness state any circumstances with regard to his own conduct, which were not perfectly excusable under the circumstances of the case? A judge, of high authority, of great eminence and learning, presumed and bound to know the law, in the exercise of his official functions and in the very seat of justice, dealing with a plain unlettered man, a suitor before him, requires a sum to be paid from funds under his care. Be such demand and the means of urging it, ever so unlawful and corrupt, still such requisition is equivalent to the most express assurance of the judge, that a compliance with such demand is lawful and right. Because the witness yielded, reluctantly indeed, and with some hesitation as against his own plain notions of propriety, still in as much as he did yield to such superior authority, in a matter in which the assurance of the judge was in his estimation a law to him, can it with any truth, propriety or justice be said, that he is unworthy of belief, when called to give tes-

timony to these facts, because by his own showing, he was *particeps criminis*, an accomplice in the Respondent's guilt? Again it is said, that this is a stale complaint, that the witness has lain by and forborne to make this complaint almost six years. It is true that he has not made a formal complaint to the House of Representatives, or taken any measures to get the Respondent impeached. Perhaps there might be some weight in this suggestion were he now a volunteer.—But he is neither prosecutor nor complainant; and he would unquestionably have lain by six years longer and forever, had he not been authoritatively called on to give his testimony. It is further urged, that if a witness state a falsehood wilfully, though in an immaterial point, no part of his testimony is to be believed. This is no more than saying, in other words, that if in the course of the trial, a witness be proved guilty of wilful perjury, no reliance can be placed on his veracity. To this rule we readily agree, but we deny that the case furnishes any ground for such a charge. In all essential parts, his testimony is corroborated by that of Mr. Grout; and in no particular is he contradicted. The supposed contradiction about beginning the conversation is easily reconciled. Mr. Grout does not say that he began the conversation with the judge, but began to state the facts, and Ware interrupted to correct him; and Ware states the same thing. Not the slightest evidence has been produced against the credit of Col. Ware, and his general reputation for veracity. On the contrary, when one of the Managers, put a question, to that effect, to one of the witnesses, inadvertently I confess, it was objected to, from the other side, and withdrawn. The rules of law will not permit a party to support the credit of his own witness before it is called in question, simply because, when no evidence is brought against the reputation of a witness, the law presumes that none can be produced. In every point of view in which the testimony of the witness is considered, I maintain with great confidence, that it stands unshaken. I feel some satisfaction in coming to this conclusion, on account of the witness, though an entire stranger, to whom I have never spoken, except on the stand, because he appears to me to have been treated with an unusual degree of harshness and severity, which no evidence in the case would warrant; and because the attempt to invalidate the force of his testimony, by charging him with malice and perjury was as cruel and unjust, as in my humble apprehension it has proved feeble and unsuccessful.

[Mr. S. stated at length the testimony of Ware, in connection with the papers and other evidence.]

The evidence in support of this article, proves a gross abuse of power to obtain a sum of money from a trustee accounting before him, under color of a compensation for services, which the Respondent himself considered due, if due at all, from other persons, and an attempt to conceal this from the persons interested, by the most unwarrantable means, by the falsification of records and papers. It proves not only the actual guilt of the Respondent, but a manifest consciousness of guilt. The declaration that the overseers need know nothing about it, his arrangement of the business in such manner that they might know nothing about it, his calling for the certificate which had been signed by the Register and actually delivered to the guardian, and altering the balance therein stated, in order as he remarked that *papers might not clash*, all lead inevitably to the conclusion, not only that the Respondent acted corruptly, but that he did so knowingly and wilfully. On the whole, the evidence produced in support of this article of impeachment, fixes upon the Respondent, beyond all reasonable doubt, a complicated charge of meanness, corruption and guilt.

Mr. President, I will not detain you with remarks, upon the remaining articles of charge, which will be more fully considered by my learned colleague. Notwithstanding the length to which these remarks have extended, I am sensible that I have taken but an imperfect view of the details of this long and complicated case. But I address myself to experienced men, to intelligent judges, capable of estimating the qualities of conduct, and appreciating the force of evidence. We have no earnest invocation to make to the Judges of this Hon. Court except that they will examine the case now submitted to them, without fear, favour, affection, prejudice or partiality, and pronounce their decision, not according to the momentary impulses of sympathy and compassion, but upon the invariable dictates of judgment and reason. If sensibility should usurp the seat of justice, and take the place of the understanding and judgment, laws would be unavailing, and all civil and social rights become fluctuating and uncertain. Justice might throw away her balance, for it would be useless, and her sword, for it would be mischievous. If punishment and disgrace are to overtake the Respondent, it is because punishment and disgrace are the natural, the necessary and the inevitable consequences of turpitude and crime. The Representatives of the people of this Commonwealth, demand at your hands no sacrifice of innocence; they ask for no victim to their resentment, for they have none to gratify. If applying the evidence to the law in this case, this Court can consistently with the conclusions of enlightened and inflexible judgment, pronounce the Respondent innocent, these Representatives will rejoice to find that the reputation of this Commonwealth, still re-

mains pure and unspotted. But if these conclusions should be otherwise, if this Court is satisfied, that the Respondent has abused the powers entrusted to him, disregarded the rights of others, and violated his high official duties, the Representatives of the people do earnestly hope, and confidently trust, that this high Court, disregarding all consequences personal to the Respondent, will pronounce such judgment on his conduct, as will prove a salutary example to all others in authority, vindicate the honour and secure the rights of this Commonwealth, and enable them to transmit to posterity, that unblemished reputation for purity, honesty and integrity in the administration of justice, which has hitherto been the ornament and glory of Massachusetts.

Mr. Shaw having been frequently interrupted in his argument by the counsel for the Respondent, to correct supposed misstatements, the question was taken in the course of his argument, whether the counsel for the Respondent should be permitted, instead of interrupting at the time, to notice what they conceived to be inaccuracies after the argument on the part of the Managers should be gone through. It was decided in the affirmative--

YEAS—Messrs. Bourne, Ruggles, Clark, Moseley, Doolittle, Rantoul, Whittemore, Sullivan, Eastman, Bigelow, Allen, Tufts, Parker, Williams, Gardner, Hunnewell, Welles and Brooks—18

NAYS—Messrs. Thomas, Reynolds. Lyman, Dwight, Hyde, Pickman, Bartlett and Varnum—8.

Mr. Shaw concluded his remarks at 20 minutes past 5, and was succeeded by Mr. Dutton.

Mr. DUTTON. Mr. President, after a trial, that has exhausted the patience, if not the strength of all concerned in it, it has become my duty to make some remarks, both on the law and the facts, in closing this cause on the part of the House of Representatives. It is not my intention to travel through the whole of this case, and if it was, I have not strength enough to execute it. It is a relief to me, however, to feel, that this is not necessary, after the able arguments of my learned associates, and that I might with great confidence leave the cause to the judgment of this Honourable Court without further illustration or remark.

It was said by the learned Gentleman who opened the Respondent's defence, that he had greatly suffered in his feelings and reputation by the publicity of this prosecution. This may be true; but whatever the extent of this evil may be, it was incident to the impeachment itself. A committee of the House reported a statement of facts; on these, the House ordered articles, to be framed—these were publicly read and carried to the bar of this Court. The Respondent was summoned to answer, and had time and opportunity to make his defence. All these proceedings were necessarily public. His accusers have been brought into Court, and examined face to face, and he has been fully heard by able and learned Counsel. I am not insensible to the power of eloquence, nor will I withhold my humble tribute of admiration at the fidelity, learning and ability, which have been exerted in the Respondent's defence. I rejoice at this; for whatever may be the result of this trial, it never can be said that he has not been ably and powerfully defended.

An allusion has been made to the overwhelming power of the prosecutors. The House of Representatives do not pretend to any other power, or to exercise it in any other way than the Constitution prescribes. In impeachments, they act as the grand inquest, of the State, in the name and behalf of the whole people; and whenever a case occurs which justifies their interposition, it becomes their duty to present it. As guardians of the public morals, as exercising a supervisory power over the conduct of men in office, they are bound to take notice of all misconduct and mal-administration in office. In the first instance, the proceedings are necessarily *ex parte*, and if *prima facie*, a strong case be made out, they have no choice left; they ought to make presentment; and as often as this occurs, it is to be hoped that the House of Representatives will always have the firmness and the patriotism to do their duty. The people have a deep interest in the administration of justice; it should not only be pure and upright, but unsuspected. Whatever tends to diminish or shake the confidence of the community in the integrity of a judicial officer, ought not to be suffered to circulate without inquiry; for any loss of confidence in the judicial department of the Government would be a public calamity. Statements and circumstances therefore, which implicate the judicial purity of any man, which tend to deprave the public sentiment and opinion, ought to be brought to the test. The government itself lives and acts by the force of opinion; and it is of the last importance that this should be enlightened and uncorrupted. Our whole system is as much an experiment in morals as politics; and if ever this moral force is lost, all is lost. It will not be denied in this case, that enough has been proved to put the Respondent to answer; and if he has been able to satisfy this honourable Court that he is not guilty of the offences charged upon him, he will, of course be acquitted, and I trust restored to all the respect and confidence, which, as a citizen and magistrate he enjoyed before this prosecution was begun.

The constitution provides, that the "Senate shall be a Court with full authority to hear and determine all impeachments, made

by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and mal-administration in their offices." What then is a Court of Impeachment? What is its jurisdiction, its powers and modes of proceeding? Where must we go to learn the law and practice of impeachments? To England, the country from whence the great principles of civil liberty as well as of law are derived. Our Court of Impeachment is formed after the model of the high Court of Impeachment in Great Britain. There the House of Lords is the Court, here by an obvious analogy, the higher branch of the Legislature; there the House of Commons impeach, and here the House of Representatives, the most numerous and popular branch of the Government. In one sentence, the Senate is made a Court of Impeachment; all the incidents, rules and forms of proceeding therefore appertaining to such a Court, are also recognised and established. They become a part of our law, and as such, ought to be preserved, with as much care as any other part of our law. Whatever then is peculiar to a Court of Impeachment as to its jurisdiction, its rules and its forms, is as truly established by this clause in the Constitution, as the trial by Jury is, in a common law Court. Suppose the Constitution had provided that there should be a Court of Chancery in this State; it would follow of course that all the jurisdiction, powers, incidents, rules and forms pertaining to such a Court in England, would be established here; and all this upon the plain maxim of common sense as well as of law, that all the incidents and means, proper or necessary to the possession, enjoyment or exercise of the principal thing granted, or established, are also granted and established at the same time.

As to the rules of evidence which are to govern a Court of Impeachment, I agree with the learned Counsel who opened this part o fthe Respondent's defence, that they are essentially the same as govern Courts of Common Law. A man is not to be convicted because he is impeached, upon hearsay, or upon evidence not under oath, but upon the highest evidence the nature of the case admits, in the form, and under the sanctions which belong to other Courts.

I also agree with the same learned Gentleman, that the same legal notions of crimes and offences, are as substantially to be regarded in this Court, as in any other. I have no conception that the law is to be disregarded, or perverted; that the nature of offences is to be changed, or that any of those great legal or moral distinctions, which have been recognised and acted upon in England or in this country, are to be overlooked or confounded.

Sir, if I thought it possible that the Respondent could be convicted upon any other than legal and constitutional grounds, I should deprecate such a result as pregnant with infinite mischief to the state; and the day in which I from any cause, had been concerned in it, as the most unfortunate one of my life. But I know it is not possible. If we cannot bring home to the Respondent some legal offence, some violation of law, this impeachment cannot and ought not to be sustained. We disclaim and abhor all notions of convicting the Respondent, on any grounds of supposed expediency or policy. The books I have read, and the principles I have imbibed, have instructed me differently on the subject of impeachment; and I hold it better that twenty guilty men should escape than that the plain principles of law should be violated. We do not stand here, as members of the House of Representatives, or as Lawyers, to maintain star-chamber doctrines;—We are not the advocates of the oppressor, but of the oppressed—not of those who do injustice, but of those who suffer it.

I was at a loss, during no small part of the learned gentleman's argument to account for the great array of positions and authorities, which he brought to bear upon the case, a great part of which I admit to be sound law; and I do not now understand the reason of it, unless he had some expectation that amidst all the learned dust he raised, his client had a better chance of escape.

Our constitution provides that the "Judgment of the Court, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honour, trust, or profit under this Commonwealth; but the party so convicted, shall be nevertheless liable to indictment, trial, judgment, and punishment, according to the laws of the land." In England it may be removal from office, disqualification, fine, imprisonment and even death.

In England, and in this Country, the persons who have been impeached, have usually been such as have held some important trust, of a public nature, or exercised some high office, connected with the welfare of the State. One hundred years ago, Lord *Macclesfield* was impeached, for selling the offices of the Masters in Chancery, which was declared to be in violation of his oath as Lord Chancellor, and of the great trust and confidence reposed in him; *Warren Hastings* was impeached for mal conduct as Governour General of India; and in later times Lord *Melville* was impeached for breach of trust as Treasurer of the Navy, &c. Cases of this sort, usually embrace a great variety of facts and circumstances, and often extend through a considerable period of time. Thus in the case of Judge Chase. He was impeached for certain official con-

duct, in Delaware, Maryland, Pennsylvania and Virginia. The nature of these offences, indicates the proper remedy. It would be inconvenient, if not impracticable to punish misconduct in office, by a resort to the tribunals of common law jurisdiction.

