THE IMPEACHMENT OF JUDGE SWAYNE

A GREEN BAG DEFENSE AND A *GREEN BAG* REPORT

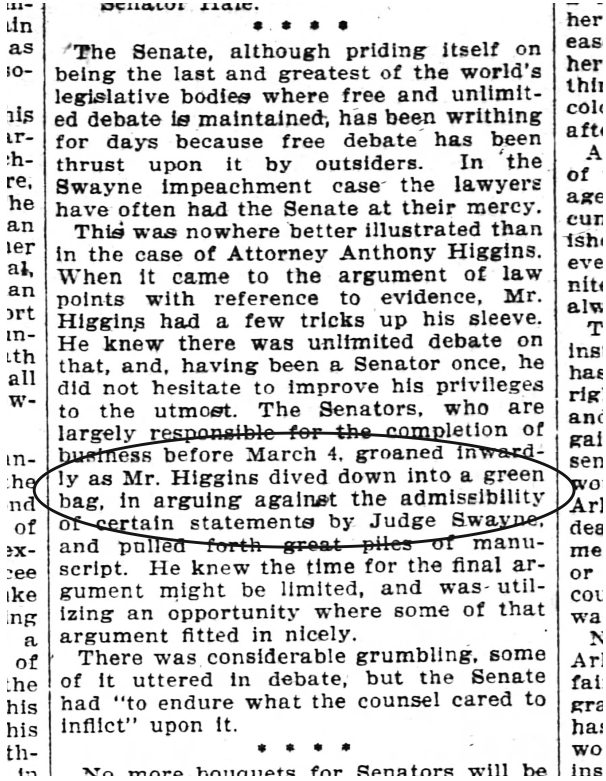
Charles E. Littlefield

To the best of our knowledge, this journal has had nothing to do with any federal impeachment proceedings in living memory. But there was a time (one time, at least) when both the *Green Bag* and the important (in olden times, at least) lawyerly accoutrement after which it is named were in the news in connection with proceedings of that kind. Judge Charles Swayne of the U.S. District Court for the Northern District of Florida was impeached by the U.S. House of Representatives on December 23, 1904, tried in the U.S. Senate, and acquitted of all charges on February 27, 1905. In April 1905, the *Green Bag* published Congressman Charles Littlefield's fascinating and occasionally vivid critique of the Swayne proceedings. The newspapers noticed. The *Louisville Courier-Journal*, for example, observed:

> In the Green Bag the Hon. Charles E. Littlefield, M. C., writes concerning "The Impeachment of Judge Swayne." Coming from such high authority this article will command general attention.

Charles E. Littlefield served the people of Maine in Congress from 1899 to 1908 and later served the U.S. Supreme Court as special master in a dispute between Virginia and West Virginia. See J. Sup. Ct. U.S. (Oct. Term 1909) 144; Virginia v. West Virginia, 238 U.S. 202 (1915).

We assume the *Courier-Journal* was referring to both the author and the publisher. Perhaps even more gratifying for *Green Bag* aficionados is the *Washington Post*'s contemporaneous coverage of some finer points of the trial tactics of counsel for Swayne.



Senator Hale.

* * * *

The Senate, although priding itself on being the last and greatest of the world's legislative bodies where free and unlimited debate is maintained, has been writhing for days because free debate has been thrust upon it by outsiders. In the Swayne impeachment case the lawyers have often had the Senate at their mercy.

This was nowhere better illustrated than in the case of Attorney Anthony Higgins. When it came to the argument of law points with reference to evidence, Mr. Higgins had a few tricks up his sleeve. He knew there was unlimited debate on that, and, having been a Senator once, he did not hesitate to improve his privileges to the utmost. The Senators, who are largely responsible for the completion of business before March 4, groaned inwardly as Mr. Higgins dived down into a green bag, in arguing against the admissibility of certain statements by Judge Swayne, and pulled forth great piles of manuscript. He knew the time for the final argument might be limited, and was utilizing an opportunity where some of that argument fitted in nicely.

There was considerable grumbling, some of it uttered in debate, but the Senate had "to endure what the counsel cared to inflict" upon it.

* * * *

No more bouquets for Senators will be

Washington Post, Feb. 25, 1905, at 6

We do not have copies of the manuscripts Anthony Higgins pulled from his green bag, but we do have Littleton's article. So, that is what we will share with you.

— *The Editors*

The Green Bag

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THE IMPEACHMENT OF JUDGE SWAYNE

BY HON. CHARLES E. LITTLEFIELD

CHARLES SWAYNE was born in Guyencourt, Del., in 1842. From 1865 to 1885 he resided in Pennsylvania. In 1885 he moved to Sanford, Fla., and began to practice law, intending to make Florida his home. June 1, 1889, he took the oath as United States District Judge for the Northern District of Florida, having been appointed by President Harrison, and October 1, 1890, he moved with his family to St. Augustine, Fla., where he continued to reside until July, 1894. He immediately embarked upon the trial of some election fraud cases which were the cause of great local excitement and irritation. Witnesses were intimidated, and in one or two instances murdered. A Deputy United States Marshall was murdered and his murderer went unwhipped of justice. Others were intimidated and in a portion of the district they were unable in these cases to execute the process of the court. Being a recess appointment, when his appointment came before the Senate for confirmation a vigorous but unsuccessful effort was made to defeat it. It is understood that the political conditions were fully ventilated in the discussion.

One of the attorneys for the defense in the election fraud cases having been elected to Congress introduced a bill which was approved July 24, 1894, changing the boundaries of the district so as to leave St. Augustine, Judge Swayne's home, outside the Northern District of Florida. In 1900 and in 1901, there were some prosecutions in his court for trespass upon timber lands involving influential persons which caused some bad blood. In 1897 he became a candidate for appointment as Associate Justice of the Supreme Court of the United States and filed letters of recommendation from lawyers in Philadelphia, California, Florida and Texas. F. Carroll Brewster, brother of ex-Attorney-General Brewster, certifying that he had "established a reputation for industry, integrity, learning and all the virtues which should adorn the bench. His patriotism and courage are undoubted."

