FERGUSON v. MADDOX et al. (No. 4183.)

(Supreme Court of Texas. June 12, 1924.)

1. States ⊂=52—Judgment of impeachment not void because charges filed and trial commenced during special session, pursuant to proclamation not designating such matter.

Judgment in impeachment proceedings *held* under Const. art. 15, §§ 1–5, not void because charges were adopted and filed and the trial was entered upon by the Senate at a special session convened by a proclamation of the Governor which did not designate such action as purpose for which special session was called, since neither House acts in a legislative capacity in matters of impeachment, within article 3, § 40.

2. States ⊂=52—Judgment of impeachment not void because articles presented and trial begun at one special session and completed at subsequent session.

Senate's judgment of impeachment was not void because articles of impeachment were presented by the House and the trial was begun by the Senate at one special session and the trial was completed and the judgment rendered at a subsequent session.

3. States ⊂=52—Governor may be impeached notwithstanding absence of constitutional or statutory provision specifying acts warranting removal.

Judgment of impeachment was not invalid because neither the Constitution nor any statute defined or designated the specific acts and conduct for which an officer could be removed, since Const. art. 15, granting power of "impeachment," impliedly adopts established principles relating thereto, and Pen. Code 1911, art. 3, does not apply.

4. States ⊂=52—Senate cannot act arbitrarily in impeachment proceedings.

The Senate in the impeachment of state officers cannot act arbitrarily, but must proceed according to law as ascertained from the Constitution, legal treatises, the common law, and parliamentary precedents.

5. Constitutional law ⊂=31—Constitutional provision as to impeachment held self-executing.

Under Const. art. 15, § 4, authorizing Senate in impeachment proceedings to pronounce judgment that impeached official shall be disqualified from holding office, the Senate in its judgment of impeachment could disqualify impeached official from holding office notwithstanding failure of Vernon's Sayles' Ann. Civ. St. 1914, arts. 6017–6027, to provide for such punishment; the constitutional provision being self-executing.

6. States ⊂=52—Governor's resignation after found guilty in impeachment proceedings did not invalidate subsequently rendered judgment.

Governor's resignation, to take effect immediately, filed after he had been found guilty in impeachment proceedings, but before judgment was pronounced by the Senate, did not invalidate the judgment subsequently rendered.

7. States ⊂=52—Senate's judgment of impeachment not subject to attack except for lack of jurisdiction or excess of constitutional power.

Judgment of impeachment rendered by Senate cannot be called in question in any tribunal except for lack of jurisdiction or excess of constitutional power, since the Senate as to impeachment is a court of original, exclusive, and final jurisdiction.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Suit by John F. Maddox against James E. Ferguson and others. Judgment for plaintiff, and named defendant appeals. On certified questions from Court of Civil Appeals. Questions answered.

Love, Wagner & Wagner, and Jno. M. Mathis, all of Houston, Taylor & Hale, of Waco, and Jas. B. & Chas. J. Stubbs, of Galveston, for appellant.

Guynes & Sanders, of Houston, for appellees.

COKE, Special Chief Justice. The Court of Civil Appeals for the First District has certified to this court certain questions, arising in the above suit, with an accompanying statement which we summarize as follows:

The suit was brought by the appellee, John F. Maddox, a resident and qualified Democratic voter of Harris county, against James E. Ferguson and the members of the Democratic state executive committee, to enjoin the placing of the name of the defendant Ferguson, as a condidate for Governor, on the official ballot at the forthcoming Democratic primary, to be held in July, 1924.

The petition alleges, and the facts show:

(1) That the said Ferguson is an announced candidate for nomination by the Democratic party for the office of Governor at such coming primary, and has duly filed with the state chairman of the executive committee his written request in manner and form as required by law, to have his name appear on the official ballot of that party at said primary election, as a candidate for its nomination for Governor.

(2) That on September 25, 1917, the Senate of Texas, sitting as a court of impeachment for the trial of certain charges preferred by the House of Representatives, by its judgment of that date, decreed that he be removed from the office of Governor and thereafter "be disqualified to hold any office of honor, trust or profit under the state of Texas."