For what offences or crimes then may an officer of the government be impeached? By our constitution, for "misconduct and mal-administration in office" only. It becomes then important to ascertain the meaning and import of these words. In the first place, they include bribery, extortion, and misdemeanor, which are technical words, well known and defined in law. They also have a more extended meaning, and embrace a variety of official acts, which do not amount either to bribery or extortion. The word corruption, though not defined in the law, has an intelligible meaning when applied to the conduct of a man in office. In common acceptation, it means "wickedness," "perversion of principles," "loss of integrity." When we speak of the corrupt conduct of a judge, we do not always mean downright bribery or extortion. I remember in the trial of Judge Chase, that one of his counsel maintained, that by the constitution of the United States, a Judge could not be impeached for any offence for which he could not be indicted; and I also remember, that this position was abandoned in the course of the trial. Cases were stated which were clearly impeachable though not so certainly indictable. As for instance—Suppose a Judge of Probate should open his Court, at the time and place provided by law, and after keeping it open for an hour, should close it and go home, to the great delay and detriment of the county. There is no law, which declares for how long a time he shall hold his court at any particular place; and yet a habit of this sort would undoubtedly amount to misconduct in office, for which he might be impeached. Or suppose a Judge of a common law Court should compose his jury of eleven, instead of twelve men; this would be mal-administration in him although there is no law which declares that a jury shall consist of twelve men. One of the Respondent's learned counsel admitted in his argument, that if a Judge of the Supreme Court should contemptuously refuse to give an opinion, when required by the Executive, in a case clearly within his duty, it would amount to misconduct in office; and yet none of these cases partake of the nature of bribery or extortion. The doctrine therefore which the learned gentleman seemed inclined to advance, that a Judge could only be impeached for bribery or extortion, cannot be sustained. Now whether such conduct in office as I have stated, be indictable as well as impeachable, is of no importance; it is enough for my purpose, if it be clearly impeachable.

I have stated that we must make out a clear case of some legal offence, some violation of law, before we can rightfully demand judgment against the Respondent; and this must be of some statutory provision, or some plain principle of the common law. The allegation of this offence or violation of law, must be according to the just interpretation and true meaning of that clause in the bill of rights, which declares, that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him."

The common law, in its true extent, is a great code of rules, which can be applied to ascertain and determine the rights and obligations of all. It is a great system of principles and analogies, of a moral as well as of a legal nature, furnishing protection for all sorts of rights and remedies for all sorts of wrongs. It embraces all the duties which a man owes to his neighbour; it can always be brought in aid of what is morally or legally right and just; and it provides abundant means for detecting and punishing every kind of fraud, injustice or oppression. This law is ours by inheritance, and by adoption; it lies at the foundation of all our civil and judicial institutions, and ought to be preserved by us in all its vigor and symmetry.

By the clause just read from the bill of rights, it is required, that the crime, or offence shall be substantially and formally alleged. But what is *formal* and what is *substantial*, must be determined by the usual course of proceedings, in the court, where the man is accused. If a man is indicted in a court of common law, for a felony, the crime must be charged with all the technical precision, which belongs to such a court. The accused has a right to require of the government to set forth his offence with the utmost certainty, to state the time, place, circumstance and manner of the act, and with few exceptions to prove the offence as it is charged. I am aware that these "unseemly niceties" as Lord Hale calls them, have been the subject of regret and complaint among wise and good men, as too much favouring the escape of the guilty;—But I am not prepared to say that they ought to be expunged from our law, for they are in favour of life, and of personal liberty. But if a man is impeached, for misconduct and mal-administration in office, what is *substance*, and what is *form*, must be decided by the rules and course of proceedings in courts of impeachment. The law and practice of impeachment must be resorted to in this case, for the right construction of the clause in the bill of rights. Some legal offence must be alleged, and this must be done plainly and intelligibly, so that the person accused may know what he is called to answer to, and if this is done, the offence is substantially set forth. No man who has

been accused of one offence, shall be held to answer to another distinct and different offence, which is not intelligibly stated. In the trial by impeachment, the law and the practice of impeachment are to govern, and these are as much in favour of the accused as of the accusers.

As the forms of proceedings in courts of impeachment, are peculiar, little can be found on the subject in common law books. Selden, in his chapter upon the "Judicature of Parliament," gives a general view of the course of proceedings; and Wooddeson, in a single lecture has compiled, chiefly from parliamentary precedents, both the law and practice of impeachment. Blackstone devotes about one page to the subject, and calls articles of impeachment, "a kind of bills of indictment." By these authorities, it appears, that the "articles need not pursue the strict form and accuracy of an indictment; for it has been ruled, that by the law and usage of Parliament, in prosecutions by impeachment, for high crimes and misdemeanours by writing or speaking, the particular words supposed to be criminal are not necessary to be expressly specified in such impeachments. The resolution indeed passed in a party cause; but it seems agreeable to a concession of the Lords, several years before, that the Commons might if they pleased, impeach in general terms" In Selden's Judicature of Parliament, it is said that the Commons impeached Richard Lyons for procuring patents and licenses, &c. &c. and also "*in general words*" of many extortions. In the same book, page 1597, it is said that "all the Lords, spiritual and temporal, claimed as their liberty and franchise, that the great matters moved in the Parliament and to be moved in other Parliaments, in time to come, touching the Peers of the realm, ought to be admeasured, adjudged, and discussed, by the course of the Parliament, and not by the civil law, nor by the law of the land." In the 1st volume P. Williams, page 616, the subject is thus alluded to:—"And as to what was said that this being an attainder by Parliament, differed from an outlawry, and that the course of Parliament made it good; it was answered *that impeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament.*"

If we examine the precedents, we shall find them conformable to the doctrine. The articles of impeachment state certain facts generally, importing some offence or violation of law, without much regard to time, place or circumstance; but with sufficient certainty to give the accused, distinct information of what he is charged. The precise species of crime or offence is not usually, if ever stated according to common law definition; but he is charged with the breach of some law provided for the case, with a breach of trust, with a violation of his oath of office, with acting contrary to his duty, &c. &c. &c. Such are the articles in the case of Lord Macclesfield, Warren Hastings, Lord Melville and Judge Chase. The answer, like the articles, is very general, consisting of a great variety of statements of facts, and reasonings upon the law; explaining some things, qualifying some things, and denying some things; in fine making the best defence the case will allow, both on the law and the facts. Then follows the replication, denying generally the sufficiency of the answer and averring the truth of the charges. Such also has been our own practice in the few cases of impeachment, which have occurred since the adoption of the constitution, as it appears from the records of the court.

The constitution declares, that the party convicted on an impeachment, shall nevertheless be liable to indictment trial, judgment and punishment, according to the laws of the land. This provision seems to carry with it, a clear distinction, between a trial at common law, and a trial by impeachment.

The pleadings being closed, the trial proceeds, and we find no notice of demurrers, either general or special to their sufficiency. After a conviction, motions in arrest of judgment or in mitigation of the sentence of the court are sometimes sustained. In the case of Lord Winton, one of the Scotch rebel Lords, there was a motion in arrest of judgment, for want of certainty as to the time the acts were alleged to have been committed; but this was overruled.

I might safely leave this part of the case with the Court, on the slight examination which has been made of the law and practise of impeachment in England and in this country; but the learned counsel for the Respondent have expended so much labour on this subject that I am willing to go a little further, and endeavour to ascertain if some additional aid cannot be derived from the common law. There are two modes of proceeding at common law where the sovereign prosecutes, which bear some analogy to the process of impeachment: one is an information in the nature of a *quo warranto*, and the other is an information for an intrusion.

Formerly there was in use in England a writ of *quo warranto* for the King, in the nature of a writ of right. This being found inconvenient, it has been succeeded, in later times by an information, filed by the Attorney-General, in the nature of a *quo warranto*. The form of the writ is given in Coke 2 Ins 279, and is very brief: A. B. is summoned, &c. *ostensurus*, to show, *quo warranto*, by what authority, &c. &c. The information is in the same brief form, and

is properly a criminal method of prosecution, though civil rights are often tried under it. We have the same process. The Attorney or Solicitor-General sometimes *ex officio*, and sometimes by direction of the Legislature, files an information in the nature of a *quo warranto*, against a corporation, or against an individual, alleging in the case of an individual, some usurpation, and in the case of a corporation, some abuse of their franchise. In the case of the Commonwealth vs. Samuel Fowler, Esq. he was called upon to show by *what warrant*, he claimed to have, use, exercise and enjoy the office of judge of probate for the county of Hampden. In all these cases, after a short and general statement of the facts, the party is called upon to set out specially his righ or title. In informations for intrusion by the King, the form of which is given in Rastell's Entries 412, the defendant must set out his title specially ; but if the information is at the instance of an individual, the defendant may plead generally *non intrusit* ; but if he pleaded not guilty, to an information by the King, he should be put out of possession immediately. This right to make allegations in a general form, and to put the party to set out his right or title specially is an incident of sovereignty—one of its prerogatives.

The object of an impeachment, by our constitution is to remove the officer—to seize the franchise, and to grant it to another, if it appears upon trial that he has forfeited it. The allegations are made in the name and behalf of the whole people ; it is the sovereign who prosecutes ; and it is an incident of this sovereignty to make these in general words, plainly, intelligibly and substantively, I agree, but not with the technical accuracy which pertains to the courts of common law jurisdiction.

I will now proceed to submit a few remarks to the consideration of this Hon. Court upon the duties of a judge of probate. His general powers and duties are defined by law, such as taking the probate of wills, granting administrations on the estates of persons deceased,—appointing guardians to minors and other persons—examining and allowing the accounts of executors, administrators and guardians, &c. &c. but there is no express law as to his duty in relation to those numerous little details in the ordinary business of his office.

There are duties of a general nature arising from his acceptance of the office. The acceptance itself implies an engagement, to fulfil all its duties faithfully and impartially. It is in the nature of a covenant, or contract, that he will execute the trust which the office creates, that he will perform all the duties, which its nature and object requires. If he refuse to perform these duties, or if he performs them so negligently, as to produce inconvenience or injury, he violates his obligation.

There are also certain duties arising from the relation which exists between a judge of probate and executors, administrators and guardians These persons are clothed with a certain legal capacity, by virtue of a decree made by the judge. They all derive their authority from him ; and in the first instance, they are all accountable to him for the manner in which they have exercised it. There may be some difficulty in determining what his duty is in a particular case ; but there are certain broad lines of distinction between which it will be admitted his duty somewhere lies. He has a right to prescribe certain official forms and to require certain formal papers, which may conduce to the orderly management of his official business ; and I hold it to be his duty as a judge to give such information, such official direction and advice, as will enable persons making application to him, to comply with the forms and modes of proceeding which he himself has prescribed. These subsidiary acts, these official directions, are a part of his duty as a judge, and if he refuse to give them he violates the trust and confidence reposed in him. The persons who apply to him to take the probate of a will, to take letters of administration, or guardianship, need such instruction and advice ; and they usually come to him under circumstances of bereavement and affliction. If he refuses to give them the necessary information, as to the forms which he has adopted for the regulation of his own office, unless they pay him as a counsellor, he takes an improper advantage of their situation, and makes an unlawful gain, contrary to his duty as a judge. On the other hand, it is not contended that a judge of probate is bound to write out the accounts of executors, administrators, and guardians, or to answer questions of law which require time and examination. But it does appear to me, that those questions, arising in the settlement of an account or an estate, which can be answered across the table, those little auxiliary services which grow out of the subsisting relation of the parties, may fairly be considered within the duty of the judge.

Whatever may be the nature and extent of these duties, whether the outlines of them, which I have sketched be correct or not ; it is to be remarked that in addition to all other obligations, there is superadded the oath of office. This is prescribed by the constitution. I A. B. do solemnly swear and affirm that I will *faithfully* and *impartially* discharge and perform all the duties incumbent on me as [Judge of Probate] according to the best of my abilities and understanding, agreeably to the rules and regulations

of the constitution and the laws of this Commonwealth. So help me God." Here is a law binding upon the conscience, as well as the conduct of the judge; here is an obligation imposed under the solemn sanction of an oath. The doing any act, or permitting others to do it, which affects his fidelity or impartiality, is a breach of a most sacred law, a violation of his oath, and contrary to his duty as judge.

At a quarter past 6 o'clock, Mr. Dutton gave way to a motion for an adjournment. The Court was adjourned to 9 o'clock to-morrow morning.

SENATE.

THURSDAY, APRIL 26.

COURT OF IMPEACHMENT.

The usual messages between the two Houses were delivered by Mr. Rantoul, of the Senate, and Mr. Holmes of the House of Representatives, and the Court was opened at a few minutes after 9 o'clock.

Mr. WEBSTER. Before any further proceeding on the part of the Hon. Managers, I beg leave to state to the Hon. Court, that after 10 o'clock last night a document came accidentally to the knowledge of the Respondent, showing the ancient usage of the county of Middlesex. With permission of the Hon. Court, I would now introduce it in evidence. It relates to the probate of a will, upon which a letter of administration was granted by the Respondent's predecessor, at a special probate court holden at the request of the executor, for which extra fees were charged, which were paid by the executor, and afterwards allowed by the judge in the executor's account. I presume there will be no objection on the part of the Hon. Managers to the admission of the evidence, as they have not yet closed their argument.

Mr. DUTTON. Under the circumstances of the case, we feel hardly authorized to consent to the admission of it.

Mr. WEBSTER. There could be no question of its admissibility, if it had been offered in season. The executor is present, and can be called, if the Hon. Managers wish it. They will have an opportunity of remarking on the evidence, if they think proper.

PRESIDENT. Shall the question be taken, as to admitting this evidence? Do the Hon. Managers still object?

Mr. DUTTON. We do not think the evidence material enough to persist in the objection, though we consider it irregular to introduce it at this late period. As the gentleman is strenuous for its admission, we consent to it.

Mr. WEBSTER produces a letter of administration, dated Jan. 18th, 1803, addressed to Abraham Biglow, executor of John Foxcroft. Mr. W. read a memorandum on the back of it, stating the whole fees for probate of the will to be - - $3 97
Paid before - - - 50

3 47
Letter of guardianship - - 1 10
For the judge for his trouble in holding a special court - 25 00

$29 57

Mr. DUTTON. The executor, if present, had better be called to the stand.

ABRAHAM BIGLOW called on the part of the Respondent, and sworn.

Witness. In 1802, I was made executor of the will of John Foxcroft. There was nobody in his house, except servants, and the heirs were desirous of having the property protected. The next regular probate court was distant; knowing the practice of holding special courts, I told the heirs I would apply to the judge of probate to hold one. In a memorandum book, I have a charge of postage Dec. 29, 1802, of a letter to Mr. Timothy Bigelow, requesting him to apply for a special probate court; and on Dec. 31, there is a charge of postage for a letter from Mr. Bigelow, enclosing the judge's order to the register. Jan. 13, 1803, there is a charge "paid probate fees on proving the will, $29,57." This is marked on the letter of administration. I closed my account in 1813, when I got my *quietus;* being executor and guardian of one of the heirs, I was unable to close it sooner. There was a balance by the quietus of $19,62; the amount of $29, 57 was taken into consideration in arriving at this balance.

