

## **PLEASE NOTE**

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### **The Removal of Judges under the Act of Settlement (1701)**

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This paper will consider the operation of the Act, the processes adopted, and the consequential outcomes.

It is perhaps worth considering for a moment how important in consequence the Act was. And yet how little enthusiasm there was for it at the time, and how its passing was, in the words of Wellington later, “a damn near thing”. The Act only passed Parliament narrowly. It is said that it was carried by one vote only in Committee in the House of Commons. It is certain that the Act itself passed in the House of Commons “nemine contradicente” on May 14, 1701, but the Bill was but languidly supported. Many of the members, never more than 50 or 60 (out of a full house of 513) appear to have felt that the calling of a stranger to the throne was detestable, but the lesser of two evils. So the Bill was passed by 10% of the members. The passing of the Act is surrounded by myth, and records were then imperfectly kept, but Sir John Bowles, who introduced the Bill, was described as “a member of very little weight and authority”, who was even then thought to be disordered in his mind, and who eventually died mad! (1) Some of the great constitutional documents have been considered in a similar light: for example, the Second Reform Act in 1867. Smith, in a history of this Act, concludes that the bill survived “because a majority of the members of both Houses...dared not throw it out. They did not want it, they did not like it, they feared what it might do, but they passed it”. (2) So it was with the Act of Settlement, which, however, remains one of the defining moments in the evolution of some points of democracy in this country.

Not only did it further refine the limitations on the Constitutional monarchy, which had begun properly with the Bill of Rights, on February 13, 1689, but it considered the position of the judges. Hitherto considered “Lions under the King’s (or Queen’s throne)” by the earlier Stuarts, appointed and dismissed at the royal pleasure, independent status was now guaranteed by life tenure. This tenure, not seriously changed until the Judicial Pensions Act of 1959, was however to be **Quamdiu se bene gesserint** (that is, during good behaviour).

It was, in a way, a reflection of what would be expected of future sovereigns, who, under the Act, would reign, not only by the grace of God, but by the grace of Parliament.

However, as Evan Haynes has pointed out in his work “Selection and Tenure of Judges” (3) “It was still assumed, however, that on the death of the king, their commissions ceased, and should be renewed or not at the pleasure of the new sovereign. In 1720 a statute was enacted providing that judges (and certain other officers) should continue in office for six months after the demise of the Crown. Finally, in 1761, a Statute provided that “commissions of the judges shall remain in full force and effect during good behaviour, notwithstanding the demise of His Majesty or any of his heirs or successors”.

In fact, Queen Anne, shortly after her accession, discontinued (an interesting use of the word) two judges, notwithstanding their patents was *quamdiu se bene gesserint*. These judges were Turton and Hatsel. George I. discontinued three, and George II. One. These were, in 1714, Lord Trevor, who was removed from being Chief Justice of Common Pleas, Sir Thomas Powys, from the King’s Bench, and Sir William Bannister from being one of the barons of

the Exchequer. George II. Discontinued Judge Aland, who was again given a post in another court some fifteen months later.

The independence of the judiciary would date from 1701. However, a nascent feeling for checks and balances would mean that it was not an unfettered independence. Article 7 ensures that judges could be removed on an address to the Crown by both Houses of Parliament. It is interesting to reflect that, just a only one sovereign has effectively been removed since 1701, so also has only one judge been removed under Article 7.

Article 7, which is actually the 7<sup>th</sup> clause of the 3<sup>rd</sup> Article, actually reads as follows:

“That after the said limitations shall take effect, as aforesaid, (i.e. those concerning the royal succession) judges’ commissions be made quamdiu se bene gesserint, and their salaries ascertained and established but upon the address of both Houses of Parliament it may be lawful to remove them.”

(This important provision, which established the independence of the judges, as well as the 8<sup>th</sup> provision in the clause, that the royal pardon should not be pleaded to an impeachment, had been omitted in the hasty and imperfect Bill of Rights). (4)

Two matters particularly call for clarification. One is the procedural matter of the “address” by both Houses to the Sovereign to remove a judge; the other is the interpretation of the phrase “good behaviour”. Because of time constraints the cases of four judges will be dealt with here, and others briefly touched on. These cases concern three Irish judges, Fox, Johnson and Barrington, and the English judge Grantham.

Firstly, the matter of procedure: did the institution of the “address” following the Act of Settlement, substantially replace existing procedures, or was it simply an addition to them? The device of Impeachment had existed from the fourteenth century, and in 1700 its use was still fresh in the public memory. As far as Parliament and the Government was concerned, Impeachment was still a living and viable option, compared with the untried “Address” for removal. The very uncertainty about this probably saved Justice Fox in 1805. The curious thing is that the last case of Impeachment, that of Lord Melville, was going on at the very same time.

But apart from Impeachment an unsatisfactory judge could also be removed by other devices, by Scire Facias and Criminal Information. What has happened, in effect, and it has taken a long time, is that the other devices have slipped into desuetude or actually been abolished. Impeachment has not been used since 1806, Scire Facias has not been used since 1830, and laying a criminal information was abolished by the Criminal Law Act 1967. (5)

Indeed, within the Act of Settlement itself, the device of Impeachment is specifically mentioned, there being a clause which states that a royal pardon will be no bar to an Impeachment, a further undermining of the prerogative powers.