Failing in this, later in 1899, he was a candidate for a position on the Circuit bench for the Fifth Circuit. In this candidacy he was supported by twenty-two of the lawyers of Florida, largely from Pensacola (some of whom afterwards became his prosecutors in the impeachment proceedings), although for nearly five years, if the contention subsequently made was well founded, Judge Swayne had been openly, notoriously, wilfully and flagrantly committing a "high misdemeanor" by non-residence in his district, for which he ought then to have been impeached. Yes, more than that, nearly six years before, as now claimed, he had committed an impeachable offense by corruptly converting to his own use a private car and sundry provisions belonging to a railroad in the hands of a receiver, a proceeding which was in 1893, if Prof. John Wurtz's (of the Yale Law School) reminiscences import verity, the occasion of "a great deal of scandalous talk." In view of the subsequent developments the statement in 1899 of an ex-United States District Attorney, afterwards counsel against Swayne, makes interesting reading. "Judge Swayne has presided over our District and Circuit Courts with great satisfaction both to mem-

bers of the bar and the public, evidencing in his decisions a fine discriminating mind and great judicial knowledge." He "cordially" endorsed him and "earnestly" urged his appointment, and felt that in so doing he voiced "the sentiment of all who have knowledge *of his character and ability*." One insisted that "his established reputation as a jurist, *his consistent courtesy to the members of the bar practising before his Court*, and his long and meritorious services as a member of the judiciary entitle him to the promotion he now desires"; and still another referred to him as "a gentleman of *unimpeachable character*." The italics are mine. Evidently these gentlemen were not then duly impressed with the great enormity of non-residence, or not absolutely continuous bodily presence in the district, or the especial iniquity of riding in a private car through the courtesy of the receiver of the road.

The resolutions of the Florida legislature which resulted in the impeachment proceedings were originated by Mr. W. C. O'Neal, who had been convicted by Judge Swayne of contempt in December, 1902, the action of the Judge being the basis of one of the articles of impeachment. Mr. O'Neal had the resolutions drawn and during a period of sixteen days with his attorney lobbied for their passage, spending as E. F. Davis testifies "a whole lot of money" and "from $200 to $300 for champagne." This seems to have been a champagne-inspired impeachment. The resolution adopted by the legislature of Florida in 1903 — charged Judge Swayne with having been a non-resident of his district for ten years, with having the reputation of a corrupt judge, with being ignorant and incompetent and with having so administered the bankrupt law as to waste the assets so that it had become "in effect legalized robbery and a stench in the nostrils of all good people." These resolutions were referred to the Judiciary Committee of the National House of Representatives, and by that committee referred to a sub-committee for the taking of testimony consisting of Hon. Henry W. Palmer of Pennsylvania, Hon. J. N. Gillett of California, and Hon. H. D. Clayton of Alabama.

Twelve specifications were presented to them as the basis of the investigation. They charged (1) non-residence; (2) improper appointment of B. C. Tunison as United States Commissioner; (3) refusal to appoint a United States Commissioner at Marianna; (4) partiality and favoritism to B. C. Tunison; (5) oppression and tyranny in the contempt cases of W. C. O'Neal, E. T. Davis, and Simeon Belden; (6) wilfully and corruptly maladministering bankruptcy cases; (7) oppression and tyranny in the case of Charles P. Hoskins, resulting in his suicide, and for the purpose of breaking down and injuring W. R. Hoskins, charged with involuntary bankruptcy; (8) corruptly purchasing a lot and house in litigation before him; (9) ignorance and incompetency; (11) failing to hold a term of court at Tallahassee in the fall of 1902; (12) procuring as endorsers on his notes attorneys and litigants having cases pending in his court; (13) maladministration by discharging people convicted of crime; (10) is missing from the printed record.

The impeachment proceedings were characterized by some very extraordinary, and it is believed, entirely unprecedented methods. Prior to March 25, 1904, when the Judiciary Committee had completed its work for the time being, the sub-committee reported to the whole committee, disagreeing vitally as to the facts, Mr. Palmer and Mr. Clayton favoring impeachment and Mr. Gillett, opposing. At this time not a word of the case had been printed, the statement of Judge Swayne in exculpation had not been transcribed, and beside the sub-committee no one on the committee had read the testimony. A motion to table the matter until the evidence could be printed and the committee could know what it was acting on was promptly voted down, and with

equal promptitude eight members of the committee voted to report a resolution recommending impeachment, six of whom could not have known by an examination of the case whether there was any justification for such action. It is written, and still true, that "He that answereth a matter before he heareth it, it is a folly and a shame unto him." The charges relating to the certificate of expenses and use of the private car had not then been made. The committee consisted of seventeen lawyers and there is good reason for believing, that as the case then stood, if all the committee had been present and had had an opportunity to read the case, the resolution of impeachment would not have been reported. Near the close of that session of Congress, the case was postponed until the next session and the Judiciary Committee were instructed to take additional testimony and report their conclusion thereon. The same subcommittee proceeded to take additional testimony, completing their work November 28, 1904. During this taking, the charges based upon the certificates of expenses and the use of the private car appeared for the first time. The same eight reported that the "testimony strengthens the case against the said Charles Swayne." Judge Swayne at the last taking made an elaborate statement explaining and answering all other charges against him, but did not answer or explain the charge of having made a false certificate of expenses. Minority views were filed in which it was stated, "As a witness he answered and explained every other charge. This charge he made no effort as a witness to answer or explain. The inference from the record on general principles is, that the charge is admitted to be true, and that he has no explanation or answer thereto. Whether a satisfactory answer can be made we do not say. We must take the record as it stands. Upon this record unanswered and unexplained, we are of the opinion that in this particular an impeachable offense has been made out." These views held that in other respects the case had been materially weakened. This was the condition of the case when the resolution of impeachment was adopted by the House without a division. Afterward and before the adoption of the articles of impeachment, controlling and significant facts relating to these certificates were ascertained.