Q. by a member of the Court. Where was this special court holden?

A. At Cambridge.

Mr. GRAY. Where did the judge of probate reside?

A. At Groton.

Q. Where did the register live?

A. At Cambridge. Judge Winthrop was register at that time.

Q. Was the register present?

A. He was.

Mr. KING. What was the order you mentioned?

A. The letter from Mr. Bigelow enclosed an order to the register to grant citations to attend the court at Cambridge, mentioning the time and place.

At 20 minutes past 9, Mr. DUTTON proceeded:—

I now proceed to call the attention of this Hon. Court, to certain statutory provisions which have a bearing upon the case. As early as the year one thousand seven hundred and twenty seven, an act was passed, which, after reciting that several judges

of probate were or might be Justices of the Superior Court of Judicature or of the inferior Court of Common Pleas, enacts that from and after the publication of the act, "no judge for the probate of wills and granting administration on intestate estates within the province, shall be allowed or admitted to have a voice in judging or determining, nor shall be admitted to plead or act as an attorney in any civil action whatsoever, which may depend on or have relation to any sentence or decree, made or passed by him in his office aforesaid; any law, custom, or usage to the contrary notwithstanding." From this time to the revolution, judges of probate were considered as surrogates of the governor and council, who derived from the royal charter the authority to prove wills and grant administrations; and no alteration of the law took place till the statute of the 12th March 1784 which vested in the Supreme Judicial Court the appellate jurisdiction which had before belonged to the governor and council. 2 Mass. T. R. 120. By the statute, which passed on the 10th of March 1784 empowering judges of probate to appoint guardians to minors and others, the provisions of the province law are re-enacted in the same words; and thus the law remained till the of statute 24th Feb. 1818 was passed. By the 4th section of this statute, it is provided that "no judge of probate shall be allowed or admitted to have a voice in judging or determining nor be permitted to be of counsel, or to act as an attorney, either in or out of Court, in any civil action, or other matter or process whatsoever, which may depend on or have relation, in any way, to any sentence or decree, made or passed by him in his office aforesaid. Nor shall he be of counsel or attorney, in any civil action, for or against any executor, administrator, or guardian, as such, within the county in which said judge shall reside." Now the design of these statutory provisions was to impose certain restraints and prohibitions upon judges of probate; to remedy some inconvenience or mischief which their practice had given rise to. It may also be remarked that the law in this case is made to regulate the conduct of judges of probate, of a small number of men, who are commonly lawyers, and apt to be, in such cases, astute in the construction of statutes. If judges of probate, therefore, put a construction upon these provisions of the law, by which they do, or can evade any of the restraints and prohibitions, which it may be fairly supposed, it was intended to impose, I hold it to be right and proper to bring them within the law, whenever a strict construction will do it. If they attempt to escape by any nice or subtle distinctions, it is fitting and just to use the same means against them.

Before the law of 1818 the prohibition was, that they should not plead, or act as an attorney in any *civil action* whatsoever, which depended on or had any relation to any sentence or decree made or passed by them as judges. What then is the meaning of the word *action*? The definition of the civil law is this, *actio nihil aliud est quam jus persequendi in judicio quod sibi debetur.* Cooper's Justinian, Lib. 4. Tit. 6. Lord Coke in the first Institute, page 285, adopts this definition of the term *action*, and adds that by "the release of all actions, causes of action are released." The strict meaning of the word action, then, is the right, which a man has, to recover by law what is due to him. Thus we say, in common parlance, that a man has an action, that an action has accrued, on a breach of contract, &c. &c. It is not therefore necessary that an action should be pending in some court to bring the case within the statute; but any counsel or advice given to an executor or administrator touching a right of action, which he may have against any one, arising on a note, bond or other matter, may be considered as within the statute. But this right of action must have some relation to some sentence or decree made or passed by the judge. An executor or administrator is made such by a decree; he is clothed with a certain legal capacity by virtue of a sentence or decree made by the judge; and any counsel, or advice given to an administrator, has *some relation* to such decree.

In the present case the Respondent maintains his right, before the late law, to give advice and professional assistance to executors and administrators, as freely as to other persons, except in matters of controversy coming before him as judge. "If an administrator wished to sue a note, or a bond, or to defend a suit on a note or bond" he contends, that he had a right to act in such case as an attorney or counsel. Whether the construction, which the Respondent has put upon the law, can under all circumstances justify his practice, or whether the practice of others is an excuse for him, must be determined by this Hon. Court. I have no wish to press this, or any other point, against the Respondent beyond its proper bearing.

If, however, this practice should be considered as a violation of law, it cannot be excused, on the ground that his construction was merely an error of judgment. There are doubtless many cases, where error of judgment is excusable. God forbid that I should deny this. I am aware of the imperfection of human nature, of the fallibility of human judgment. I know that many great and wise and good men have erred in their judgment of the law, in deciding controversies between adverse parties, and hard indeed would be their lot, if such errors

could bring in question their purity or uprightness. But when a judge undertakes to construe a law, which was made for the regulation of his own conduct, which imposes upon him certain restraints and disabilities, the case is widely different. If the construction, which he puts upon the law, is a profitable one to himself; if he puts money in his pocket; if the adverse parties are, the the law on one side and his own interest on the other; if the controversy is between the statute and himself, he must decide at his peril. I do not say that every such decision carries with it evidence of a corrupt intent, of a wilful perversion of the law, for the purposes of unlawful gain. This ought not to be inferred from a single instance. If a judge is charged with taking illegal fees of office and he pleads in excuse the practice of his predecessor, or the uncertainty or silence of the law on the subject, to rebut the presumption of criminality, he is entitled on every principle of equity and justice to have such facts and circumstances considered, before a judgment is formed. But then the inquiry ought to be a strict one. If he urge a usage in his office, it ought to be ascertained whether he himself has not exceeded or departed from such usage; if he show that certain abuses existed in the office when he came into it, he ought also to show, that he has not multiplied or aggravated them. To justify one abuse or illegal practice, by showing that another existed in the same office, different in its nature or degree, cannot and ought not to be admitted.

As to those formal papers which issue from the probate office, for which the law has provided no compensation, I readily admit with my learned associates that a reasonable compensation ought to be allowed, if it appears that the papers themselves are proper and necessary to the orderly and safe management of the office. Papers of this description ought not to be multiplied unnecessarily, and whether they are so or not must be determined by the importance of the end, and the fitness of the means which are employed to accomplish it.

But what is a reasonable compensation? By what rule is the price of such papers to be regulated? The learned counsel for the Respondent contend, that it stands on the ground of a *quantum meruit;* that it must be determined by the nature and amount of the service rendered, or labour performed, without reference to what the law has provided, as compensation, for like services.—I am not prepared to admit this principle, without some qualification. I hold that the price in such cases is to be regulated by a reference to the prices fixed by law for papers of a similar nature. The amount of all services and labours ought to be governed by the rule of analogy and proportion. If for example, the law allows one dollar to the judge for granting a guardianship to a minor, the same sum, supposing the papers to be the same, ought to be allowed for granting guardianship to a person *non compos mentis*, for which no compensation is fixed by law. A judge is not at liberty to take three or four dollars for this service on the ground of a *quantum meruit*, because the law has left it without any compensation whatever. In a similar case the law has fixed the price, and this binds *his* discretion, although it might not that of another man. If an application is made to a professional man, to prepare any of these formal papers, his compensation, perhaps, stands on the ground of a *quantum meruit;* he may charge the same sum he would be entitled to for the same labour and service in any other case; but a judge of probate is bound to regulate his fees by the rule of proportion, by a reference to the compensation which the law has provided for like services. The law allows to the judge twenty cents for the letter of administration, and I know not on what ground he is authorised to charge a dollar for a copy. It does appear to me that this is a plain case. If it becomes necessary to make a copy of the letter of administration, the price of the original is the price of the copy; and if he demand and receive five times as much, it is an abuse of the trust reposed in him, it is contrary to his duty as a judge, it is taking money extorsively.

With regard to the legality of special probate courts, as they were holden by the Respondent, I shall say nothing;—that part of the case having been so fully considered by my learned associate. The increased expense of these courts, however, and the reasons upon which it is defended, deserve some further notice. It is said, that these courts are more expensive to the judge, but in what way, is not stated. They are usually holden at his own office in Groton. The expense of travel to Cambridge or Framingham is saved; and as all the probate business of the county must be done at some place, that portion of it which is transacted at his own office, redeems so much of his time, at the courts in other places, where he must always be at some expense. Supposing then, that the three dollars and sixty cents, which according to his own usage is commonly taken for what is called a set of administration papers, at a regular probate court is rightfully taken, how can the taking of from two to three dollars more, for the same papers, at a special court, be justified? The only answer to this, besides the one already noticed, is that he is obliged to take copies, to enable the register to make up his record. Now it turns out upon examination, that the only paper he is obliged to

copy is the letter of administration. The petition, decree, bond, warrant of appraisement and order of notice either remain in, or return to the office. The letter of administration, which is in the possession of the party, must be copied. Now the law allows twenty cents for this—and it remains with the Respondent to show by what right, or law, or usage, he demands and receives two or three dollars for the copy.

But in answer to the charge of taking illegal fees of *office*, it is said by the learned counsel for the Respondent, that all beyond the legal fees is taken by him in his *ministerial* and not in his *judicial* capacity. We are told, that the moment the *official* act or service is completed, the functions of the *Judge* cease, and all that is done afterwards is merely *ministerial;* and as he is only charged with misconduct as judge, he cannot rightfully be punished for acts done by him in some other character. This *legal* distinction so *happily* brought in aid of the Respondent, by his learned counsel, has been pressed upon the attention of the Court with great apparent confidence. And here I might adopt their own style of argument, and appeal to them as *lawyers*, and ask them, if they were prepared to maintain, before a learned profession, such *notions*. Now I apprehend, that this refinement cannot avail the Respondent, however convenient it might be to him; and I do humbly submit to this Hon. Court, that James Prescott, in his *judicial* capacity, shall answer for the conduct of James Prescott in his *ministerial* capacity.

But this is not the only instance of subtlety and nice distinction, which has been resorted to by the Respondent in justification of his conduct. Sometimes he divides his court. There is the *amicable* jurisdiction on one side, and the *contentious* on the other. The judge is always found, of course, on the *amicable* side, and the lawyers on the *contentious*, where it is admitted lawyers ought to be. Nothing but tranquillity and harmony on one side, and nothing but strife and contention on the other.

Besides dividing the business of his office into judicial and ministerial, he divides himself into two legal entities, judge and lawyer. If he is charged, as in the second article, with taking illegal fees of office, to wit, the sum of thirty two dollars and ten cents; his answer is that the "official fees" for the papers in this case amount to nineteen dollars and eighty cents, besides the additional expense of a special court; and the balance was received by him for professional advice; and that the "charge cannot be made good by contending, that although he did not officially receive any excess of fees, yet that he did receive, in another capacity, money, which he had no right to receive." Now it does not appear, by the evidence, that the Respondent gave notice, at the time, that a part of the services rendered were of a professional character, and that he expected to be paid as counsel or attorney; it does not appear that Parker gave notice, that he wished to consult him otherwise than as a judge, or that any bill was made out, though asked for, distinguishing the fees of office from those of counsel; but on the contrary that the whole sum was paid at the same time, without any discrimination of fees. The distinction, therefore, set up in this case, by way of defence, seems to be an after thought, resorted to merely to meet the occasion.

As another instance of the Respondent's ingenuity in making out his defence, I refer to the eighth article. He is there charged with giving advice and assistance to one Josiah Crosby, who, as it appears from the papers, was an administrator; but inasmuch as this case, which happened in November, 1818, is within the last statute, the Respondent in his answer "thinks he recollects that the said Crosby had some individual personal interest connected with the estate of which he happened to be administrator; that in relation to that interest he was asked for, and gave professional advice, as well he might do." Now to give counsel or advice to an administrator, as such, is prohibited by the statute of 1818, but to give counsel to a man, not in his capacity of administrator, is not; and therefore it is that the above distinction is taken. It appears however, that the charge for this advice is in the hand writing of the Judge, and is added to the account of Josiah Crosby, *as administrator*. If the fact alleged by the Respondent is true, I would ask by what right or authority the estate was charged. One of two things is true, either the counsel was given to Crosby as administrator, which is prohibited by the statute, or the estate was wrongfully charged by the Judge, for advice given to him in his individual capacity.

In several articles he is charged with acting as attorney or counsel in matters, or controversies, which were or might be pending before him as Judge. I shall not examine all those articles separately, but submit some remarks upon them, as a class, to the consideration of the court. It appears that in nearly all the cases where he acted as attorney or counsel, for executors, administrators and guardians, the charge made by him for such services, came before him for allowance in their respective accounts. In every instance, therefore, of this sort, he was called upon to judge of the reasonableness of his own charges. Now let it be remarked, that an administrator is merely a trustee for others; he is acting in *auter droit*, and has usually no personal interest in the

estate beyond his own compensation. It becomes then the duty of the judge to see in what manner the authority derived from him has been exercised; to look to the interest of the orphan and widow; to be satisfied that no little depredations have been committed upon the estate; that no needless or improper charges have been made, or if they have, to take care that they are not allowed. The judge, from his relation to the parties, is the especial guardian of the rights and interests of those who are absent; it is his duty to hold the administrator or executor, or guardian, to a strict account, and allow nothing beyond what is just and reasonable. Their accounts against an estate are to be examined; there are adverse parties in interest, although they may not be present; the propriety and reasonableness of each charge is to be determined, and the voucher for it, to be produced. If in such an account there appears a charge of fifty or an hundred dollars for professional services; the judge in any other case than his own, would naturally inquire into it, in order to satisfy his own mind, that the charge was necessarily or properly incurred, and that the amount was reasonable. But if the money has been paid to himself, what is the value of his judgment to the absent widow and her children, who by the law of the land, and by his oath of office, have a right to his *impartial* determination of every question which affects their interest.

If a judge of probate advises, as counsel, an administrator or executor, to bring a suit upon a note, contract or bond, or to defend a suit brought against him upon any of these, all that is done in pursuance of such advice, all the money that is expended in maintaining or defending such suit, is ratified and allowed as a matter of course by the judge. He can never say to an executor or administrator; Sir, this was an ill judged and needless expence, and the estate ought not to be burthened with it; his opinion has been taken and paid for, and his mouth is forever closed.