The plaintiff alleged that said judgment is valid, subsisting, and makes the said Ferguson ineligible to hold the office of Governor if he should be nominated and elected thereto.

The defendant Ferguson, after admitting his candidacy and his efforts and purpose to

get his name placed upon the Democratic ticket, answered denying his alleged ineligibility, and averring that said judgment was and is void, and ineffectual to disqualify him, for these reasons:

(a) Said judgment was rendered September 25, 1917, at a time when he was not Governor, and not subject to the jurisdiction of the Senate sitting as a court of impeachment, because, although he had theretofore held the office of Governor, he nevertheless had resigned his said office on September 24, 1917, and said judgment was rendered after his resignation, and after the Lieutenant Governor had succeeded to and was performing the duties of the office.

(b) Said judgment and impeachment proceedings constituted a quasi criminal action, in which it was attempted to inflict on him certain punishment for offenses alleged to have been committed by him, and, by the terms of said judgment, he was convicted of and punished for offenses not defined by the Constitution and laws of this state; that neither the Constitution nor any act of the Legislature had defined the offenses for which such punishment could be inflicted upon him, and that the effort of the Senate to punish him for the offenses alleged was violative of the Constitution and of article 3 of the Penal Code, as well as the general public policy of this state.

(c) That portion of the judgment which attempted to impose on him the penalty of disqualification to hold office as a punishment for acts alleged to have been committed by him was violative of the Constitution, and especially of section 16 of article 1, because such punishment had not been affixed by the Constitution or any existing law, as a penalty for such alleged acts.

(d) The articles of impeachment were filed by the House during a called session of the Legislature, and the Senate thereupon resolved itself into a court of impeachment, and proceeded with the trial of the charges, until the end of the called session, which expired August 29, 1917, when the Legislature adjourned without disposition having been made of said charges, or of the trial of the defendant thereon, which trial was then in progress, and which was concluded during another called session, convened on August 31, 1917; that the action of the Senate in rendering judgment in pursuance of proceedings initiated at the previous session was void.

(e) The judgment was rendered upon charges adopted by the House and filed with the Senate, and the trial was had at a special session of the Legislature, convened by proclamation of the Governor, which proclamation did not designate or authorize such action, in violation of section 40, art. 3, of the Constitution.

The defendant Ferguson prayed that the injunction sought by the plaintiff be denied, and that the committee be enjoined from refusing to certify his name as a candidate for Governor at the coming primary election.

The other defendants, the members of the executive committee, answered declining to predict what action they would take on the application of the defendant Ferguson to have his name placed on the ticket, and averring that they would discharge their duty as members of the committee, when they should meet to consider that matter, as they might determine at that time.

The trial court, after hearing evidence, granted the relief prayed for by the plaintiff, and denied the relief prayed by the defendant Ferguson; from which judgment the latter appealed, making the plaintiff, Maddox, and the members of the executive committee, appellees.

It was shown that the Second Called Session of the Thirty-Fifth Legislature convened on August 1, 1917, and adjourned sine die August 30, 1917; and that the Third Called Session convened August 31, 1917, and adjourned sine die September 29, 1917. Certified copy of the judgment of the Senate, sitting as a court of impeachment, decreeing the removal of the appellant Ferguson from the governorship, and his disqualification to hold any office of honor, trust, or profit, under the state of Texas, was introduced; and these additional facts were proved:

(1) The impeachment charges were presented by the House of Representatives to the Senate, and trial thereon by the latter was begun during the Second Called Session of the Thirty-Fifth Legislature, but the trial was not completed nor the judgment of the Senate rendered until near the end of the Third Called Session of that Legislature.

(2) The written resignation of appellant as Governor, the terms of which specified that it was to take effect immediately, was filed in the office of the secretary of state on September 24, 1917, while the judgment of impeachment and ouster was rendered on the next day, September 25, 1917.

(3) That the Thirty-Fifth Legislature of Texas convened in its Second Special Session on August 1, 1917, in obedience to proclamation of James E. Ferguson, then Governor of Texas, calling it in special session "for the purpose of considering and making additional appropriation for the support and maintenance of the State University for the two fiscal years beginning September 1, 1919."