In his original report in speaking of the Hoskins case, Mr. Palmer used this mild and conservative language: "The whole disgraceful perversion of law and justice was made possible by the complacency, stupidity or worse of Judge Swayne who lent himself to a conspiracy to ruin an honest man by aiding the conspirators in every way in his power." After making this report and while taking the additional testimony, Mr. Palmer said, November 28, 1904, as to the Hoskins case, "There was no allegation that Judge Swayne knew anything about this alleged conspiracy between Canhoun, Boone, and Tunison (the attorneys who were alleged to be pursuing Hoskins) at all. There is no testimony of that kind or finding based upon it." Yet on the 13th of December, 1904, he repeated the assertion made in the report in a speech on the floor of the House, urging the adoption of the resolution of impeachment.

It should be stated as to the suicide of young Hoskins that the physician who attended him testified that in his opinion he died of "acute alcoholism." Mr. Palmer was chairman of the committee to formulate the articles of impeachment and the fact that he reported no article on the Hoskins case is a demonstration that those charges had no valid foundation. They had probably served their purpose when they aided in the passage of the resolution of impeachment.

The articles of impeachment were twelve. The first three were based upon the certificates for expenses made by Swayne under the following statute, which has been contained in the several appropriation bills since 1896 and is not found in the general

statutes, although one of a like character relating to the circuit judge is in the general statutes, viz: "For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed ten dollars per day each, to be paid on written certificates of the judges and such payment shall be allowed the marshal in settlement of his account with the United States." Judge Swayne certified the maximum of ten dollars per day and the fact that in the instances relied on he had not disbursed that sum was not seriously contested. It was claimed that many other judges certified in the same manner, and that under the authority of United States *v.* Hill, 120 U. S. 169, the contemporaneous and continuous interpretation of a doubtful statute by judges, heads of departments and accounting officers would govern. In 1896 when this law first made its appearance in an appropriation bill, the attention of the Senate was expressly called to the fact that under a similar statute "Judges were certifying ten dollars a day regardless of the actual expenses to which they were put," and the Senate proposed to correct the practice by adding to the section after the word "Judges" the words, "which said certificate shall state in all cases that the judge had actually incurred or paid the expense therein stated." This amendment was disagreed to in conference and in lieu thereof the words "and such payment shall be allowed the marshal in settlement of his account with the United States" were added and by implication Congress thus recognized the propriety of that construction and practice.

It appeared that when this paragraph in the appropriation bill for 1898 was under consideration in the House, Mr. Cannon, the chairman of the Committee on Appropriations (Speaker of the last House), stated that the circuit judges certified their accounts for expenses "upon the basis of ten dollars per day." . . .

"Now the provision in this bill, as we have reported it will allow these district judges ten dollars a day upon their certificates in the same way that the circuit judges get their allowances (which we cannot prevent them from getting) at the rate of ten dollars per day."

Whatever the true construction of this statute may be it is very clear that Mr. Cannon understood it to authorize a certificate for ten dollars per day without reference to actual disbursements, and that acting upon that construction the House placed it in at least one appropriation bill. To hold that when Judge Swayne placed the same construction upon the statute he was beyond a reasonable doubt acting corruptly and dishonestly or that it is not fairly open to two constructions would impeach either the intelligence or candor of Mr. Cannon, either of which conclusions would be entirely inadmissible. The House sustained these articles by six majority. The Senate failed to sustain them by a vote of 33 to 49. Bard and Kittredge, Republicans, voting guilty, and Dubois and Gibson, Democrats, voting not guilty on the first article, being joined by Clarke of Montana, a Democrat, on the second and third articles, which were lost by a vote of 32 to 50.

Article 4 was based upon the use of a private car on a trip from Guyencourt to Florida belonging to a railroad, the receiver for which had been appointed by Judge Pardee and concurred in by Judge Swayne. The judge was charged with unlawfully appropriating the car to his own use without making compensation to the owner and with allowing as judge the credit claimed by the receiver for the expenses of said trip as a part of the necessary operating expenses of the road. The facts were, that the receiver on his own motion tendered the use of the private car to Judge Swayne and his family from Guyencourt to Florida, and that the accounts were never passed upon by Judge Swayne at all. It was not pretended that it in any way influenced his judicial action or was

intended to. It appeared that the car was only used by the receiver and when not in use by him was standing in the yard. It was passed over the connecting lines. After having specifically charged that Judge Swayne "acting as judge allowed the credit claimed by the said receiver for and on account of the said expenditure," the managers made special and strenuous effort to show that the "expense was not disclosed in any of the receiver's reports." They charged him with using the car without compensation "under a claim of right, for the reason that the same was in the hands of a receiver appointed by him" but produced nothing before the Senate to sustain the charge. They were apparently relying upon the testimony of Swayne before the sub-committee, which testimony the Senate promptly excluded under an act of Congress which provided that "no testimony given by a witness before either House or before any Committee of either House of Congress shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony" (R. S. U. S. Sec. 859). It should be said, however, that if the testimony had been admitted it would have been only by segregating a question and answer from the context that they could have proved any admission tending to establish that charge. The transcript would have shown that in answer to the question, *Q.* "You thought that the railroad being in the hands of the court, you had the right to use the property of the railroad without rendering the railroad any compensation for it?" he said, *A.* "Yes sir, I had ten railroads in my hands as judge in six years." That he did not claim that he had the right to use it without compensation appears from the answer to the next question which was propounded by Mr. Palmer, *Q.* "And you fancied you had the right to use the property of any of the railroads that were in the hands of the court whenever you pleased without rendering any compensation to the railroads for it?" He said: "I would not say that." There was practically no evidence offered to sustain the third article which related to the use of the private car for a trip to California. It is interesting to note that Mr. Manager Olmstead in an ineffective attempt to amend these articles in the House insisted that they did not "conform to the facts as disclosed by the record." He said, "He, (Swayne), never did appropriate the car and the provisions under the claim of right as charged in articles 4 and 5, but he did improperly use them." While this manager insisted before the Senate that these articles properly *charged* an impeachable offense, whether the charge had been made out he considerately left to the judgment of the Senate without any discussion or the expression of an inconsistent opinion on his part. Thirteen Senators were either not advised of the previously expressed opinion of the learned manager, or if advised thereof, did not give it determining weight as they voted guilty on both articles and 69 voted not guilty.