Another serious objection to this practice is, that it is a perpetual temptation to do wrong; it opens a door to fraud and collusion, between the judge and the executor or administrator. There is a certain amount charged in the account, for monies paid the judge, as attorney or counsel, and there is also a certain amount claimed by the executor or administrator, as a commission upon the settlement of the estate; and the judge is to pass upon the whole account. It is easy to perceive, in such a state of things, that improper charges on both sides may be made and allowed, and that frauds may be committed without the knowledge of those who suffer by them. I do not say that a judge of probate shall not be allowed to draw a deed or power of attorney, for which the compensation is fixed by usage; the evils here pointed out do not arise from such a practice.

As an illustration of the argument, I take the last article. It appears from this, that he advised with, and directed the executrix of one Jonas Adams, of Lincoln, in relation to her liability as executrix for the support of a person who was supposed to be chargeable upon the estate. For this counsel and advice, he was paid fifteen dollars. From the papers in this case, it appears, that one John Adams, the father of the testator, had a female slave, and that by his will, he had charged her maintenance upon his estate. His son, the testator, continued to maintain this slave during his life, according to the provision of his father's will; but made no express provision in his own will for her future support. The question, therefore was, whether this slave was still chargeable upon the estate which had descended from John Adams, or was chargeable upon the town of Lincoln, as a pauper. Upon this, the executrix, as it appears, was instructed that she was not liable; the Selectmen of the town of Lincoln however had a different impression, and presented a petition to the judge, for a letter of administration *de bonis non*, upon the estate of John Adams, in order that this question might be determined by some other tribunal. The question then upon which he had given his opinion as counsel, came before him as judge between adverse parties, and he held the same opinion as judge which he had before given as counsel. The petition was dismissed; there was an appeal taken, to the Supreme Court; where the decree was reversed, and an order issued to the judge to grant the administration prayed for.

Here we see a practical illustration of this mischief arising from the habit of giving counsel or advice to an executor or administrator, in matters or controversies, which *may* come before him as a judge. It is enough that the case may come before him judicially, and he can never know that it will not; and when it does can it be said that he is in a situation to act *impartially* between the parties? No his opinion has been bought and paid for; is the property of one of the parties; he has voluntarily disabled himself from acting with fidelity and impartiality; he has knowingly done, or permitted another to do an act, which has destroyed the just balance of his mind, and he cannot in any proper sense be a judge. In all such cases he acts contrary to his duty as a judge, in violation of his oath and of the great trust and confidence reposed in him.

In the third article, there is a charge of a corrupt taking of certain sums of money, of

one Benjamin Dix, Esq. administrator of one Eri Rogers, as and for fees of office. In this case, a bill of particulars was made out by the judge, amounting in the whole to $44,57. Of this sum $3 is charged for extra writing, and the rest is for official services. For some of these papers and services the law has provided the compensation, for others not; and as to the last he claims the benefit of usage, or a reasonable compensation for labour and service. But on none of these grounds can these charges be justified. There is an excess of six or seven dollars in this single bill, beyond his own usage in like cases: there is then a violation of his own law. If it is right, as he contends, to fix a compensation where the law has provided none, it is also right that he should abide by his own law. The taking greater sums as fees of office than the law, his own usage, or analogy to like cases can justify, as he has done in not less than five instances in this bill, is in the nature of extortion. It is taking money *colore officii*, unless it can be maintained, that there is no limit, as to the amount of fees which a judge of probate may lawfully demand and receive, but his own arbitrary discretion or good pleasure. This therefore is a plain, well proved case of misconduct and maladministration in office.

[Mr. Dutton here went into a minute examination of the evidence and the law, upon the first, sixth, and eleventh articles, and then proceeded to the twelfth.]

I now come to the twelfth article, "the little green spot" as my learned friend called it, where impeachment flourishes; the "little Oasis" amidst the desert which surrounds our cause. Sir I approach it with no pleasure; for if the only green spots are those where impeachment grows, let my habitation be in the desert. But if indeed this be so, let it be also remembered, that it was the Respondent who planted and watered and cherished this deadly plant, and he alone must reap the bitter fruit.

Much surmise, ingenious speculation and subtilty have been brought to bear upon this article; and many objections have been urged against some portion of the evidence upon which it rests. It is a difficult case to deal with, if there is any truth in the saying, that "facts are stubborn things."

In the examination of this article a very laboured attempt has been made to discredit the testimony of *Ware*. Before I proceed to consider the different objections which have been urged agaist his testimony, I would make one general remark. If it had been possible to impeach the veracity of Ware, would it not have been done? If one man in the county of Middlesex could have been found, who would have said, upon the stand, that the general reputation of *Ware* for veracity was bad, or even questionable, would he not have been produced? Two months have elapsed since the publication of this article; with a perfect knowledge, that *Ware* was the only witness who had been examined by the committee of the House. The article, as framed, was reported upon the strength of his evidence, in connection with the papers belonging to the case; and yet no direct attempt is made to impeach his credit as a man of truth. The following objections have been made to the credit of *Ware*:—

1. The transactions charged in the article took place five years ago;—
2. He has had a misunderstanding or quarrel with the Respondent;—
3. He is a *particeps criminis*;—
4. He is contradicted by *Grout*;—
5. The offence is so infamous as to be incredible.

As to the first, I would remark that it forms no solid objection to the credit of a witness, that he does not forthwith become a public prosecutor. I appeal to the knowledge and experience of every member of this Hon. Court, if it is not often true, that violations of law in matters of small amount, petty depredations upon property, and little acts of injustice, are endured for a long time; till at length there is a spontaneous movement, to bring the offender to trial and punishment.

As to the second, it does appear from the testimony of M'Intosh, that *Ware* and the Respondent had for some time been on bad terms; that the Respondent had sued him, that he was angry, and said he would, or could, have the Repondent indicted; but Ware had never been heard to make use of any language importing revenge. I agree, that he does not like the Respondent, and I presume he is not the only man in the county who has the same sentiment. Yet this does not, in my humble judgment, bring into doubt the veracity of *Ware*.

As to the third;—if Ware and the Respondent had colluded together to defraud the estate of the ward, and had divided the money between them, there might have been some color for this objection. But the money was demanded by the judge, and the payment objected to by *Ware*, on the ground that nothing was due; and it was not till the Respondent proposed to do a certain judicial act, that he yielded.

As to the fourth; I apprehend it will appear on a little examination, that there is no contradiction between the testimony of *Grout* and *Ware*. The first object of the Court will be, to see whether the story of these two witnesses cannot be reconciled. According to *Ware's* evidence, he and Grout were conversing about the ward's estate, within hearing of the judge, who interrupted the

conversation and proffered his advice; upon which *Grout turned to the judge*, and began to state the case. Grout's testimony upon this point is in these words: "After Ware and myself had conversed some time, being not more than six feet from the judge, *I turned to the judge*, as he was sitting at the table, and supposing we were conversing on a subject, in which it was the duty of the judge of probate to direct, I began to state to him the circumstances relative to said notes," &c. The only difference is, that Grout does not state the previous interference of the judge; but on the supposition that he did thus interfere, every circumstance related by Grout naturally falls in with it, and there is not the smallest variance between them. Grout says, that *he turned* to the judge and *began to state* the circumstances, and *Ware says* the same thing. Ware relates a previous circumstance, of which Grout takes no notice; and that is the whole amount of the contradiction. The fact itself is of no importance; it was an act of indelicacy, merely, which few men would be likely to commit.

Now let it be remarked, that the testimony of Ware, in every other particular, is fully confirmed by the original papers, and by the testimony of Grout. I do maintain then, that his evidence remains unimpeached, and unimpeachable.

As to the last objection, I have only to say, that however shameful or infamous the charge may be, it is, like any other fact or transaction, susceptible of proof. The only question is, whether it is proved; for it will not I suppose be denied, that men do sometimes commit infamous acts, and that they are convicted upon evidence, and punished.

Now, if the testimony of Ware is wholly laid out of the case, all the material facts alleged in this article are proved by the papers and by Grout's evidence. What then do these facts as charged and proved import? What species of legal offence do they constitute? I answer, in the first place, that they amount to corrrupt and criminal conduct in the judge; a manifest and gross instance of misconduct in office. And this I hold to be a sufficient answer. This case is clearly within the provision of the constitution; unless it can be shown, that there is no misconduct or maladministration in office which is not technically bribery or extortion. This has not and cannot be made out. It is not only a clear case of misconduct in office, but it is set forth *substantially* and *formally*: unless it can be shown, which it cannot be, that an article of impeachment must be framed with as much technical precision as an indictment at common law. I have already attempted to show, that there is a substantial difference between the course of proceeding in common law courts and courts of impeachment; and I am not disposed to surrender any part of the law or practice of impeachment. It is enough if the Court are satisfied that these are adhered to, in the present case, without suffering themselves to be embarrassed with the "unseemly niceties" of the common law courts.

But in examining the nature and character of the misconduct charged in this article, it does appear, in the first place,—to partake of the nature of, if it is not, mere extortion. Although it is true, that the service for which the five dollars was demanded was not strictly judicial, still it is evident, that both Ware and Grout considered it as pertaining to his duty as judge, and it was solely on that ground that they resisted the payment. Whatever distinction he chose to make between professional and official fees, they denied his right to do so, insisting that he had done nothing more than his duty as judge. As a means of extorting this money from Ware he proposed to do a judicial act, under circumstances importing a desire of concealment and implying a consciousness that it was wrong. The money was paid to him under an impression, that it was not due to him as a professional man, and that it was more than he was entitled to receive as judge. In the second place, it was a *falsification* of an important paper. The account had been examined and approved by the overseers, who had an interest in the ward's estate, and been sworn to by the guardian. The certificate of the judge, that it had been so approved and sworn to, had been appended to the account, and nothing remained but to place it upon the record. After all this had been done, the five dollars was added by the judge, and the foot of the account, of course, altered. It then became *another* and a *different* account, and not the one which had been approved and sworn to. Yet the certificate of the judge still declared, that this account, thus *altered*, had been *approved* by the overseers and *sworn to* by the guardian.

I once more call the attention of the Court to the impeachment of Lord Macclesfield, which took place one hundred years ago. He was at that time lord chancellor, and it is hardly necessary for me to state, that it pertained to his office to appoint the six masters in chancery. Whenever one of these offices became vacant by death or resignation, the chancellor proceeded to fill it by a new appointment. These officers of the court having large sums of money in their custody belonging to the different wards of chancery, the place of a master in chancery was an object of desire and competition.—It appears from evidence in this case, that it had been the usage of former chancellors to

receive a present upon the admission of a master into his office. The charge in substance, against Lord Macclesfield was, that these offices concerned the administration of justice, that he corruptly, illegally, and extorsively bargained and sold them, for large sums of money; and it appeared in evidence, that through the agency of his secretary, he used means to enhance the amount of the gift or present which he was to receive upon the admission of a master; and that this was far beyond what his predecessors in office had ever taken; but it does not appear that any loss of the property in the custody of the masters was finally sustained, though one or two of them had failed; nor is there any evidence, which throws a shadow of suspicion upon the purity or uprightness of his judicial administration; yet for these acts, which were alleged to be "in breach and violation of his oath, as lord chancellor, and of the great trust reposed in him—contrary to the duty of his office, and against the good and wholesome laws and statutes of the realm," he was impeached, tried, convicted and punished, by the loss of all his offices, by a fine of thirty thousand pounds, and commitment to the tower.

It has been stated by one of the learned counsel for the Respondent, that he has been distinguished for the order, intelligence and legal ability, with which he has discharged the duties of his office. I believe this to be true, and it is the more to be regretted, that a man so capable of being useful in an important office, should ever have had his integrity brought into question. But neither his knowledge, nor talents, form any excuse for his misconduct in office.

If ever there was a man, who could plead great talents, or great benefits conferred on mankind, as an excuse for corruption in office, it was Lord Bacon: the great author of the reformation in learning—a reformation hardly less important in the affairs of the world than that in religion; the man who first gave an impulse and direction to the human mind, which it still feels, and to which much of the advancement of the present age in useful knowledge, and sound learning is to be attributed: yet this great man, though confessing and bitterly lamenting his misconduct, was fined forty thousand pounds, deprived of the great seal, and sent to the tower. He stands in the waste of time an object of wonder and pity,—forever marked as the "greatest, wisest, meanest of mankind."

And now, Mr. President, the Managers are prepared to commit this cause, which has oppressed them with an anxiety they never felt before, to the final determination of this Hon. Court, with the most entire confidence in its wisdom and impartiality. They confidently trust, that the principles, upon which they have supported this impeachment, are such as can, and ought to be, sustained at all times, and under all circumstances. If they have at all failed here, they must look to the better discernment of the Court to correct their errors. Of this they are sure, that they have been influenced by no unworthy prejudice or personal feeling towards the Respondent, in the discharge of a painful public duty.

Let then the invocation which he has made to the sentiment of universal justice be heard and answered; let the law, which is sovereign over all, have its just application to the facts which are proved, and we ask no more; let justice be laid to the line, and righteousness to the plummet, and let the Respondent who has demanded the test abide the result. By the reproach his example has brought upon the administration of justice; by the wrongs he has done to the widow and the orphan, whose little pittance of worldly estate his rapacity has made less; by the wrongs he has done to the whole community in diminishing their confidence and respect for judicial institutions, and in the name of the violated law and constitution of this Commonwealth, we pray the judgment of this Hon. Court against the Respondent.

Mr. *Dutton* finished his remarks at a few minutes past eleven.

Mr. WEBSTER.—Mr. President, I shall avail myself very briefly of the opportunity afforded me to correct the few important errors which I have remarked in the argument of the learned Managers.

In Lord Macclesfield's case, the Chancellor was convicted, not because he took a larger sum of money than was usual for the appointment of a master; but because, taking such sum, he appointed to the office a man of no responsibility, and required no sureties; in consequence of which misconduct, it was alleged that 40,000*l.* of suitors' money had been dissipated. I refer your honours to the 13th and 18th article of that impeachment.

It was said yesterday that Ware was not a prosecutor. I refer your honours to the deposition of Grout, by which it will appear that Ware was present at the examination, and your honours will judge for what purpose.