(4) On August 29, 1917, W. P. Hobby, acting Governor of the state of Texas, called the Third Special Session of the Thirty-Fifth Legislature of the State of Texas to convene at 10 o'clock a. m. on August 31, 1917, for a number of purposes specified in his proclamation calling such special session, the same being Nos. 1 to 6, both inclusive, No. 5 thereof reading as follows:

"To facilitate a fair and impartial trial of the articles of impeachment preferred by the House

of Representatives against the Governor of Texas."

[1] The questions certified will be set out at length as they are considered. In logical order, question No. 4 should be considered first. It is as follows:

"4. Is the judgment of impeachment void because the charges on which it rests were adopted and filed by the House of Representatives in the Senate and the trial of appellant in accordance therewith was entered upon by the latter body at a special session of the Legislature convened by a proclamation of the Governor, which did not designate or specify such action as a purpose for which it was called, pursuant to section 40, article 3, of the Constitution?"

Under the Constitution, the powers of government are divided into three departments —legislative, executive and judicial—"and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Article 2, § 1. The legislative power of the state "shall be vested in a Senate and House of Representatives, which together shall be styled 'the Legislature of the State of Texas.'" Article 3, § 1. "The enacting clause of all laws shall be: 'Be it enacted by the Legislature of the State of Texas.'" Article 3, § 29. "The Legislature shall meet every two years, at such time as may be provided by law, and at other times when convened by the Governor." Article 3, § 5. "The Governor may, on extraordinary occasions, convene the Legislature at the seat of government. * * * His proclamation therefor shall state specifically the purpose for which the Legislature is convened." Article 4, § 8. "When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days." Article 3, § 40.

Article 15 of the Constitution relates to "impeachment":

"The power of impeachment shall be vested in the House of Representatives." Article 15, § 1.

"Impeachment of the Governor, Lieutenant Governor, Attorney General, Treasurer, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Courts, shall be tried by the Senate." Article 15, § 2.

"When the Senate is sitting as a court of impeachment, the senators shall be on oath, or affirmation, impartially to try the party impeached; and no person shall be convicted without the concurrence of two-thirds of the senators present." Article 15, § 3.

"Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this state. A party convicted on impeachment shall also be subject to indictment, trial and punishment, according to law." Article 15, § 4.

"All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the duties of their office during the pendency of such impeachment. The Governor may make a provisional appointment to fill the vacancy occasioned by the suspension of an officer until the decision on the impeachment." Article 15, § 5.

"The Legislature shall provide by law for the trial and removal from office of all officers of this state, the modes for which have not been provided in this Constitution." Article 15, § 7.

From this review it is seen that the Constitution creates a House of Representatives and a Senate, each separate and distinct from the other; that these two bodies, or houses, together constitute "the Legislature"; and that upon this Legislature is conferred all legislative power.

But the sole function of the House and Senate is not to compose "the Legislature," and to act together in the making of laws. Each, in the plainest language, is given separate plenary power and jurisdiction in relation to matters of impeachment: The House the power to "impeach," that is, to prefer charges; the Senate the power to "try" those charges. These powers are essentially judicial in their nature. Their proper exercise does not, in the remotest degree, involve any legislative function.

In the matter of impeachment the House acts somewhat in the capacity of a grand jury. It investigates, hears witnesses, and determines whether or not there is sufficient ground to justify the presentment of charges, and, if so, it adopts appropriate articles and prefers them before the Senate. In doing these things, the House is not "legislating," nor is it conducting an investigation in order that it may be in better position to legislate. It is investigating facts in order that it may determine whether one of the people's servants has done an official wrong worthy of impeachment under the principles and practices obtaining in such cases, and, if so, to present the matter for trial before the constituted tribunal. All of this is judicial in character.

The same is true of the Senate, except its powers are so clearly judicial as to make argument on the point almost superfluous. "Impeachment," says the Constitution, shall be "tried" by the Senate. During the trial the Senate sits "as a court of impeachment," and at its conclusion renders a "judgment." Obviously, a body authorized to sit as a "court" to "try" charges preferred before it, that is, to hear the evidence and declare the law and to render "judgment," possesses judicial power, and in its exercise acts as a court. The Senate sitting in an impeachment trial is just as truly a court as is this court. Its jurisdiction is very limited, but such as

it has is of the highest. It is original, exclusive, and final. Within the scope of its constitutional authority, no one may gainsay its judgment.