Article 6 charged non-residence in the Northern District of Florida from July 23, 1894, to October 1, 1900, and Article 7 non-residence from July 23, 1894, to January 1, 1903, in violation of an express statute providing that "Every judge shall reside in the district *for which he is appointed*, and for offending against this provision shall be deemed guilty of a misdemeanor" (R. S. U. S. Sec. 551). Undoubtedly the most satisfactory method of establishing the fact that he did not reside in the district would have been to have shown that he did actually reside elsewhere, but the managers were not of course confined to that. Substantially all of their testimony was directed to showing that from 1894 to 1900 he was not actually in the district except when he was holding court, arriving there on the day before and leaving the day or the day after court ended, and it was claimed that this averaged about

sixty days in a year. It appeared that during this period he boarded while in the district at a private house, or a hotel, and an effort was made to show that his real home was in Guyencourt, Del.

The evidence for the respondent clearly showed that he only spent his summer vacations at Guyencourt and that it was not his residence or home. In fact this contention was substantially abandoned in argument, one of the managers stating "Witnesses were called to show that the respondent did not live in Guyencourt. We do not care whether he lived in Guyencourt or whether he did not." He never registered and never voted in Pensacola during that time. Nor did he anywhere else. He paid no poll tax there or elsewhere. On account of his age he was exempt from a poll tax after 1897.

As cut down, his district contained in 1900 only about 176,337 inhabitants, less than an ordinary congressional district, and it is obvious that he had relatively very little to do. Under the law he was subject to being ordered to other districts to hold court, absences for which purpose were clearly consistent with a continued residence in his own district. He submitted certificates of days when he was holding court from January 1, 1895, to January 1, 1904, from which his counsel made a computation claiming that it showed that the number of days in which court was opened and adjourned by him outside of his district was 814, inside of his district 597. Intervening days during that time such as Sundays, holidays, etc., 192, and days used in traveling to courts outside 102, in all 1705 days employed in the discharge of his official duties and consistent with his residence in his district, or an average of about 189 days in each year. The managers claimed that the days outside of his district as shown by the certificates were only 570.

Shortly after the act of July 29, 1894, was passed, Judge Swayne left St. Augustine where he was then residing within the limits of the district for which he was "appointed," stating that he "would be compelled to make his residence within the boundaries of his district and that he was going to Pensacola, and with that declaration he left St. Augustine that summer in the month of July." His family continued to live in St. Augustine until 1896, when they broke up housekeeping and did not resume it until October, 1900, in Pensacola. Meanwhile he made numerous efforts to get a house in Pensacola. May 28, 1898, he registered at the hotel in Pensacola as of "St. Augustine, Fla." Until March 1899, he registered in Pensacola as of "Fla." but on that date and afterward as of "City." There was no serious question but that he resided in Pensacola after October, 1900. In 1903, a house was purchased in Pensacola into which he moved and where he has since resided.

The Judiciary Committee in its report relied upon the case of People *v.* Owers (29 Colo. 535) as an authority on the question of residence.

In that case the court held that the Constitution required the district judge to maintain his actual residence in his district, as distinguished from a legal or constructive residence or domicile. It was a *quo warranto*, and the court held that the burden of proof was upon the judge to clearly establish such a residence. The facts were as follows: — The judge's term began January 9, 1901. The information was filed September 9, 1901. "During that time, on account of the state of his health, the judge had not actually resided in his judicial district." He had served a six-year term, ending January, 1901, and until the spring of 1897 he had clearly resided in Leadville, in his district. At that time his health was impaired, resulting in nervous prostration. He was unable to sleep in such a high altitude, and was advised by his physician that his health and life depended upon his spending as much time as possible in a lower altitude. He was married in October, 1897, and from that time, with the exception of five months at

Santa Barbara, Cal., he spent most of his time in Denver, five thousand feet lower, during the last two and three-fourths years. He immediately returned to Denver upon the adjournment of his court, when there was no other business requiring his presence unless he stayed longer for the transaction of his private business, except in a few instances when he went to other parts of the state. From the time of his marriage he either kept house and lived with his wife or boarded with her in Denver, except when she was away on visits, when while in Denver he boarded alone. His wife and family were never in Leadville but once, and then for less than ten days, on a visit. For the last nineteen months he had an office in Denver with his name painted on the door, the room being rented by a company of which he was the secretary. His name appeared as a resident for 1900 and 1901 in the Denver directory, but, as he claimed, without his knowledge or direction. During this time when in Leadville he occupied as his sleeping room a room in the court house adjoining his chambers and had no other house or dwelling place in Leadville. The furniture, including bedstead, bedding, bureau, washstand, and carpet, was his property. He had in 1898 sold the furniture in the chamber to the county. He paid nothing for the use of his room. He had no other personal property in Leadville, made no tax return, and paid no poll or personal tax during this period. He took his meals at restaurants or hotels as might be convenient and had no regular boarding place. His wardrobe he kept in Denver, and took with him when he went to his district sufficient clothing to meet the necessities of a short stop, except that he had sufficient personal and bed linen for his use in Leadville. He was registered as residing at the "Court House."

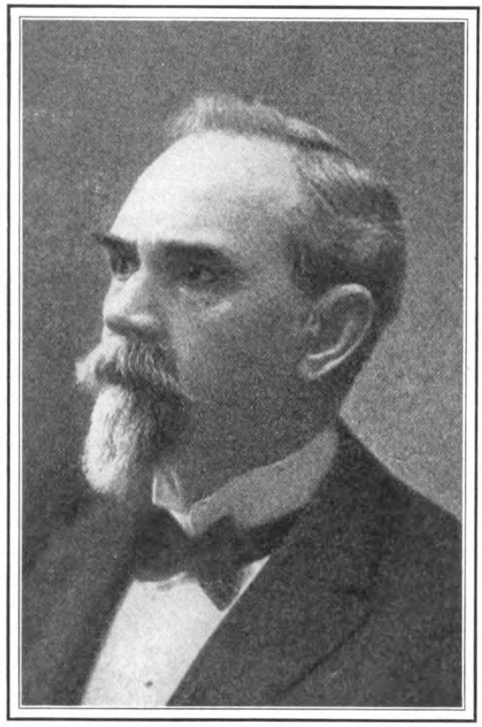
For nine years, with the exception of three elections, he voted in Leadville. During these two and three-fourths years he had not been personally present exceeding three hundred days, fifty of which were exclusively devoted to campaigning. In 1899, 1900, and 1901, two-thirds to three-fourths of his time was spent out of his district. In legal documents he had always described himself as of Leadville, so registered himself when traveling, had rented a box in its post-office and had had his personal envelopes marked for return to Leadville, and had claimed and still claimed it as his home domicile and residence.