In relation to the sixth article—in point of law—I aver we stand entirely right. The learned gentlemen have now cited for the first time the statute of 1784 "for the more easy partition of lands, &c." and infer from it that all that was done for Mary Trowbridge, might have been done at the Supreme Judicial Court, or Court of Common Pleas. I read the law differently. It is a provision of Probate law, that, where an estate cannot be divided among the heirs with-

out injury, one shall take it and make reasonable allowance to the rest; and so afterwards by another provision, where it is unequally divided, the balance is to be made up.

Partition of lands among tenants in common, is indeed matter of original jurisdiction with the other courts; but there is no law in this commonwealth, authorizing the assignment of an intestate's estate to the oldest or other child, without application made, and leave obtained at the probate office. And we do not say, or allow that every thing was done in this case by agreement among the parties. Neither do we admit as gentlemen have asserted, that the Respondent in this instance acted as counsel after he was judge, in a case for his own judicial decision. There is nothing of the kind in evidence. True, the papers are in the Respondent's hand writing; and so are other formal papers (for these are mere formal papers) that issue from his office. He fills up the blanks.

There was a little misunderstanding of the ground assumed by one of my learned colleagues, where he was represented as saying, that the Respondent could be impeached only for bribery or extortion in office. The ground was, that the charges exhibited against him could be brought in under those heads only, if at all.

As to the allowance of the account, and the certificate of the Selectmen, in Ware's case, your Honours will perceive that the certificate was brought to the Judge only as a reason why that account should be allowed; and did not preclude him from allowing any other item, for which he saw reason. As to the item in question having been added after the account was sworn to, that depends solely on the credibility of Ware.

In regard to the sixth article again; Dr. Prescott's testimony was, expressly, that it was agreed by the parties to make the report of the commissioners final.

One word more and I have done. The learned gentleman yesterday stated, and considered it proved, that the customary charge of $3,60 for administration was made up without any reference to the fee-bill. In answer we again state, that not less than eight or ten papers are made out on that occasion; that of these only two are provided for in the fee-bill; and the register only said, that when he came into office he found that aggregate charge for the whole business, and that he never knew how the prices on the papers not provided for were averaged.

Mr. BLAKE. For my own sake, rather than that of my Hon. Client, I beg leave to make a single remark. It is with relation to a mistake of the Hon. Managers as to one ground of my argument. The position taken was, that for no extra-judicial act in the nature of bribery or extortion, could the Respondent be impeached of misconduct and maladministration in office.—But so far from asserting that he could be impeached only for bribery and extortion, I distinctly enumerated five different cases of misconduct which I considered impeachable:

Mr. DUTTON. I have also a single remark to make, in answer to the learned gentleman on the case of lord Macclesfield. It is true that he was charged in the articles alluded to with having occasioned a loss to certain wards in chancery, by appointing a master of no responsibility; but he was not convicted on that ground. On the contrary it appeared that no loss was eventually sustained; and the other articles were as I stated.

Mr. SHAW. In relation to the Trowbridge case, I beg to refer the Court once more to part of the 4th, and the whole of the 5th section, of the act concerning intestate estates. 1 *Mass. Laws, p.* 126. I take it the object of these provisions is only to preserve entire the family estate. The general provision for assigning a piece of land to one of the parties interested, with an allowance to the rest of a proportionate value, is in the 15th section of the same act, p. 130. The subsequent act in p. 145 empowers the Supreme Judicial Court, and Court of Common Pleas, to appoint commissioners to make partition of lands. I will now state what I take to be the difference established by adjudged cases in the operation of the two acts. Where there has been no alienation of the estate, the jurisdiction, by the first act, lies with the judge of probate. Where there has been, then the jurisdiction of the judge of probate is devested; and the parties, as tenants in common, *must* apply for partition to the other courts; but they *may* also in the former case. The several Courts of Common Pleas and the Supreme Judicial Court have jurisdiction over a whole class of cases, of which the judge of probate has jurisdiction over a part only.

Mr. WEBSTER. There was one other fact misrepresented. It was argued as if it did not appear that Mary Trowbridge had any other counsel than the Respondent after he was judge. It *does* appear by one of the papers in the case: which is in the handwriting of the Hon. Timothy Bigelow.

Mr. SHAW. It does not appear however on whose retainer Mr. Bigelow acted.

PRESIDENT. The case is now gone through. What course will your Honors take?

Mr. LYMAN moved, that the Court be adjourned, and the spectators directed to withdraw.

Mr. SULLIVAN thought, that a time

ought to be fixed when the opinion of the Court should be pronounced; and moved an adjournment to 9 o'clock to-morrow morning; and so from day to day, as often as should be necessary, until the judgment were finally agreed on.

Mr. LYMAN believed it was customary for the House of Representatives first to send a message to the Senate demanding judgment.

Mr. SULLIVAN said, that could not be till after verdict.

Mr. VARNUM said, that judgment could as well be rendered on that day as any other, and moved an adjournment to half past three in the afternoon.

Another member moved an adjournment to 10 o'clock, and another to 12 o'clock the next day.

The question was first taken, according to the rule of the House, on adjourning to the farthest time proposed; namely, 12 o'clock the next day; and decided in the negative. Ayes 10—Noes 13.

The question was then taken on adjournment to 10 o'clock the next morning, and decided in the affirmative. Ayes 13—Noes 9.

The Court was adjourned to 10 o'clock accordingly.

SENATE.

FRIDAY, APRIL 27.

COURT OF IMPEACHMENT.

After the usual messages between the two houses the Court was opened at 20 minutes before 11; the Senate having been previously sitting with closed doors.

The following resolve was read by the President, viz:—

Resolved, that in taking the judgment of the Senate upon the articles of impeachment, now pending against James Prescott, Esquire, the President of the Senate shall call on each member by his name, and upon each article propose the following question; —How say you, is the Respondent James Prescott, guilty, or not guilty, of misconduct and maladministration in office, as charged in the — article of impeachment? Whereupon, each member shall rise in his place, and answer *guilty*, or *not guilty*.

The Clerk was ordered to read the first article, which being read, the President took the opinion of the members of the Court respectively in the form before prescribed.

The other articles were then read in their order, and the question put upon each.

The opinion of each member, as well as the decision upon each article may be seen in the following

TABLE.

ARTICLE	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Mr. Bourne	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Thomas	g	ng	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Ruggles	g	g	g	g	g	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Clark	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Mosely	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Doolittle	ng	ng	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Rantoul	g	g	g	g	g	ng	g	ng	ng	ng	g	g	ng	ng	ng
Mr. Whittemore	g	g	g	g	g	ng	g	ng	ng	ng	g	g	ng	ng	g
Mr. Sullivan	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Eastman	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Bigelow	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Allen	g	g	g	g	g	g	g	g	ng	ng	g	g	ng	ng	g
Mr. Reynolds	g	g	g	g	g	g	g	ng	ng	ng	g	g	ng	ng	g
Mr. Tufts	g	g	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Dwight	ng	g	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Parker	g	g	g	g	g	ng	g	ng	ng	ng	ng	g	ng	ng	ng
Mr. Lyman	ng	g	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Williams															
Mr. Gardner	ng	g	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Hyde	g	g	g	g	g	g	g	g	ng	ng	g	g	ng	ng	g
Mr. Hunnewell	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Pickman	ng	ng	g	ng	ng	ng	ng	ng	ng	ng	ng	g	ng	ng	ng
Mr. Bartlett	g	g	g	ng	ng	ng	ng	g	ng	ng	ng	g	ng	ng	ng
Mr. Welles	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Brooks	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Varnum	g	g	g	ng	g	ng	g	g	ng	ng	g	g	ng	g	g
The President		ng													
Guilty,	11	13	16	7	8	8	7	4	0	0	6	19	0	1	5
Not Guilty,	14	13	9	18	17	22	18	21	25	25	19	6	25	24	20

Mr. Williams being called upon said, he thought himself incompetent to give an opinion by reason of his absence during a great part of the trial.

Messrs. Gray and Longley, who had been sworn at the preceding session, were absent during the trial, as well as at the taking of the final vote.

Mr. Myrick was present only at the latter part of the trial and having never been sworn, was not called upon for an opinion.

The President gave no opinion excepting on the second article, when the vote standing 13 *guilty*, and 12 *not guilty*, the President said it had become his duty to express an opinion and he pronounced the Respondent *not guilty* on this article.

Two hours and ten minutes were consumed in taking the opinions of the Court.

PRESIDENT. The Court have declared the Respondent *not guilty* of misconduct and maladministration in office, as charged against him in every article except in the third, and the twelfth ; and on those articles he is pronounced *guilty* by a majority of the members present and voting thereon.

Mr. KING. Mr. President ; the Managers acting for the House of Representatives and in behalf of the people of Massachusetts are not now instructed to demand judgment against the Respondent ; but will report the decision of the Court to the House of Representatives who have directed their Managers to state that upon receiving such report they will forthwith act thereon.

At one o'clock the Court was adjourned to half past three.

SENATE.

Mr. King came up soon after the adjournment of the Court with a message, and stated, that he was directed by the House of Representatives to inform the Hon. Senate, that the House had voted to demand judgment against the Respondent, and were prepared so to do, as soon as the Hon Senate should be ready to pronounce the same.

The Senate afterwards sat with closed doors.

AFTERNOON.

The Senate met and sat with closed doors. At 20 minutes past 4 the doors were opened. Mr. Thomas was charged with a message to the House to inform them that the Senate was ready to proceed further in the trial of James Prescott, Judge, &c. Mr. Leland came in with a message that the House would attend forthwith. The House then entered in their usual order and took their seats.

COURT OF IMPEACHMENT.

The Court being opened and the Respondent called, the House of Representatives rose and stood while their Managers, through Mr. KING the chairman, demanded judgment as follows :—

Mr. President, the House of Representatives having impeached James Prescott, judge of probate &c, for the county of Middlesex of misconduct and maladministration in his said office, and the said Prescott after a full, fair and impartial hearing on his trial at the Bar of this Hon. Court having been convicted of misconduct and maladministration in his said office, the House of Representatives now here present do in their own name and in the name of the people of the Commonwealth demand that this Hon. Court render such judgment in the premises, as to right and justice may appertain, and as the constitution and laws of this Commonwealth authorise and require.

PRESIDENT. The Hon. Managers have now moved that judgment be pronounced. Has the Respondent any motion to offer ?

Mr. WEBSTER. My Hon. Client had the misfortune this morning of learning from the President of this Hon. Court that on two of the articles he was pronounced guilty. He supposed of course that an opportunity would be afforded him to move in arrest of judgment, or to argue on the degree of punishment, which the Court might think proper to inflict. For this purpose he appeared at the door of this chamber at the hour to which the Court was adjourned, and found it closed against him. If, as he understands, the Senate has signified to the House of Representatives its readiness to pronounce sentence, he presumes that sentence is formed, and that it is now incompetent for him by any observations of his Counsel to attempt to change that sentence.

PRESIDENT (after a pause of some minutes.) Are your honours ready to pronounce sentence ? If no reason be offered why judgment should be arrested, or any motion made on behalf of the Respondent, or by some member of this Court, I must proceed to pronounce the sentence of the Court.

Mr. WEBSTER. The Respondent had intended by his counsel to say a few words, while he thought it would be of any avail. If he is to understand that the sentence is prepared, his counsel do not feel themselves bound to make any observations.

PRESIDENT. The Respondent and his counsel must understand that this Court is now prepared to render judgment, unless a motion is made in arrest ; which motion the Respondent is still at liberty to make.

Mr. WEBSTER. It was in relation, Sir, to that preparation, that the Respondent hoped to have been heard. If the Court is prepared to pronounce judgment, he considers the occasion as gone by, and he has no motion to submit.

Mr. PICKMAN. I do not understand that the members of the Court have pledg-

ed themselves to any particular conduct. I supposed, if the Respondent made no motion in arrest or in mitigation, that we were now ready to pronounce sentence. But the case is open to the Respondent, or to the Managers, to make any suggestions to the Court which shall appear to them to be proper, and the Court will take them into consideration. I however move that the Court declare itself ready to hear any suggestion from the Respondent.

The Court assented to the motion.

PRESIDENT. The course pursued by the Court was this. They agreed on the sentence to be pronounced unless some suggestion for a stay of judgment should be made by the Respondent or by the Managers. The Court is now open to receive any motion.

Mr. WEBSTER. The course which has been adopted is so extremely novel, and so different from the practice of courts to which I have been accustomed, that I cannot consider it my duty to my client, to speak against a judgment already formed. It might have been material to address some considerations to the Court before that judgment was formed. We do not now think it our duty to our honourable client, to trouble your honours with any observations.

PRESIDENT. Unless some of your honours propose some other course, it will be my duty to proceed to pronounce the judgment of this court.

Mr. SULLIVAN. I am not aware that the proceedings of this court have been in any degree novel. I do not however rise for the purpose of entering into an argument in defence of the court, but to make such an explanation that the Respondent may understand that any course is now open to him that ever was. A majority of the court at 1 o'clock declared the Respondent guilty on two of the articles of impeachment. No notice was then given of any intention on his part to make any motion in arrest of judgment, or in mitigation of sentence, and the Court could not know that he had any such intention. It became their duty to go on and deliberate on the judgment to be pronounced if nothing should be offered to change the course of proceeding. This they had done, and they had given notice to the Hon. House that they were ready to proceed in the trial. I have no notion that any member of the Court has formed a judgment not to be altered if any reason is offered for a change. The Respondent is now called upon. I conceive in the proper order, to say whether he has any reason to offer why sentence shall not be passed upon him. I have distinctly understood that he has now all the advantage that he could ever have had. If he has nothing to offer there is no reason why the court should not proceed to pronounce judgment. But it ought not to be understood that he has not had every opportunity which he ought to have to be heard and make his objections.

Mr. WEBSTER. The Respondent's counsel are only desirous of being informed of the course they are expected to pursue, and to see that it is such a course as they owe to their client and to themselves. Am I to understand that the subject is open for observations in favor of an arrest of judgment, and of a mitigation of the sentence? I presume from the information to the Hon. House that the Court are ready to proceed to pronounce judgment, that it is not so.