The powers of the House and Senate in relation to impeachment exist at all times. They may exercise these powers during a regular session. No one would question this. Without doubt, they may exercise them during a special session, unless the Constitution itself forbids. It is insisted that such inhibition is contained in article 3, § 40, which provides that legislation at a special session shall be confined to the subjects mentioned in the proclamation of the Governor convening it. This language is significant and plain. It purposely and wisely imposes no limitation, save as to legislation. As neither House acts in a legislative capacity in matters of impeachment, this section imposes no limitation with relation thereto, and the broad power conferred by article 15 stands without limit or qualification as to the time of its exercise.

We therefore answer question 4 in the negative, and hold that the House had authority to impeach Governor Ferguson and the Senate to enter upon the trial of the charges at the Second Called Session of the Thirty-Fifth Legislature, though the matter of his impeachment was not mentioned in the proclamation convening it.

[2] Question No. 2 is next in logical order. It is as follows:

"2. Does the fact that the articles of impeachment were presented by the House of Representatives to and the trial thereof by the Senate was begun at one special session, that is the Second Called Session of the Thirty-Fifth Legislature, while the completion of the trial and the judgment of ouster therein occurred at a subsequent session, to wit, the Third Called Session of the same Legislature, render such judgment invalid?"

In this connection the record shows that the articles of impeachment were filed in the Senate August 24, 1917, during the Second Called Session of the Thirty-Fifth Legislature, which expired August 30th. On August 29th the acting Governor issued his proclamation convening the Third Called Session August 31st. On August 30th the Senate resolved itself into a court and was duly sworn, and Governor Ferguson appeared and filed his answer. Thereafter and on the same day it recessed as a court until Monday, September 3d, at which time the articles of impeachment and the Governor's answer were read and the trial proceeded with.

From the inception to the conclusion of impeachment proceedings the House and Senate, as to that matter, are not limited or restricted by legislative sessions. As has been shown, their constitutional powers with regard to impeachment are not legislative and are not affected by article 3, § 40. Each House is empowered by the Constitution to exercise certain functions with reference to the subject-matter; and as they have not been limited as to time or restricted to one or more legislative sessions, they must necessarily procede in the exercise of their powers without regard thereto. At the end of a legislative session the House does not cease to exist, and its power, so far as its proper participation in a pending impeachment proceeding is concerned, is not affected, or the effect of what it has already properly done impaired. When the House presented the impeachment charges to the Senate, a major part of its constitutional duty was done, though, in accordance with established parliamentary practice, it must still, through its managers, in the role of prosecutor, conduct the trial in the Senate. But the expiration of the legislative session before the indictment preferred by it could be fully tried, did not impair the effect of the indictment or make it necessary for the House to proceed anew and return another. The Constitution does not require this. It is not a reasonable implication from any of its provisions, and to so hold would be illogical and contrary to pertinent precedents and analogies. Articles of impeachment, when preferred by the House, stand for trial before the Senate as a constitutional court, created and organized for such purpose, and whether that trial is concluded at the then legislative session or at some subsequent one is wholly immaterial.

And the same reasoning applies to the Senate. When the House prefers charges, the Senate, under the mandate of the Constitution, resolves itself into a court for the trial of the charges, and it may and must continue this trial until the matter is disposed of by final judgment. Like the House, it does not cease to exist at the expiration of the legislative session. It is a court and continues such regardless of legislative sessions. The fact that the impeachment trial may extend from one legislative session into another and cover parts of both is not material. The Constitution creates the court; it does not prescribe for it any particular tenure, or limit the time of its existence. By indubitable reason and logic it must have power and authority to sit until the full and complete accomplishment of the purpose for which it was created, limited, perhaps, by the tenure of office of the persons composing it.

We therefore answer question 2 in the negative, and hold that an impeachment proceeding, begun at one session of the Legislature, may be lawfully concluded at a subsequent one.