Upon these facts the court held that the Constitution should be given "a reasonable and not a purely technical or literal interpretation" that "it is only a fair and reasonable construction, we think, of the admitted facts to say, and we shall so hold, that it is his bona fide intention as soon as his health will permit, which he hopes will soon be realized, to return to Leadville, in his district, for the purpose of there maintaining his actual residence." Again, "We think it would be a strained construction of the language and a harsh rule to enforce within eight months after the plaintiff's induction into office to say that because he had not during that time, on account of the state of his health, actually resided in his judicial district and because thus early in his term it is not entirely certain that at some definite future date he would return there, he should therefore be ousted from office." And again, "and although the rule, as we have said, requires him clearly to show a continuing right to hold, this rule is in entire harmony with another of equal potency, which is that it is only for some substantial misconduct upon his part that the severe penalty of an ouster should be visited upon him."

In the Colorado case the judge had an actual and continuous abiding place for himself and family in Denver, out of his district, for four years before the hearing. Swayne has never had any such abiding place.

At the time of the hearing the Colorado judge was neither actually abiding or residing in his district. Swayne was. When

the decision was rendered it was not even certain that the Colorado judge would "return to Leadville, in his district, for the purpose of there maintaining his actual residence." The court said he had a "bona fide intention" to do so. Everybody concedes that Swayne is now a bona fide resident of his district. With the exception of voting, which was no doubt technically necessary in order to make the Colorado judge eligible for election, every fact and circumstance is much stronger in support of residence in Swayne's case. In that case the burden was upon the respondent to satisfy the court that he resided in Leadville. In Swayne's case the managers were bound to establish non-residence beyond a reasonable doubt and the facts were much more probative of residence than in the Colorado case. It may be safely inferred that the managers did not exert themselves to impress upon the Senate the authority of the Colorado case. On this article 31 voted guilty and 51 not guilty. On Article 7, 19 voted guilty and 63 not guilty.



JUDGE CHARLES SWAYNE

The 8th, 9th, 10th, and 11th articles were based upon an alleged unlawful conviction for contempt of E. T. Davis and Simeon Belden, and as they all depend upon substantially the same facts they can be considered together. These cases arose out of a suit in Judge Swayne's court known as the Florida McGuire case. It appeared that while this case was pending in June or July, 1901, he negotiated with J. J. Hooten for the purchase for his wife of block 91, a vacant unoccupied lot and a part of the land in controversy in the McGuire suit. Hooten testified before the Senate that the judge "stated if he bought it it would disqualify him in the case in case it came up before him." The judge was not a witness before the Senate and this statement therefore stood undenied. Hooten was a witness before the sub-committee and on this point then testified:

Q. "Did you go over the land with Judge Swayne and point it out to him?"

A. "Yes sir."

Q. "Do you know whether or not this land was in litigation in the United States Court at that time or not?"

A. "I don't remember, I know there has been litigation about that land before and since. I could not state whether or not there was at that time."

It is difficult to understand how the witness could have made that answer, if Swayne made the statement to which he last testified. He was not however confronted with his former statement before the Senate. Swayne was notified that a quit-claim deed had been made to Mrs. Swayne, Edgar the grantor declining to make a warranty on account of the "old Alberta Caro" or McGuire claim. He wrote the agents to omit block 91 and send the papers for other property for which he had been negotiating. There was no pretence that a deed was ever made or sought to be made to Judge Swayne. Sometime in August, Belden and Paquet, plaintiff's attorneys in the McGuire suit wrote Judge Swayne requesting him to recuse himself. To this he made no reply until he reached Pensacola to hold the November term. November 5, while the criminal docket was being disposed of, Mr. Paquet came into court and Judge Swayne suspended proceedings, called him up and in the presence of Mr. Blount, one of the defendants, and attorney for the defendants, in the McGuire suit, called attention to the letter stating that he had not answered it as he thought it should be disposed of in court when the other side was represented. He stated that he had negotiated in behalf of a relative for block 91, that during the negotiations a quit-claim deed had been forwarded, and on inquiry it was developed it was because the grantor would not warrant against the Caro claim, that thereupon the deed was returned and all negotiations terminated, that while the letter was not a formal application he would treat it as such, and thought under the circumstances he was qualified to try the case and felt in duty bound to go on. In argument he was vigorously assailed for failing to recuse himself, but a discussion of that phase of the case is clearly immaterial as he was not impeached for such failure. In fact, if his conduct in thus failing was a proper subject of adverse criticism it only furnished the stronger motive for the alleged improper and contemptuous conduct of Paquet, Belden, and Davis, and makes it more probable that they were guilty of such conduct, as it intensified the motive. Paquet was not a witness, and the testimony that he was informed by Judge Swayne on November 5, that the judge had terminated all connection with lot No. 91 was uncontradicted. The clerk testified that substantially the same statement was made by the Judge on Friday, the 8th of November in the presence of Paquet, Belden, and Davis.