PRESIDENT. It may be proper to inform the counsel, that the Court gave notice to the Hon. House, not that they were ready to give judgment, but that they were ready to proceed further in the trial. They are now ready to hear any remarks of the counsel for the Respondent, to show that judgment should not be rendered against him.

Mr. WEBSTER. Am I to understand that the remarks of the counsel for the Respondent are to be confined to objections to the rendering of any judgment?

Several members. No Sir.

MR. PICKMAN. I understood it to be distinctly stated that the whole subject of the judgment would be open for observation, and if any remarks were made in behalf of the Respondent they would be taken into consideration. The judgment agreed on was to be pronounced, only in case the Respondent had nothing to say. This is the same course that is pursued in common law courts.

Mr. LYMAN. I consider the counsel for the Respondent as having waved their right to address the Court. I do not see any advantage in keeping the House of Representatives waiting here any longer. I move that the Court now proceed to pronounce judgment.

Mr. WEBSTER. The counsel for the Respondent have not waved any right. On the contrary they had intended if the Court had remained undecided, to be heard. But they do not intend to argue a question already decided.

Mr. SULLIVAN. It appears to me that the Court has intimated, as plainly as possible, that it has formed no decision which is not subject to be changed in consequence of what may be offered by the Respondent. I wish it to be understood, that there is no agreement that a particular sentence shall be pronounced, but in case no motion is made by him.

Mr. WEBSTER. I understood the President of this Court to say that observations might be made against the rendering of any judgment, but not in relation to a mitigation of sentence.

PRESIDENT. It is with great pain that I find myself called on to act on this occasion. It is well known from the vote that I have given what my own opinion is in relation to the case. But a question has been taken by this board, and they have decided on two of the articles against the Respondent. I have never known it to be the practice of any court, after having come to an opinon and declared it, unless there was immediate notice given of some motion to be made, to adopt any other course than to proceed to determine what judgment should be pronounced.

Mr. DWIGHT. I think the Respondent has had every reasonable indulgence. I move that the Court proceed to pronounce judgment.

Mr. WEBSTER. The Respondent's counsel thought it decorous to wait until they had an intimation that they should be heard. I can only say, that as far as my practice has extended, it has been usual to hear a motion in arrest of judgment, if any is made, before the judgment is determined on.

Mr. PICKMAN. I did think as I stated before, that the subject was open for the Respondent's counsel, to make any observations either to obtain an arrest of judgment, or a mitigation of the sentence. If I am mistaken I now move, that the Court hear any remarks, which the Respondent's counsel may now offer, and that they deliberate upon them before proceeding to pronounce sentence.

Mr. SULLIVAN. I would propose to the Hon. gentleman so to amend his motion, that the President shall ask the Respondent whether he has any thing to say why judgment should not be pronounced, or in relation to the degree of punishment to be awarded against him.

Mr. WELLES. I do not rise to any technical point, for these I do not wish to meddle with, but merely to observe, that I did not consider that any decision was made in relation to the sentence, but on the condition that nothing should be suggested on behalf of the Respondent, in mitigation of sentence or in arrest of judgment.

Mr. Pickman withdrew his motion, and Mr. DOOLITTLE offered the following in writing :—That the Court will now hear and consider any suggestion from the Respondent in mitigation of sentence, or in arrest of judgment.

The motion was agreed to.

PRESIDENT. The Court is now open to hear any motion from the Respondent, either in arrest of judgment or mitigation of sentence.

Mr. WEBSTER. If I am to understand the meaning of the order or resolution which has just passed to be, that the Court has not made up its judgment, and that the sentence is a subject yet to be deliberated upon, I have something which I wish to say to the Court. But I wish to know whether I am right in giving such a construction to the vote just passed.

PRESIDENT. The learned counsel has the order before him and can judge for himself. [The President reads the order.]

Mr. WEBSTER. I am not a member of the Hon. Court, and have no right to construe its orders. I wish to know distinctly from the head of the Court how I am to understand it.

PRESIDENT. This Court, following the precedents of the courts of common law, after having heard the Managers on the part of the House, and the Respondent in his defence, by a majority of votes pronounced the Respondent guilty; they have also agreed on the sentence to be pronounced by me as their organ, if no sufficient reason should be offered why the sentence should not be pronounced. But they have now voted, that they will hear any suggestions from the Respondent's counsel, either in arrest of judgment or in mitigation of the sentence. There can be no doubt, that if the counsel for the Respondent shall offer any reason for an arrest of judgment, or in favor of a milder sentence, that shall induce any member to change his opinion, that member will move the Court to proceed to deliberate further upon the sentence.

Mr. WEBSTER. If the opinion of the Court is already formed, and I am to understand that my client is put to the disadvantage of moving for a reconsideration of their opinion, I shall decline making any remark.

PRESIDENT (after a short pause) No motion in arrest of judgment being made by the Respondent, if no motion is made by any member of the Court, I shall proceed to pronounce the sentence of the Court.

After a pause the president pronounced judgment and sentence as follows, viz :—

The Court for the trial of impeachment having found James Prescott guilty of misconduct and maladministration in the office of Judge of Probate of wills and for granting letters of administration within and for the county of Middlesex, charged upon him in the third article and twelfth article of impeachment as charged against him by the House of Representatives—It is considered by the Court, that the said James Prescott be removed from the office of Judge as aforesaid, for the county aforesaid, and he is removed accordingly.

The Court, on motion of Mr. Lyman, was then adjourned without day.

HOUSE OF REPRESENTATIVES.

FRIDAY, APRIL 27.

After the House had attended on the Court of Impeachment, and returned to their own chamber, Mr. King, chairman of the Managers, to conduct the impeachment against James Prescott, reported, that the said Prescott had been convicted before the Hon. Senate on two of the said articles of impeachment.

It was thereupon *resolved*, that the House do demand judgment against James Prescott, Esquire, who has been convicted of misconduct and maladministration in his office as Judge of Probate, &c. for the county of Middlesex, by the Hon. the Senate of this Commonwealth, upon the impeachment thereof made by this House.

It was also *resolved*, that the committee appointed to manage said impeachment do forthwith proceed to the bar of the Hon. Senate, and there, in the name of this House and of the people of this Commonwealth, demand judgment against the said James Prescott, upon said conviction.

Mr. King was charged with a message to inform the Senate.

AFTERNOON.

The House having proceeded to the Senate chamber and returned to their own chamber, on motion of Mr. Hoyt, of Deerfield, it was

Resolved, that the thanks of this House be given to their Managers in the impeachment and trial of James Prescott, and that this House highly appreciate the intelligence, the learning, and the ability displayed by them in their arduous labours for the promotion of public justice.

IN SENATE.

SATURDAY, APRIL 28.

On motion of Mr. Williams ;—

Ordered, That a message be sent to His Excellency the Governor to inform him that James Prescott, Esq. has been convicted of misconduct and maladministration in his office of judge of probate of wills and for granting letters of administration within and for the County of Middlesex, upon articles of impeachment exhibited against him by the House of Representatives, and has thereupon by judgment of the Senate sitting as a court of impeachment, been removed from his said office ; a copy of which judgment will be certified to His Excellency by the clerk of the Senate in due time.

Mr. W. was charged with the message.

On motion of Mr. Williams :—

Ordered, That the clerk of the Senate be authorised and directed to purchase a sufficient number of copies of the Trial of James Prescott, Esq. Judge of Probate of wills, &c. in the county of Middlesex on articles of impeachment exhibited against him by the House of Representatives, to furnish each member of the Senate who has attended the present session of the General Court with one copy.

A resolve for paying witnesses and other persons for travel and attendance and services as witnesses, &c. came up from the House of Representatives and was concurred in by the Senate.

HOUSE OF REPRESENTATIVES.

SATURDAY, APRIL 28.

A resolve for paying witnesses and other persons for travel and attendance and services as witnesses, &c. in the trial of the impeachment against James Prescott, Esq. was twice read and passed ; and sent up for concurrence.

Ordered, that the clerk of this House be directed to procure and deliver to each member of this House a copy of the report of the trial of James Prescott, Esq, late Judge of Probate for the county of Middlesex provided any report thereof shall be speedily published which in the opinion of the speaker of this House shall appear to be faithful and correct and charged at a reasonable price, and that the Hon. Speaker of this House be requested to certify to the Clerk accordingly.

[The House met each day, forenoon and afternoon, at half an hour before the time to which the Court of Impeachment was adjourned—received the message from the Senate notifying their readiness to proceed in the trial—returned a message to inform the Senate that they would attend forthwith—attended at the bar of the Court during the trial—and returned to their own chamber.]

[*Omitted in the proper place*]

HOUSE OF REPRESENTATIVES.

FRIDAY, APRIL 18.

Ordered, that if during the trial of the impeachment now depending before the Hon. Senate, a quorum of the House should not be present at the hour to which that high Court shall be from time to time adjourned ; those members who are present shall be called to order, and may accompany the Managers to the bar of the Senate, to proceed on the trial of said impeachment.

The Speaker communicated to the House a letter from the Hon. Levi Lincoln, stating that it would not be in his power to attend during the session, and requesting that his place as Manager of the impeachment of James Prescott, Esq. might be supplied by some other person. It was thereupon ordered, that Mr. Lincoln be excused from further serving as Manager, and that this day at 1 o'clock be assigned for choosing a Manager in his place. At the time assigned, the

house proceeded to elect by ballot, and made choice of HORATIO G. NEWCOMB, Esq. of Winchendon. Mr. Phelps was instructed to inform the Senate of the choice.

Ordered, That the Clerk be directed to cause each member of the House to be furnished with a printed copy of the charges against James Prescott, Esq. Judge of Probate for the County of Middlesex—his answer to the same—and the replication of this House.

FRIDAY, APRIL 20.

Mr. Baylies, one of the Managers of the impeachment, not having attended in his place, the House proceeded to elect by ballot an additional Manager, and FRANCIS C. GRAY, Esq. of Boston, was chosen.

Mr. Sibley, was instructed to inform the Senate of the choice.

At page 7, immediately before the Articles, the following was omitted, viz:

Commonwealth of Massachusetts.

Articles of impeachment, preferred against James Prescott, Esq. Judge of the Probate of wills and for granting administration within and for the county of Middlesex, by the House of Representatives of the said Commonwealth, in their own name, and in the name of the people of Massachusetts; and [to be] exhibited to the Honorable, the Senate of said Commonwealth, this fifth day of February in the year of our Lord one thousand eight hundred and twenty one.

At page 10, immediately after the Articles, read as follows, viz:

House of Representatives, Feb, 5, 1821.

Read and accepted,

JOSIAH QUINCY, Speaker.

Attest,

BENJAMIN POLLARD Clerk.

At page 11, near the end, it should have been mentioned, that after the Articles had been read to the Respondent, and he had pleaded not guilty, an attested copy of them was handed to him by the clerk.

APPENDIX.

A SHORT account of the former impeachments in this Commonwealth, since the adoption of the constitution, collected from the journals of the Senate and House of Representatives, will not, we trust, be unacceptable to our readers, especially to such of them as shall hereafter be engaged in trials of this nature.

The first case which we find upon record, is that of William Greenleaf, Esq. sheriff of the county of Worcester, as early as the year 1788. The course of proceedings in his case differs in several particulars from that pursued in relation to Judge Prescott. The attention of the House of Representatives was first called to the subject by petitions of the inhabitants of the towns of Petersham and Hardwick against W. G. for illegal conduct in his office of sheriff, praying for an inquiry thereon, and that he might be impeached if found guilty. On the 7th of March these petitions were read and committed. On the 11th the committee reported an order, which was accepted, "that the petitioners serve said W. G. Esq. with a copy of their petitions, and of this order thereon, at least thirty days before the second Wednesday of the next session of the General Court, that he appear on that day, to show cause, if any he has, why the prayer of their said petitions should not be granted. And also the petitioners are hereby required to appear on said day with their evidence to support the charges alleged in their said petitions against the said W. G." This order was duly served, and on the 4th of June a committee was appointed to consider the complaints of the towns of Petersham and Hardwick, and to hear the parties and report. This committee was discharged on the 5th, and it was ordered that the parties be admitted to a hearing on the floor of the House the next day, and that either of the parties be heard by themselves or one counsel. On the 6th the hearing was postponed, at the request of W. G. until the next morning. On the 7th a representation of one of the agents of Petersham, praying a postponement of the hearing to the next session, was referred to a committee, who reported the same day. Whereupon it was ordered, that an order issue for any witnesses to support the complaint, which said agent may request, and that Mr. Kinsley of Hardwick, be a committee to attend to the serving of such order. On the 11th, in the forenoon, the House sent a message to the Senate, that they were about to proceed upon a public hearing, and could not conveniently receive any messages at present, but that they would inform the Senate when the hearing was over. The complainants were then admitted, by their agent, on the floor of the House, and the said W. G. by himself, and one counsel, and were heard upon the subject of the complaints in part. In the afternoon the subject was resumed, and after a full hearing, the parties had leave to withdraw. After debate, the further consideration of the subject was postponed to the next morning. On the 12th the House resumed the consideration of the complaints, and the following question was put—"whether the evidence exhibibited to this House be a sufficient ground for bringing forward articles of impeachment against W. G. &c. for misconduct and maladministration in his office?" The members present were 167; of whom 157 voted in the affirmative. It was then ordered that Messrs. Phelps, Dawes, Bowdoin, Choate and Bourne be a committee to prepare articles. This committee on the 14th reported six articles, which were read and accepted, and thereupon Messrs. Heath, Dawes, Ames, Phelps and Choate were appointed a committee to carry them up to the Senate. The articles are preceded by a full recital of the prior proceedings, in which however no reference is made to the petition of the town of Hardwick. The recital concludes—"And whereas it doth appear, that the charges laid in the petition aforesaid are well founded and substantiated, and that the said W. G. Esq. &c. is guilty of misconduct and maladministration in that office—Therefore this House of Representatives do offer and present to the said Hon. Senate, against the aforesaid W. G. &c. all and singular the *general* and *special* articles of impeachment following; viz. 1. The said W. G. &c. hath illegally and unjustly, from time to time, detained in his own hands, for his own private use, public monies, when the Commonwealth had a right to, and was in great want of the same." This may safely enough be presumed to be one of the *general* articles abovementioned; it will be found more difficult to determine which are the *special*. The 2d Art. accuses the said W. G. in much the same informal manner, of having exhibited to the Treasurer of this Commonwealth in order to be laid before