[3] The third question submitted is as follows:

"3. Is such judgment invalid and void because of the fact that at the time it was rendered neither the Constitution nor any statute of this state either defined or designated, within the purview and meaning of article 3 of title 1 of our Penal Code, the specific acts and conduct

for which an individual could be removed from office and disqualified from thereafter holding any office of honor, trust, or profit under the state of Texas; in other words, there being in Texas no such constitutional or statutory definition or designation, does the Senate's decree in this instance visit upon appellant such a punishment as this penal statute declares cannot be done, unless the act or omission upon which it is based 'is made a penal offense, and a penalty is affixed thereto by the written law of this state'?"

While impeachable offenses are not defined in the Constitution, they are very clearly designated or pointed out by the term "impeachment," which at once connotes the offenses to be considered and the procedure for the trial thereof.

"Impeachment," at the time of the adoption of the Constitution, was an established and well-understood procedure in English and American parliamentary law, and it had been resorted to from time to time in the former country for perhaps 500 years. It was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law. Generally speaking, they were designated as high crimes and misdemeanors, which, in effect meant nothing more than grave official wrongs.

In the nature of things, these offenses cannot be defined, except in the most general way. A definition can, at best, do little more than state the principle upon which the offense rests. Consequently, no attempt was usually made to define impeachable offenses, and the futility as well as the unwisdom of attempting to do so has been commented upon. In the Constitution of the United States impeachable offenses are designated as "treason, bribery, or other high crimes and misdemeanors." Const. U. S. art. 2, § 4. Substantially the same language is used in many of the state Constitutions. In others "misdemeanors in office," "maladministration," "oppression in office," and the like, are declared to be impeachable offenses.

When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted. The power granted to the House to "impeach," and the Senate to try "impeachment," carries with it, by inevitable implication, the power to the one to prefer and to the other to try charges for such official delinquencies, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of the English Parliament and the parliamentary bodies in America. The grant of the general power of "impeachment" properly and sufficiently indicates the causes for its exercise.

[4] It is said this construction of the Constitution confers arbitrary and unrestrained power on the Senate. Not so at all. There is no such thing under our government as arbitrary power. As has often been said, it is a government of laws, and not a government of men. We most emphatically repudiate the idea that any officer may be arbitrarily impeached. In the exercise of its exalted jurisdiction, the Senate must proceed according to law. It must ascertain the law by an examination of the Constitution, legal treatises, the common law and parliamentary precedents, and therefrom determine the nature, elements, and characteristics of impeachable offenses, and, in the light of reason, apply the principles so worked out to the facts of the case before it. This is not arbitrary power. It is the exercise of judicial authority under the Constitution. There is a vast difference between arbitrary power and final authority. This court, in most cases, has final authority; but it has, and can exercise, no arbitrary power. So the Senate, sitting as a court of impeachment, has, and in the nature of things should have, final authority; but it, too, is wholly lacking in arbitrary power.

There is no conflict between article 3 of the Penal Code and the sections of article 15 of the Constitution relating to impeachment. They relate to different matters and operate in entirely different spheres. "The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law." The Constitution, in relation to impeachment, has in mind the protection of the people from official delinquencies or malfeasances. The Penal Code, on the other hand, has in mind an offender merely as a member of society who should be punished for his individual wrongdoing. The primary purpose of an impeachment is to protect the state, not to punish the offender. True, he suffers, as he may lose his office and be disqualified from holding another; but these are only incidents of a remedy necessary for the public protection. There is no warrant for the contention that there is no such thing as impeachment in Texas because of the absence of a statutory definition of impeachable offenses.

We therefore answer question 3 in the negative, and hold that the Constitution sufficiently indicates what offenses are impeachable, and that article 3 of the Penal Code is without application in the premises.

[5] The fifth question is as follows:

"5. Is that portion of such judgment decreeing that 'the said James E. Ferguson be disqualified to hold any office of honor, trust, or profit under the state of Texas,' invalid be-

cause of the fact that the statutes existing at that time carrying into effect article 15, §§ 1, 2, 3, and 4, of the Constitution, that is chapter 1 of title 98, Vernon's Sayles' Statutes of 1914, failed to denounce such a punishment against or visit such a penalty upon an individual as a result of his impeachment?"