It seems that Blount, Paquet, and Davis, (claimed by Blount, but denied by Davis), were conferring from time to time about the trial of the McGuire case up to Saturday. It had been set down for trial at the beginning of the term on the motion of both parties. About five o'clock Saturday afternoon the criminal docket having been disposed of, the parties endeavored to make a disposition of the McGuire case. Paquet, Belden, and Davis were in court. Davis it was claimed was sitting with and conferring with Paquet representing the plaintiff, W. A. Blount representing the defendants. Plaintiffs desired a postponement until the following Thursday. To this the judge was willing to agree if defense consented. Defendants insisted on immediate trial. The judge ordered the case to go over until Monday at 10 when it should be tried unless plaintiffs could show cause for continuance. Mr. Belden said he wanted to try the case, and was all ready except procuring the attendance of his witnesses. He claimed he needed forty witnesses, one of whom was out of the state, but he could not give his name. He afterwards tried the same suit in 1902, with full opportunity to get all the witnesses he wanted and only used sixteen witness all of whom lived within a mile or two of the Court House and could have been summoned if at home, in about two hours time. Paquet was the leading counsel. He left court and prepared a precipe for a suit in ejectment in the state court against Judge Swayne, claiming dam-

ages for rents and profits in the sum of one thousand dollars, though he knew that Swayne had never been in possession and did not claim any title. There never was any pretence that Judge Swayne had any title, as the only deed ever made was to his wife and that was rejected. Mr. Davis was then employed in that suit and testified that he knew nothing about the title. Mr. Belden, in answer to a question as to whether he was advised that Judge Swayne had made a statement from the bench and had declined to recuse himself said, "Oh, I was fully informed about that," though he afterwards in the same examination denied any knowledge of Judge Swayne's statement about the purchase. He made no examination of the record to see how the title stood. Mr. Hooten testified that neither Paquet, Belden, or Davis had ever made any inquiry of him as to the negotiations for the sale of lot 91. Apparently they were not looking for reliable information. Belden admitted that he had made no inquiries. It appeared in the contempt hearing that Paquet, Belden, and Davis, all signed the precipe in the State Court suit. The conference which resulted in the bringing of that suit was held in the store of Mr. Pryor, who seems to have been financing the McGuire litigation. At that conference it is claimed an understanding was entered into to dismiss the McGuire suit on Monday morning, and great stress was laid upon this understanding as conclusively demonstrating that the suit in the State Court, which was afterward brought could not have been intended to affect the McGuire suit inasmuch as it had already been agreed to discontinue it. But that understanding, if in fact, had proved to be entirely immaterial as affecting the propriety of Judge Swayne's conclusions on the facts in the contempt case, as it was conceded he was not informed of any such understanding or agreement. Testifying to it and exploiting it with a great flourish of trumpets, three years after it ought to have been communicated to the judge, if he was to be affected by it, while possibly characteristic, could hardly prejudice the judge before an intelligent tribunal. The writ was served on Swayne after eight o'clock Saturday night. Mr. Belden gave as reason for this extreme diligence, that it was hurried up and served that night so as to be in time for the rule day of the following month, and they wanted to have service on Charles Swayne before he left the state, but it appeared that the first Monday of December was the first rule day and that according to his understanding he needed only fifteen days for service and he had at least twenty-one, six more than the requisite number, and that he knew Swayne was to be in Pensacola until the following Monday at 10, so that from every point of view there was ample time and opportunity for service on Monday.

Later in the evening, apprehensive no doubt, that the bringing of the suit should not sufficiently embarrass the Judge and bring him into public contempt, Mr. Paquet wrote an article for the *Pensacola Press*, published Sunday, and sent it to the paper by Mr. Pryor. In this article he described the State Court suit as "A decided new move in the now celebrated case of Mrs. Florida McGuire," and in order that there might be no question as to identity and purpose, said it was to recover possession of lot 91 "and which is alleged that Judge Swayne purchased from a real estate agent in this city during the summer months and which is a part of the property now in litigation before him." Belden and Davis endeavored to break the force of this article by stating that they had nothing to do with writing it and testified that they so stated to Judge Swayne at the hearing. Judge Swayne's counsel claimed in argument before the Senate, that these attorneys conspired to bring a baseless suit for an unlawful purpose, and if the conspiracy was made out it might well have been held on familiar principles that they were re-

sponsible for all acts done in pursuance thereof, though they did not directly participate therein, and the fact that they all signed the precipe in the State Court suit, tended strongly to establish the conspiracy. Monday morning Belden and Davis went into court (Paquet having been called to New Orleans by sickness in his family). Davis had his name entered of record as counsel for the plaintiff, and discontinued the McGuire suit. W. A. Blount then, as *amicus curiae*, stated that in his opinion a contempt had been committed and suggested that an investigation be had for the purpose of determining whether a contempt had been committed or not, and afterward wrote out and signed a motion to that effect in the motion book. The motion was not on oath. Mr. Palmer in his speech on the impeachment resolution contended that in case of a contempt not committed in the presence of the court the proceeding "must be founded on an affidavit setting forth the facts and circumstances constituting the alleged contempt sworn to *by the aggrieved party* or some other person who witnessed the offense. W. A. Blount was certainly the "aggrieved party" and was therefore properly moving, yet, in his address before the Senate, Mr. Palmer bitterly complained that Blount acted in that capacity, using this choice collection of language, characteristic to some extent of the impeachment proceedings, to adequately express his feelings. "He selected the one man Blount whose grist he had insisted upon grinding in his judicial mill and who had been able, through Judge Swayne's refusal to recuse himself, to force a discontinuance of the case, and who might therefore be supposed to feel willing to do the dirty work of the judge to institute and prosecute the proceedings for contempt," evidently ignoring the right of "the aggrieved party" to intervene, which he had previously asserted. His law was evidently temporarily in eclipse. As to the necessity of an oath the "Encyclopaedia of Law and Procedure" states the law as follows: "As a rule the proceeding to punish for contempt committed out of the presence of the court should be instituted by a statement or some writing or affidavit presented to the court setting forth the facts" (Vol. ix, p. 38). So an oath is not an essential element in the motion.