the House of Representatives thereof, false and dishonest accounts of monies which he, as sheriff aforesaid, had collected in payment of public taxes." The 3d Art. alleges, that he had "from time to time, and for the space of more than two years together, illegally detained in his own hands, and for his own private use, certain monies belonging to the aforesaid inhabitants of the town of Petersham for which he never accounted to them" Art. 4th is, that on a certain day he "did procure from the Treasurer of the Commonwealth an execution for money, which money he had then already received on a former execution." Art. 5th sets forth, rather more at length than the others, that he falsely returned to the Treasurer a certain execution as unsatisfied, upon which he had received a certain sum in part satisfaction. The 6th and last is, that on a certain day he did "unjustly procure a warrant of distress to be served on the inhabitants of Petersham aforesaid for a large sum of money, which he then well knew they had long before paid." All which the House of Representatives say they are ready to verify, and that they do thereupon, as the Grand Inquest of the Commonwealth, impeach the said W. G. of all and singular the misconduct and maladministration in his said office of sheriff, &c. contained and alleged in the articles aforesaid; saving to themselves by protestation the liberty of exhibiting further complaints, and concluding with a prayer that the said W. G. may be notified to make answer, and be brought to a trial, and, if found guilty, removed from his office; and that such other judgment may be rendered thereon, as shall be agreeable to the law and the constitution. The summons issued upon this occasion by the Senate was dated June 19th, 1788, and was directed to any or either of the coroners of the county of Worcester, who were therein commanded "to summon W. G. &c. to appear before our Senate on the second Wednesday of the next sitting of the General Court, at &c. by serving him with an attested copy of the foregoing articles of impeachment and this summons, or by leaving the same at his last and usual place of abode, thirty days at the least before the said second Wednesday, &c. to make answer, &c. and to receive such judgment," &c. The House were informed on the 20th, of the issuing of this summons, in order that they might be then and there prepared to support their charges. On the same day the House ordered that Messrs. Parsons, Kinsley, Ames, Dawes and Bourn be Managers; who were "authorised, required and directed to procure the necessary evidence," &c. The clerk was directed to furnish each of them with a copy of the articles. The House also passed a Resolve for staying all law processes in the hands of W. G. &c. &c. which was sent up for concurrence. The entry on the Senate's journal of the same day is—Resolve requiring W. G. to give bond for the faithful discharge of his office, read and concurred, as taken into a new draft—sent down for concurrence —came up concurred. The printed Resolve of this date is *general* that the Governor be requested to inquire whether the sheriffs and coroners have given bonds, &c. and to take certain measures in relation to any that have not.

The General Court was prorogued once by message from the Governor, and twice by proclamation, until the 29th of Oct. On the 5th of Nov. the House ordered that the Managers proceed in the prosecution of the business committed to them with all convenient speed. It was voted that the House would attend the trial; and a message was sent to inform the Senate, that in case they were inclined to sit as a court in the Representatives chamber, the usual seats would be assigned for their members. The Senate returned an answer that they thought it would be most convenient to proceed to the trial in Faneuil Hall and that seats would be assigned for the members of the House if they should choose to attend.

This same day, it being the second Wednesday of the sitting of the Legislature, the Senate was organized as a court. The Lt. Governnor, at the request of the Senate, administered the oath to the members collectively; the form of the oath being the same as in the trial of Judge Prescott, except in its commencement, which was "You A. B. C. &c. do respectively solemnly swear" &c. When the Respondent was put to his plea, he waved it, until an agreement in writing was made and signed by three of the Managers and himself, that under the general plea of not guilty he should be allowed to give any special matter in evidence; and if the trial should not proceed at that time, he might plead anew, and specially, if he pleased; which agreement was admitted by the Court. He then pleaded *not guilty.* His counsel then moved that the trial be postponed to a future day; which was objected to by the Managers, but finally granted by the Court, after a full hearing of counsel at Faneuil Hall. On the 11th the House reconsidered their vote to attend the trial. The Court again met, and the Respondent, waving his former plea, made a formal answer. To the first article, after setting forth the Declaration of Rights, that "no subject shall be held to answer to any crime or offence, until the same is fully and plainly, substantially and formally described to him," he demurs generally, averring "that the supposed charge in the same article is too general to be understood, in such a manner as will enable him the said William to make

a proper and just defence;" "wherefore the said Greenleaf most humbly submits to the judgment of this Hon. Court, whether he shall be held to answer to the same article; saving which, if overruled, the said Greenleaf saith, that he hath at all times faithfully served in his office aforesaid, and never unjustly detained in his own hands, for his own private use, public monies, when the Commonwealth had a right to the same."—To the 2d Art. he demurs generally, because the charge is so *uncertainly* and *indefinitely* described that he has no opportunity to answer it, reserving liberty to make another answer if it should become necessary, and also for plea says, that whatever errors might appear in any account by him exhibited, he never intended or attempted to defraud the Commonwealth thereby To the 3d Art. he demurs specially, protesting he is not guilty, and reserving liberty to plead over, assigning for cause, that the town of Petersham had brought an action of the case against him for the matter complained of in the Art. and that upon trial before the Supreme Judicial Court, the jury returned not guilty; all which he is ready to prove by a copy of the record. He then goes on to state the mode of his doing business with the treasurer, and other particulars. To the 4th and 6th Art. jointly he likewise demurs specially, reserving the same liberty as before of answering over, on the ground that the acts complained of were not official acts, the procuring of the treasurer to issue executions and warrants of distress being no part of the duty of a sheriff, but a matter for which he would be liable in his private capacity in an action at law; but if the Court shall still hold him to answer, he pleads not guilty. To the 5th Art. he pleads that the return on the execution was true at the time, as explained in his answer to the third article.

The Managers having proceeded to open the prosecution, the counsel for the Respondent moved the Court to determine, whether the articles were laid with such certainty as that the Respondent should be held to answer; and the Court determined that they were.

An agreement was then signed by the Managers and the Respondent, that the latter "should have all advantages by way of objection to the admission of evidence produced in support of either of the articles, to avail himself of any informality or defect in the article, that he could have by plea; and the said William agrees that no reply be given to his answer, but that the trial proceed upon his answer filed; which agreementwas allowed by the Court, and ordered to be filed.

The remainder of this and the two following days were taken up with the examination of witnesses, and the arguments of the Managers and counsel. The Court then adjourned to the next afternoon to give their opinions, but not being ready at that time adjourned again to the next morning, when the question was put generally to each member of the Court, "is W. G. &c. guilty of misconduct and maladministration in that office charged upon him by the impeachment of the House of Representatives, or not guilty?" He was pronounced guilty by a vote of 20 to 3. The Managers then moved for judgment, but the Court not being ready adjourned for three days. On the 18th the Senate sent to inform the House, that they were about to pass sentence, and that seats were assigned in Faneuil Hall for the members of the House. The House voted to attend, and sentence was passed, that the Respondent be removed from his office.

The trial being finished, the Senate returned to the Senate chamber, and ordered that the Supreme Executive of the Commonwealth be furnished with a copy from record of the judgment.

It appears from the newspapers of the day, that the Hon. James Sullivan closed the defence; and that Mr. Parsons closed on the part of the Managers.

The next case of trial by impeachment is that of William Hunt, of Watertown, one of the justices of the peace for the county of Middlesex. The first notice we find of the proceedings in this case is in the journal of the House, of Jan. 20th, 1794, where it is said, that a letter from the attorney-general enclosing a representation of the grand jury of the county of Middlesex was read and committed to Messrs. Edwards, Eustis and Slocum.

On the 27th it is ordered that the clerk of the House be directed to issue summons to such witnesses as the committee should think proper to support the charges exhibited to the grand jury of Middlesex by Stephen Hall, 3d, against W. H.--an order of the same date, that the attorney-general be directed to attend the committee on this subject, and ask such questions of the witnesses as he should think proper—and a third order adding Mr. Black and Mr. Brigham to the committee.

On the 4th of February the committee of inquiry reported, that they had heard the evidence brought in support of the charges against W. H.; that most of these charges affected him only in the character of an attorney; and that only three cases had been made out against him of misconduct as a justice of the peace. The report goes on to state the cases.

A petition was then read from W. H. praying that he might be admitted to a hearing on the floor of the House; upon which it was ordered, that the petitioner be admitted to a hearing by himself or counsel, or both; and that the party complainant be heard at the same time. The attorney-general was to manage the inquiry on the part of the

Commonwealth, and the clerk to summon such witnesses as the attorney-general should direct.

On the 11th a message went to the Senate informing them of the inquiry in which the House was at that time engaged, and that the House were desirous of receiving no communications from the Senate until farther notice. On the same day in the afternoon they voted, 113 to 36, not to examine the charges against W. H. as an attorney. The next day the investigation continued, and in the afternoon the vote on the question of impeaching W. H. being taken by yeas and nays, was decided in the affirmative—yeas 111—nays 21.

Messrs. Whiting, Ely, and Bishop, were appointed a committee to prepare articles.

On the 13th of Feb. it was ordered, that Messrs. Jarvis, Bigelow and Town be a committee to consider the propriety of admitting in future a public officer accused of malconduct to be heard by himself, or counsel, while the House are inquiring into the facts.

Feb. 14th, articles of impeachment against W. H. were reported, and Messrs. Bigelow, Ely, Lyman, Whiting and Widgery, appointed to carry them up to the Senate.

Feb. 15th the House received notice, that the Senate had ordered W. H. to be summoned to appear on the 20th inst. and make answer to the impeachment. It was ordered, that Messrs. Willington, Bigelow, and Smead be a Committee to procure the necessary evidence to support the impeachment of W. H. and the Clerk was directed to issue such summons as this Committee should require.

Feb. 17th, it is ordered, that Messrs. Ely, Widgery and Bishop be Managers; and they are authorized, required, and directed, to procure the necessary evidence, and are further authorized to employ the attorney-general, or other counsel, as they think proper.

Feb. 20th the House were informed by message, that the Senate would sit as a Court of Impeachment for the trial of W. H. in Faneuil Hall.

Feb. 25th, the House were notified, that the Senate would proceed to Faneuil Hall at 3 o'clock to give their judgment in the case of W. H. and that seats would be assigned for the members of the House.

Ordered, that the House attend accordingly.

Messrs. Willington, Whiting, and Ely were appointed a committee to report a resolve providing for the expenses of the prosecution.

Feb. 27th. The committee appointed to take into consideration the propriety of officers accused before the House of Representatives for maladministration in discharge of the duties assigned them by the constitution and laws of the government, being admitted to be heard by counsel on the floor of the House in vindication of their conduct, are clearly of opinion, notwithstanding the precedents to the contrary, that such indulgencies have been attended with much trouble and expense, and ought not to be permitted in future, as the inconveniences which have resulted have greatly preponderated against the benefits that have been experienced on any former occasion. And the committee further report, that this opinion be entered on the journals of the House, that it may operate against the authority of the forementioned precedents, on future applications of the same nature for similar indulgencies to those which have been heretofore allowed on the application of persons of this description who may be accused before this branch of the Legislature. Read and accepted and ordered accordingly.

Nothing appears in the journals of the Senate, as such, relative to this trial. The records of the Court begin with the articles exhibited.

1st. Art. That the said W. H. Esq. in the year 1792, at Watertown aforesaid, he being then and there a justice of the peace as aforesaid, did issue a writ in due form of law in favour of Thomas Hunt, of said Watertown, Esquire, against Stephen Hall the 3d, of Medford, in the same county, yeoman, in a plea of confession of the case, and made the same returnable before himself as a justice of the peace as aforesaid; that the same writ being duly served and returned, the said Hall appeared on the 19th day of March, in the year abovesaid, on Monday at 9 of the clock in the forenoon; that the said Hall appeared before the same W. H. Esq. and demanded the appearance of the said T. H. the Plaintiff in the same suit; but the said T. H. did not appear, either by himself personally, or by any attorney by him substituted therefor, yet the said W. H. Esq. without the appearance of the said T. H. or of any person by him authorised to appear in said case, did then and there corruptly, falsely and wickedly enter on his records as a justice of the peace, that the parties named in the same writ did appear before him at the time therefor set in the same writ, and that the said T. H. did then and there, in the presence of the said justice, notify the said Hall that he the said T. H. would carry the same action to the next court of common pleas to be holden within and for the said county of Middlesex on the 3d Tuesday of March then next, and that the said W. H. Esq. in his office as a justice of the peace aforesaid, did corruptly, wilfully and falsely certify to the said court of common pleas the same record as true, he the said W. H. then and there well know-

ing the same to be corrupt and false as aforesaid"

The 2d Art. alleges with equal precision that the said W. H. issued a writ in favour of I. C. vs. J. W. in a plea of the case, returnable before himself; that the said J. W. appeared in obedience to the writ; that the said W. H. Esq. being absent from the county did not enter the action at the time assigned; that the Plf. did not appear by himself or attorney, notwithstanding which the said W. H. recorded the appearance of the Plf. and the default of the Deft. against whom execution issued for debt and costs.

Art. 3d alleges that the said W. H. issued another writ returnable before himself, that the Deft appeared at the time, and that the Plf. did not appear; yet the said W. H. entered on his record that the Plf. appeared, entered and prosecuted his action, and gave notice that he should carry the same before the next court of common pleas, and that he certified the same to the said court as a true record.

All which the House of Representatives saythey are ready to verify, and do thereupon impeach the said W. H. of the misconduct and maladministration alleged, saving to themselves the liberty of exhibiting other articles, and pray the Senate to proceed to trial, and give judgment of removal from office, &c. if he should be found guilty.

The summons was directed "to Jacob Kuhn, Messenger of the General Court," and was to be served in the same manner as that in the preceding case.

Of this proceeding information was given to the House of Representatives, and it was ordered that the Sheriff of the county of Suffolk, and the crier generally attending the court in the county of Suffolk, should attend the trial.