What has been said answers this question. The Constitution, in the matter of impeachment of the officers mentioned in section 2 of article 15, is clearly self-executing. It needs no aid from the Legislature. The Senate is plainly authorized by section 4 of article 15 to pronounce "judgment" that the impeached official shall be disqualified from holding office under this state. It is not believed that chapter 1 of title 98 of the Revised Statutes has relation to this matter, or was intended to affect this right. But if so, it is plainly void. Obviously, the Legislature may not deprive the Senate of the power to enter such judgment as the Constitution authorizes.

We therefore answer question 5 in the negative, and hold it is immaterial that chapter 1 of title 98 of the Revised Statutes does not provide that impeachment shall constitute disqualification to hold office.

[6] The last question certified is No. 1, which is as follows:

"1. Is the judgment of impeachment so rendered on September 25, 1917, void as a result of the fact that the written resignation of James E. Ferguson as Governor, 'same to take effect immediately,' was filed in the office of the secretary of state on September 24, 1917?"

The record shows that Governor Ferguson appeared before the bar of the House and answered the charges preferred against him, and participated in the trial thereof until the vote was taken and he was found guilty. Thereafter, and before the Senate, in due course of orderly procedure, could pronounce its judgment, he filed his resignation with the secretary of state.

On no admissible theory could this resignation impair the jurisdiction or power of the court to render judgment. The subject-matter was within its jurisdiction. It had jurisdiction of the person of the Governor; it had heard the evidence and declared him guilty. Its power to conclude the proceedings and enter judgment was not dependent upon the will or act of the Governor. Otherwise, a solemn trial before a high tribunal would be turned into a farce. If the Senate only had the power to remove from office, it might be said, with some show of reason, that it should not have proceeded further when the Governor, by anticipation performed, as it were, its impending judgment. But under the Constitution the Senate may not only remove the offending official; it may disqualify him from holding further office, and with relation to this latter matter his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh-hour resignation.

We therefore answer the first question in the negative, and hold that the resignation of Governor Ferguson in no manner impaired the power or jurisdiction of the Senate to render judgment disqualifying him from holding any office under this state.

Extended reference to authorities is not practicable or necessary. The following, among others, have been consulted and generally support the conclusions reached: Wooddeson's Lectures, vol. 2, p. 596 et seq., being "Lecture XL of Parliamentary Impeachments"; Rawle on the Constitution, chapter XXII, "Of Impeachments"; Pomeroy's Constitutional Law, § 715 et seq.; Law & Practice of Legislative Assemblies, by Cushing, part 9, Impeachment, p. 979 et seq.; Story on the Constitution, vol. 1, §§ 788–812; Foster on the Constitution, vol. 1, c. XIII, and especially section 93, p. 581 et seq.; American & English Ency. Law, vol. 15, pp. 1064–1071; People v. Hayes, 82 Misc. Rep. 165, 143 N. Y. Supp. 325; "The Impeachment of the Federal Judiciary," 26 Harvard Law Review, pp. 687–692; "The Law of Impeachment," 6 Am. Law Reg. (N. S.) 641; Opinions of Justices, 14 Fla. 289; State v. Hastings, 37 Neb. 96, 55 N. W. 774.

[7] This opinion should not be concluded without a statement as to the status under our organic law of the judgment of the Senate, sitting as a court of impeachment. It is unquestionably true that such judgment cannot be called in question in any tribunal whatsoever, except for lack of jurisdiction or excess of constitutional power. For instance, an attempt by the Senate to try an officer who had not been impeached by the House, or to pronounce a judgment other than that authorized by section 3, of article 15, would be without effect and its action void. The Senate must decide both the law and the facts. It must determine whether or not the articles presented by the House set forth impeachable offenses, and it must determine whether or not these charges are sustained by the evidence produced. Its action with reference to these matters is undoubtedly within its constitutional power and jurisdiction. This is as it should be. The power reposed in the Senate in such case is great, but it must be lodged somewhere, and experience shows there is no better place. The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as a court of impeachment, are not exempt from this judicial power; but so

long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction.

FERGUSON et al. v. MANSFIELD et al. (No. 3432.)

(Supreme Court of Texas. June 28, 1924.)