The judge made a declaration on the 11th, Monday, relative to the facts, incorrect in some of its details, but in substance an accurate statement of his connection with lot 91, and this was made a matter of record. Tuesday, Belden and Davis appeared and filed an unverified answer. Neither of them testified, though they had every opportunity. Mr. Palmer in his report to the House stated in substance five times that they had purged themselves on oath and enlarged upon the iniquity of holding them for contempt after such purging, and although his attention had been called to the fact by Judge Swayne, that there had been no such purging, he afterward repeated in substance the same statement six times in his speech to the House. In their answer they did not deny bringing the suit in the State Court, but they did not claim it was in good faith or that they so believed. They denied being present on November 5, when Judge Swayne made the statement, but did not deny that it had been communicated to them, or that they had any knowledge thereof. For their reasons for believing that Judge Swayne or some member of his family was interested in lot 91, they referred to the declaration made November 11, the day before, in which declaration it was stated that "thereupon,and by his advice, the said deed was returned to the proposed grantors with the statement that no further negotiation whatever could be conducted by them in relation to this property, and they thereupon refused to purchase either at the present time or in the future any portion of said tract," *an express and unequivocal repudiation of the deed*. Yet having referred to this very

declaration as the source of their information, Belden and Davis went on to say in their answer that they "believe there is in existence a deed to Mrs. Charles Swayne uncanceled, and that they have *no knowledge of its repudiation.*"

That must have impressed Judge Swayne as a candid way of treating his own declaration, mildly informing him that he was not worthy of belief and constituting a new contempt. It indicates perhaps why the answer was not sworn to. Davis did not deny in the answer that he had been of counsel for the plaintiff in the McGuire case, he simply claimed the court had no jurisdiction over him until he requested the court on the 11th to mark his name as attorney for the plaintiff. He testified before the Senate that he was not of counsel in that suit, but he did not testify at all before Judge Swayne, and all Judge Swayne had was the evasive denial, not on oath, in the answer. There was testimony on the impeachment trial that Davis was conferring with and apparently making suggestions to Paquet when he was urging a postponement on Saturday, and at other times, which among other things properly led the judge to believe and hold in the absence of any express denial, as he held in his finding that "his acts in and about the court room had led the court to believe that he was the counsel in the case previous to that time" (Monday).

In answer to the question: "Then, Mr. Belden, these facts of what you did outside of that court and as to your notice and the honesty of your purpose in doing them were never brought to the attention of Judge Swayne on the hearing of the proceeding for contempt, were they?" Mr. Belden emphatically said, "Never, under no circumstances would I have gone to him."

The bringing of the suit in the State Court, the notice in the paper, were all proved. It was hardly necessary to call any one to prove to the judge his own declaration made to Paquet, and when Belden and Davis failed to deny that that information had been communicated to them, or that they had any such knowledge, but stood dumb and mute, he clearly had a right to infer, if he was not actually bound to do so, that it had been so communicated to them and that they knew the State suit was without foundation and clearly a contempt. Who can say that beyond a reasonable doubt he was wrong in so finding? Who can justify the professional ethics that for the purpose of convicting Judge Swayne of an infamous crime in rendering a judgment, insistently urged upon the Senate facts believed to be important and determining, which were not only not presented but were deliberately withheld from him when he rendered that judgment. It is to be regretted that the management were confronted with an exigency so great as to make such a course necessary.

In this connection it is important to note that after having failed in a writ of prohibition to prevent Judge Swayne from proceeding against him for the same contempt, Louis Paquet, the leading counsel for plaintiffs in the McGuire case, who drew the precipe in the State Court suit and wrote the newspaper article, and was fully informed of all the facts, came into court March 31, 1902, and filed a signed statement in which he admitted that "through excessive zeal in behalf of his clients he did so act that this honorable court was justified in believing the said actions were committed in contempt thereof, and as showing disrespect therefor" and apologized therefor, whereupon he was promptly excused by the judge. This was not in evidence before the court when the judgment was rendered against Belden and Davis, but the confession of one of the combination does not tend to impeach that judgment but confirms it.

It was urged that Judge Swayne had no jurisdiction of contempt proceedings in such a case. The case was carried before Circuit Judge Pardee and with Judges McCor-

mick and Shelby sitting and concurring with him he held: "The relator is an attorney and counsellor of the United States Circuit Court for the Northern District of Florida and as such one of the officers of the court within the intent and meaning of the above statute. As such officer he was and is charged with conduct *in and out of court*, which if accompanied *by malicious intent or* if it had the effect to *embarrass and obstruct the administration* of justice was such misbehaviour as amounted to a contempt of court. To hear and decide whether the relator was guilty of such contempt was *clearly within the jurisdiction* of the court" (112 F. R. 139).

When sustained by three disinterested judges, Judge Swayne could hardly be said beyond a reasonable doubt to have wrongfully asserted jurisdiction. He sentenced them to two years disbarment and imprisonment for ten days and one hundred dollars fine. Mr. Blount immediately called his attention to the erroneous disbarment and it was at once remitted. The statute only authorized fine *or* imprisonment. No one at the time consulted the statute and the respondents made no question as to the propriety of the sentence. No one seems to have known at the time that the sentence could not be cumulative. A petition for *habeas corpus* was made out and seventeen reasons alleged as the ground thereof, but the illegal sentence was not relied upon. Judge Pardee in his opinion called attention to it and gave the respondents the option of serving the time or paying the fine. They had both served three days. Belden elected to complete the time but Davis paid the fine, so that neither was injured by the erroneous sentence.

There was nothing to show that Judge Swayne knew the requirements of the statute in this respect, and constructive or inferred knowledge as distinguished from actual would hardly be sufficient upon which to predicate express malice. There was a good deal of conflicting testimony as to the language used by Judge Swayne in passing sentence. It was claimed and denied that he characterized their conduct as a "stench in the nostrils of the decent people." It was at least doubtful whether he used that expression and it was admitted that he expressed regret at being obliged to sentence Mr. Belden who was some seventy years of age and suffering from facial paralysis. On these articles the vote was uniform, 31 guilty and 51 not guilty.