On the day assigned, Feb. 20th, the Lt. Gov. administered the oaths, and the articles being read to the Respondent he pleaded *not guilty*. The Managers for the House of Representatives produced a certificate of their appointment, upon which the counsel for the Respondent read an answer to the impeachment, which was ordered to be filed; but which does not appear upon the record. Witnesses were examined, and the counsel for the Respondent opened his defence on the same day. The next morning the arguments of the counsel and the Managers were gone through; and the morning following, the question being put whether the Respondent was guilty, or not guilty, in the same form as in the preceding case, he was convicted by a vote of 20 to 7. The Managers moved for judgment; but the Court, not being ready, adjourned for four days. At the day appointed for judgment, it is mentioned that the House of Representatives attended and occupied the seats which had been provided for them. The judgment was suspension for one year.

The Managers were assisted by the Attorney General. The counsel for the Respondent were the late Ch. Jus. Parsons and Hon. Harrison Gray Otis.

The next impeachment was of John Vinal, Esq. one of the justices of the peace for the county of Suffolk, in Feb. 1800.

House of Representatives, 1800.—February 24th P. M. A communication from the Attorney General was read respecting the conviction of J. V. Esq. for sundry crimes before the Sup. Jud. Court. Committed to Messrs. Hale, Tillinghast, Bartlett, Russell and Titcomb.

Feb. 25. This committee reported that it was the duty of the House to impeach.

Ordered, that Messrs. Ephraim Williams, Wm. Prescott, Nath'l Tillinghast, Jona. E. Porter, and Nahum Mitchell be a committee to prepare articles.

Feb. 26. Articles were reported and carried to the Senate by the same committee.

Feb. 27. The House was notified that J. V. was summoned to make answer March 1st at 10 o'clock.

Feb. 28. The committee who prepared the articles were appointed Managers.

March 1. The House sent a message to the Senate, offering the use of their chamber for the purposes of the trial; and receive answer, that the Senate had made arrangements in their own room and assigned seats for the House, if they choose to attend.

The articles in this case begin by reciting, that whereas the said J. V. is a justice of the peace, &c. and that by the records of the Sup. Jud. Court, certified copies of which had been laid by the Attorney General before the House of Representatives, it appeared that the said J. V. had been "convicted of extortions, bribery and corruption in his office aforesaid, whereby it is manifest that the said J. V. Esq. a justice of the peace as aforesaid is guilty of gross misconduct and maladministration in that office, therefore this House of Representatives do offer and present to the said Hon. Senate against the said J. V. &c. all and singular the general and special articles of impeachment following." Then follow the articles, setting forth with great precision, 1st, that the said J. V. had committed a certain person to gaol, who was before him charged with the crime of perjury, and afterwards did recognize the same person to appear before the S. J. C.; "and that he the said J. V then on the 12th day of August aforesaid, at Boston aforesaid, in the county aforesaid did extort from, demand, and unlawfully, corrupt-

ly, and wilfully receive and take from and of him the said James Murphy, the sum of five dollars, for recognizing him as aforesaid, and for certifying and returning the same recognizance to the same Sup. Jud. Court, for which the same was taken as aforesaid, when in fact the fees therefor, as established by law, were twenty five cents, and no more, of which the said J. V. was well knowing."

Art. 2d, 3d and 4th charge the Respondent with several cases in which he had agreed to take bribes for the granting of licenses to retail spirituous liquors, and had afterwards in pursuance of these corrupt agreements given his vote for the granting of the said licenses; and received the bribes.

All which the House of Representatives say they are ready to verify, and that they do thereupon impeach, &c. saving to themselves by protestation the liberty of exhibiting new articles, of replying to the answer, and "of offering proof of the premises, or of any of their impeachments and complaints that shall be exhibited by them, as the case may require," and conclude with the usual prayer.

The summons was as in Hunt's case; and similar orders were passed. The members were sworn collectively by the Hon. Elisha May, one of the council, upon the request of the Senate. The clerk was sworn by the Hon. Solomon Freeman, being the oldest senator present. The articles were read, and the Respondent pleaded *not guilty*, and said he was ready for trial. Upon this the Managers produced their credentials. Having authority for the purpose, they had employed the Att. General to assist them, who had begun to open the cause, when the Respondent consented to allow the record of the Sup. Jud. Court as conclusive evidence against him in support of the articles contained in the impeachment. Which being entered on the records of the Court, the question was taken as follows. What says your Honor, is J. V. guilty of extortion as charged upon him in the 1st Art. &c. or not guilty? He was unanimously found guilty. The question was then put, what says your Honor, is J. V. &c. guilty of bribery and corruption as charged upon him in the three last articles, &c. or not guilty? Upon which also he was unanimously pronounced guilty. This was on Saturday, the 1st of March, and the Court not being ready to pronounce judgment was adjourned to the following Monday; when sentence was passed that the Respondent be removed from his office, and disqualified to hold or enjoy any place of honor, trust, or profit under this Commonwealth.

At this trial seats were assigned for the Council, the House of Representatives, and the Judges of the Sup. Jud. Court.

The fourth and last impeachment, was of "Moses Copeland, Esq. one of the justices of the peace for the county of Lincoln, on the 20th day of June A. D 1807, for *malfeasance* and maladministration in his office."

House of Representatives, 1807.—Jan. 27. The petition of G Wellington and others complaining of M. C. &c. was read and committed to Messrs. Kinsley, Parsons, Moody, Davis and Bacon.

Feb. 7. The committee made a report, which was read and recommitted.

Feb. 9. The committee reported, that if the complaint was true, it furnished sufficient ground of impeachment; and that the House should pursue measures to effect a full investigation of the subject.

June 8. A communication was received from Hon. George Ulmer, stating that in pursuance of a resolution of Feb. 9. appointing him an agent to collect evidence for and against M. C. &c. he had taken certain depositions which were inclosed. This communication was read and together with the depositions committed to Messrs. Smith, Wheeler and Oakes. *See printed journals of* 1807, *p.* 81.

June 15. The above committee reported that they had examined the depositions, and divers witnesses, and heard the arguments of counsel for M. C. and that they were of opinion, that although the said M. C. may have been guilty of malfeasance and misconduct in office, it did not appear that his behaviour had been so aggravated as to require the exercise of the constitutional power of the House by impeachment; but they submitted whether if the House believed the facts stated, it would not be expedient to address the governor and council to remove the said M. C. from office. This report was accepted, and recommitted for the purpose of drafting the address.—*Ibid* 119, 120. The same day the committee reported an address, which was read and approved. It was then ordered, that Messrs. Smith, Wheeler and Flagg, with such as the Senate should join, be a committee to present the address. Sent up for concurrence.—*Ibid* 123-4.

June 19. A message went to the Senate requesting them to send down the petition and the doings of the House thereon.—*Ibid* 146. The Senate having complied with this request, the House forthwith reconsidered their vote respecting an address, and ordered that Messrs. Ripley, Whitman and Slocum be a committee to draft articles of impeachment against M. C.—*Ibib* 147.

June 20. The committee reported articles, and it was thereupon ordered, that the

same committee carry them to the Senate, and request that they would take order thereon.—*Ibid* 151-3. The House received a message by the clerk of the Senate, informing ihem of the measures taken for the trial of M. C. *ibid* 156. Messrs. Bangs, Story, Whitman, Bradbury and Ripley were chosen Managers by ballot, of which the clerk of the House was directed to inform the Senate.

Jan. 12, 1808. A message was received from the Senate, that they had resolved themselves into a court of impeachment for the trial of M. C. but that the process issued against him, not being yet returned, the Court was adjourned to Friday next.—*Ibid of* 1808, *p.* 23.

Jan. 15. A message was received, that the Court was adjourned, for the same reason, until the following Wednesday.—*Ibid* 37.

Jan. 20. Notice was received of a further adjournment to the 27th.—*Ibid* 61.

Jan. 27. The House offered their chamber to the Senate for the trial. A message was received from the Senate stating that they had resolved themselves into a Court—that M. C. had appeared and made answer—that they had adjourned till half past 12—and that seats would be provided for the Managers.—*Ibid* 80, 81.

Senate.—June 20, 1807. The articles of impeachment against M. C. were brought up and exhibited as follows:

Art. 1st. "That the said Moses, in direct subversion of the impartiality and disinterestedness which ought always to govern the judicial department of government, did purchase of one Samuel Kellock a note of hand, endorsed blank by said Samuel, bearing date the second day of March, A. D. 1805, for the sum of $12,00, payable to said Kelioch or order on demand with interest, and afterwards a writ issued from said Copeland thereupon in the name of Samuel Kingsbury, of a place called Balltown, and judgment was entered on the same for the sum of $12,24 damage, and $5,15 costs of suit, when in fact the said note was the property of the said Copeland, who made use of the name of a fictitious endorsee for the purpose of augmenting the costs, and giving him an opportunity to sit as a magistrate in a cause in which he possessed an essential interest."

Art. 2d accuses the said Copeland, in a manner equally informal, of issuing two writs returnable before himself on a certain day and hour, and defaulting the defendant before the hour had arrived; which default, although the defendant appeared in due season, he refused to take off, and afterwards issued execution upon these judgments.

Art. 3d. Is, "that said M. in contradiction to his oath of office and in defiance of every principle of morality, at &c. on &c. did wilfully and corruptly take and receive of one D. R. the sum of $1,50 as a bribe to bias his opinion in favor of said R. in relation to an action then and there depending before the said M. C. in which ene B. H. was plf. and the said R. was Deft."

The House then by protestation reserving the liberty of exhibiting new articles, and of replying, and of offering evidence, "pray that said M. may be put to answer to the premises, and that such proceedings, examinations, trials and judgments may be had thereon, as to the laws and justice may appertain."

Upon the exhibition of these articles, the first Tuesday of the next Session of the General Court was assigned for trial, and it was ordered that a copy of the articles and "a summons in due form to attend at the time aforesaid be served by the Sheriff of the County of Lincoln on the said Moses ninety days at least" before the day appointed for the trial. The form of the summons is not given.

Jan. 11, 1808. Messrs. Titcomb, Otis and Sprague were appointed a committee to make arrangements and report rules of proceeding.

Jan. 12. The committee reported rules, which after amendment were adopted. This being the day of trial, the oath was administered, in the form before used, to the Senators collectively, by the President of the Senate, and afterwards by the oldest Senator to the President.

The Court appointed John D. Dunbar their clerk (who was sworn by the President) and Jacob Kuhn crier. The Court was adjourned to the 15th inst.

On that day the summons issued not being returned, the Court ordered an alias summons returnable on the 29th inst.

On the 27th however the Court being opened M. C. was called and appeared, and requested the Court to allow him counsel, which was granted. An answer was then filed, in which, reserving liberty to give any other answer, and saving all legal exceptions to the insufficiency of the articles, it is set forth at considerable length, that as to the charge contained in the first article, Kellock being indebted to the Respondent, and having given satisfactory security for the debt, afterwards handed him the note abovementioned, with a request that it might be put into the hands of an attorney and sued, and that the amount when recovered might be retained by the Respondent and put to Kellock's account: that the Respondent accordingly gave it to an attorney to collect; that the attorney afterwards entered the action above spoken of, among others, on the Respondent's docket, and no person appear-

ing for the defendant, he was defaulted; that the Respondent did not know at that time. that this action was brought on the said note, nor did he discover it until he was making up his record at large, after the attorney had left his office; nor had he any idea that it was brought in the name of a fictitious endorsee, until after the execution had issued; that the Respondent had no interest or property in the note, and that it was never intended that he should have any thing more to do with it, than to hand it over to an attorney, and receive from the attorney the amount which he collected, to be credited by the Respondent to Kellock. And the Respondent further says, that he gave no directions whatever to the attorney, as to the manner in which this note was to be sued, nor as to the action being brought before him, &c.

"And as to the 2d and 3d articles of impeachment, as well as to the 1st, and as to all the criminal matters and things in the same impeachment alleged against the said C. he the said C. doth say that he is not guilty of the same, or of any part thereof, in manner and form as is set forth, and thereof puts himself on trial."

A replication was filed by the Managers in the case, but was not read in Court.

The Court then adjourned to the 29th and on that day, on the motion of the Managers, adjourned again to the 2d of Feb. The 2d and 3d Feb. were occupied in the hearing of evidence and the arguments.—George Blake, Esq. closed on the part of the Respondent, and Benjamin Whitman, Esq. on the part of the Managers.

The next day the Court deliberated with closed doors. The day after, the question was put, "is M. C. Esq. guilty as charged in the 1st article of impeachment, or not guilty?" The vote was *guilty*, 7—*not guilty*, 25. On the 2d article the vote was unanimous, *not guilty*. On the 3d article the vote was as on the 1st.

The President then declared, that it was the opinon of the Court, that M. C. Esq. was not guilty of either of the charges in the several articles of impeachment. Mr. Lee, counsel for the Respondent, moved the Court, that M. C. Esq. should be discharged. The Managers making no objections, the Court ordered that M. C. Esq. be discharged and go without day.

It does not appear in either of the foregoing cases, that a message was sent by the House to the Governor, to inform him of the impeachment pending.

INDEX.

Abbreviations—ans. for answer—art. article or articles—com. committee—ct. court—ev. evidence—exam. examined—Gov. governor—H. of R. house of representatives—imp. impeachment—M. manager or managers—prob. probate—R. respondent—S. senate—v. vide.

ERRATA.

Page 8, in 8th and 9th articles, for *Crosly*, read *Crosby*.
Page 73, line 29, for *B*, read *But*.
Page 98, line 10, for 1722, read 1727.
Page 127, line 38, for *Salisbury*, read *Sainsbury*.
Page 132, line 49, for 1, read 3.
Page 160, line 37, for *we form*, read *we may form*.
Page 161, lines 28 and 29, for *they were*, read *he was*.
Page 161, line 37, for *permission*, read *provision*.
Page 165, line 2, from bottom, for *offensive*, read *official*.
Page 166, line 37, before *offence*, read *other*.
Page 167, line 29, for *carried*, read *carved*.
Page 169, line 6, from bottom, for *province*, read *provision*.
Page 172, line 16, for *found*, read *proved*.
Page 172, lines 36 and 37, for *prepared*, read *proposed*.
Page 177, line 33, for the note of interrogation, read a period.
Page 182, line 3, for *offected*, read *affected*.
Page 186, line 7, from bottom, for *transacted business*, read *business transacted*.
Page 199, line 8, for *he*, read *it*.
Page 200, line 21, from bottom, for *lawyers*, read *lawyer*.
Page 201, line 12, from bottom, before *is*, read *it*.