1. Principal and agent ⇐100(4) — Attorney authorized to recover lands and sell them without authority to pledge vendor's lien note.

One given power of attorney to recover lands and sell them was without power, to secure his own debt, to pledge a vendor's lien note given to him as "attorney," though he owned half of note, his power being limited to collecting note in money.

2. Parties ⇐29—Persons giving power of attorney to recover and sell interest in land held necessary parties to suit involving vendor's lien note.

Persons giving power of attorney to recover and sell interest in land to one having a half interest were necessary parties to a suit involving vendor's lien note received by attorney for land.

3. Principal and agent ⇐79(7)—Issue held raised as to whether or not action of attorney in becoming joint owner with purchaser of property was permissible.

In action involving proceeds of sale of land by attorney under power, issue *held* clearly raised as to whether or not action of attorney in becoming joint owner with purchaser of property was permissible under rules of agency.

4. Bills and notes ⇐132—Instrument payable upon condition, not payable until that condition has happened.

An instrument payable upon a condition which does not import an absolute liability is not payable until that condition has happened.

Error to Court of Civil Appeals of First Supreme Judicial District.

On rehearing. Former opinion overruled and judgment reversed and cause remanded.

For former opinion, see 235 S. W. 524.

Love, Wagner & Wagner, of Houston, for plaintiffs in error.

Kittrell & Kittrell, of Houston, for defendants in error.

L. B. Moody and Lewis R. Bryan, both of Houston, for McDonald & West.

CURETON C. J. This suit was brought by H. P. Mansfield against the Temple State Bank, James E. Ferguson, C. F. Stevens, Dayton Mills, a corporation, Duval West, R. McDonald, and Mary McDonald, individually and as independent executrix of the estate of R. McDonald, deceased, and the Houston National Exchange Bank. The suit is an equitable one in its nature, involving an accounting and various other matters of an equitable character, including a receivership. The judgment in the trial court was for Mansfield and others, and the appeal by Ferguson and the bank. The case was affirmed on appeal. (Tex. Civ. App.) 215 S. W. 234. Writ of error was granted, and the case first affirmed on recommendation of the Commission of Appeals. 235 S. W. 524. Rehearing, however, was granted, and the case heard by the Supreme Court.

We will not undertake to make a complete statement of the case, since the opinion of the Court of Civil Appeals is available. On June 6, 1902, and October 10th of the same year, certain parties who will be hereafter designated as the Davis heirs executed powers of attorney to the defendant in error H. P. Mansfield. The powers of attorney were coupled with a one-half interest, conveyed to Mansfield, and relate to certain land in Liberty county, which, or the proceeds of which, is involved in this litigation. By these powers of attorney the Davis heirs authorized Mansfield, as attorney in fact, in their "name, place and stead" to ask, demand, sue for and clear the title to the lands involved, and to "sell, convey and dispose of these lands." He was authorized to clear the title to the land, empowered to sell it, make deeds thereto, and "to perform any and all acts necessary to be done in and about the business of recovering and clearing the title to said land," as fully as the Davis heirs might do. No sale of any of the land, or the timber, or any compromise with reference to any part of same, could be made by Mansfield until the same had been first submitted to and ratified either by J. V. Lea or C. B. Martin, two of the parties who signed the powers of attorney. This was all the authority conferred upon Lea and Martin.

It may be noted here that none of the Davis heirs were made parties to this suit, and that the action was brought by H. P. Mansfield for himself, and not as an agent or attorney for the Davis heirs. Mansfield however prayed for a general accounting, and in the course of the accounting asks that he be accounted to as attorney named in a certain note for $2,500, hereafter referred to.

On January 13, 1910, the plaintiff in error, James E. Ferguson and L. Fouts, of Liberty county, entered into a contract the content of which is not disclosed by the record, except that it related to the lands made the basis of this litigation, and provided, among other things, for the cutting of timber and payment therefor. The contract is not in the record. Fouts acted for the Dayton Lumber Company, but Ferguson finally took the land back, and sold it directly to the Dayton Lumber Company for $48,000.

At the time of this agreement, and thereafter, in so far as the record discloses, the plaintiff in error, Ferguson, owned or held