The 12th article was based on the O'Neal contempt case. On this article the managers asserted in argument that the facts material to the issue were not in dispute. Nothing could be farther from the facts. On the material facts there was a direct and irreconcilable conflict of testimony. Mr. Greenhut was at one time a director in the American National Bank of Pensacola, of which Mr. O'Neal was president. While such a director the bank negotiated a loan to Scarritt Moreno of $13,000, and received security therefor. There was some question as to its value. The loan with the security was transferred to a director of the bank for $10,000. Meanwhile Greenhut had endorsed a note to the bank for Moreno, for $1,500. Greenhut refused to pay the note, claiming that the bank had security which should be applied thereto. Moreno became insolvent and Greenhut was appointed his trustee and under the advice of his counsel brought a suit in equity, claiming an interest for the bankrupt estate in the security, and made the bank a party thereto. The suit was brought on Saturday, and on the following Monday, as O'Neal states in his affidavit, as he was going to the bank he saw Greenhut standing in the door of his store "and it suddenly occurred to respondent to reproach the said Greenhut with having brought the suit mentioned in his affidavit against said bank." He entered Greenhut's store in which an altercation occurred, as the result of which O'Neal cut Greenhut with a knife "at a point behind the left ear, then across the left cheek, ending at the

left corner of the mouth and stabbed him on the left side, over lower ribs, upon the left hip, on the left elbow, and on the left hand."

O'Neal admitted in his affidavit that the conversation was "however *concerning chiefly* the bringing of the said suit against the said bank." The great question in the case was whether he made an assault with intent to kill upon Greenhut "*concerning chiefly* the bringing of said suit," or whether he was properly repelling an assault made upon him by Greenhut. Upon this point O'Neal and Greenhut were directly at issue. At the hearing Greenhut was impeached only by the opposing testimony of O'Neal, there being no other eye witness to the beginning of the affray.

On the other hand O'Neal having sworn in his affidavit made about fifteen days before the hearing, "that Greenhut in his answer to the suit on the $1,500 note had interposed a defense which this respondent believed and believes to be untrue, and known to the said Greenhut to be untrue" admitted on his cross examination at the hearing that he didn't know what the plea in that case was, an admission that did not tend to sustain his credibility as a witness. He admitted he had pleaded guilty to three criminal charges, one, shooting across a public street, and two, for carrying concealed weapons, neither of which were calculated to commend him as a keeper of the peace. A newspaper reporter testified that immediately after the assault O'Neal gave him his version of the facts and said Greenhut gave him the lie when he struck Greenhut and then Greenhut struck him, flatly contradicting O'Neal's subsequent version and proving him the aggressor. At the hearing O'Neal exhibited a small pocket knife as the weapon used by him. One witness who held O'Neal and tried to take the knife from his hand, with which he had been asserting his judicial rights against the trustee in bankruptcy, testified that the knife exhibited was not the knife used, and another witness not so positive, said he did not think it was the same. If he had any regard for the weight of evidence, how Judge Swayne could have done otherwise than accept Greenhut's version, it is difficult to see. How any intelligent, fair-minded man fully informed as to the facts, could have held otherwise is not perceived. *A fortiori* Swayne did not commit an impeachable crime in so doing. O'Neal was convicted, sentenced to sixty days imprisonment, a writ of error to the Supreme Court of the United States was sued out, a supersedeas of the sentence was granted and O'Neal was never imprisoned a moment for his murderous assault. That court held that "Jurisdiction over the person and jurisdiction over the subject matter of contempt was not challenged. The charge was the commission of an assault on an officer of the court for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out."

In other words the contention was addressed to the merits of the case, and not to the jurisdiction of the court. (190 U. S. 36.)

The judge's jurisdiction, his right to hear and determine the question of contempt, on such a state of facts was then challenged in a *habeas corpus* proceeding before Judge Pardee, Judges Shelby and McCormick sitting with him. They unhesitatingly and unanimously held:

"The question before the District Court in the contempt proceeding was whether or not an assault upon an officer of the court, to wit, a trustee in bankruptcy, for and on account of, and in resistance of, the performance of the duties of such trustee, had been committed by the relator; and if so, was it, under the facts proven, a contempt of the court whose officer the trustee was? *Unquestionably* the District Court had jurisdiction summarily to try and determine these questions, and, having such jurisdiction, said court was fully authorized to hear and decide and adjudge upon the merits." (125 F. R. 967.)

When three able and disinterested judges held that he "*unquestionably*" had jurisdiction, it is preposterous to contend that Judge Swayne committed a crime in asserting it. To be sure the learned managers vehemently contended in argument that, reproaching Greenhut with a lethal weapon "concerning chiefly" the bank suit, was an indictable offense, and if punished as for contempt, he would be twice punished, and therefore O'Neal could not be held for contempt. Unfortunately for this contention the Supreme Court of the United States in *In re* Savin (131 U. S. 275) had held the other way, saying "undoubtedly the offense charged is embraced by that section and is punishable by indictment. But the statute does not make that mode exclusive." Strange as it may seem, this article received the largest vote of any, 35 voting guilty and 47 not guilty. There was no division on party lines.

Thus ended the fifth impeachment of a United States Judge in our history. Judge Swayne was not a witness and at the conclusion of the evidence his counsel offered to submit the case without argument, which offer was declined by the managers.

Of all impeachments it was the most abject and humiliating failure as none was ever tried that did not come nearer a favorable result, in no case failing to get at least a majority in favor of conviction on at least one article, while here the most favorable result was a majority of 12 against conviction.

What there was in legitimate proof that would stand the test of impeachment proceedings, as indicated by the articles relied on, to justify the assertion of Mr. Palmer, made in the debate on the articles, January 19, 1905, that "The track of this man since the time he was appointed a judge in Florida down to this date, is spread all over with bankruptcies, scandals, and suicides," an intelligent and discriminating public must judge. The assertion, however, went broadcast throughout the country, as a summary of the charges against Judge Swayne.

It is reasonably safe to assume that hereafter Congressional lawyers having any desire for "the bubble reputation" will not be likely to seek it in impeachment proceedings, unless the facts are such as to compel a favorable result, unaided by passion or prejudice.

Hon. C. H. Grosvenor has something of a reputation as a political prognosticator, but he sometimes enters other fields. I conclude this article by quoting without comment, approving or otherwise, a prophecy with which he concluded a speech on this case in the House of Representatives. He said: "We shall see what we shall see, and when our managers come back from the Senate trailing the flag of partisanship and persecution in the dust of overwhelming defeat, we shall understand then better than we understand now the principles of law governing this case and the elements of hate that have entered into it."

ROCKLAND, MAINE, March, 1905.