Today, the overwhelming evidence is that the judges cannot be removed, except upon an address.

A further clarification in this area concerns criticism of the judges, not amounting to removal, but which clearly undermines their reputation and thus their future credibility in performance. It seems that Parliament does not exercise any disciplinary function over judges short of removal by an Address, and that it cannot pursue a course with the final aim, not of an Address for removal, but of censure, criticism or condemnation of judicial conduct.

This view, as Shetreet has noted, has been expressed many times in Parliament (6)

In Baron Smith’s case in 1834 it was suggested that Parliament had no right to institute an inquiry into the conduct of a judge “with any other view than to address the Crown for his removal”. Otherwise, “the independence of the judicial bench was a mockery and the (Act of Settlement) was no better than wastepaper” .(7)

Thus, in this sense, the power to move an Address for removal is also restricted and limited.

The actual way in which an Address for removal was conducted was a matter of some Parliamentary agonising over a considerable length of time and was only gradually resolved. In Fox's case, for example, in 1805, the case was debated for almost two years in the House of Lords and evidence heard, both in a Select Committee, and in the House sitting as a Committee of the whole House. Eventually, upon a petition of the judge, Lord Granville, the Prime Minister, moved that that proceedings against the judge be abandoned on the grounds that the House of Lords could not entertain an inquiry into the conduct of a judge before the House of Commons had looked into the matter. For if the House of Lords passes a resolution for an Address for removal, and **then** the matter goes to the House of Commons, the Commons may constitutionally resolve that the charge against the judge ought to have been brought by way of Impeachment. In such a case the Lords, having prejudged the case, would not be able to try it. Though there was a strong minority, consisting of Lord Eldon and others, against it, Lord Granville's motion was agreed to, and there the matter ended. The lack of clarity in the matter is palpable, and greatly assisted Mr. Justice Fox, who remained on the bench until he resigned ten years later, in 1816.

One could say that he escaped because of procedural uncertainty. The better view now is that proceedings may originate in either House, preferably in the House of Commons!

As to the procedure to be followed upon a motion for an address, Sir Charles Wetherell (8) Said:

"As a constitutional question (address) for the removal of a judge from his office ought to be founded in evidence at (the) bar." The Solicitor General in another case thought it was unconstitutional to condemn a judge of rank and character without giving him an opportunity of being heard". This is of course only the basic rules of Natural Justice.

Mr. McNeil argued in Mr. Justice Grantham's case in 1906 that "it had been held to be in accordance with constitutional practice that such procedure (for address) should not be instituted unless the prima facie case against the judge was so strong as to justify an address", and in the same case, the Attorney General thought that the prima facie case "was the first constitutional step for proceeding to an address".

In the light of these principles, Shetreet suggested that some basic principles governing the procedure and grounds for an address have arguably become constitutional conventions. As Professor Hood Phillips said, "a long series of precedents all pointing in the same direction, is very good evidence of a convention".

And, of course, by 1906, the Act of Settlement was over two hundred years old, and the precedents had been accumulating.

But who should actually start matters-put the whole procedure in motion?

Proceedings for an address for removal may be initiated by a motion for inquiry into the conduct of a judge. The motion may be based on a petition of an aggrieved individual, on a report of a commission imputing misconduct to a judge, or an investigation conducted by the M.P., who moves that proceedings be initiated against the judge.

Parliament may pass a resolution for an address to the Crown praying that a Commission of inquiry shall investigate the administration of a certain court presided over by a particular judge, thereby in fact ordering the government to make an appropriate investigation into the conduct of the judge, which will eventually serve as a basis for debate in Parliament.

The dangers however are clear. How is it possible, considering the doctrine of the separation of power, to extricate the Government itself from somehow taking part in the whole process? The experience since 1700 is that it has not always been possible, and sometimes the Government and the Prime Minister are most obviously and ostensibly involved. This is all part and parcel of the second question, which is the interpretation of "good behaviour" and whether this does, or does not include dabbling in politics and expressing political opinions.

This development would apply only to the procedural safeguards of hearing, notice, distinct charges, prima facie case and to the grounds for removal, such as the **requirement for a moral element in the misconduct**, insufficiency or error of judgment, or of matter of court practice, and this would leave open the question of how much a public official's private life could be considered in the circumstances. Thus, the second question, concerning interpretation of what constitutes good or bad behaviour, flows naturally from the first question of procedure.

Regarding the involvement of the Government itself in these matters, the general view is that it, the Government, ought not to institute proceedings in Parliament against judges; this should be done by ordinary members of the House.

However, as will be seen, members of the Government cannot usually forbear from making comments, and sometimes significant and consequential ones.

Not only that, but from Mr. Justice Grantham's case II in 1911, it is evident that sometimes the Government will be expected to take the initiative. In that case, the Prime Minister, Asquith, stated that, as the conduct of the judge was universally condemned, the Government "does not propose to invite Parliament on this occasion to take the extreme step of addressing the Crown for the removal of the judge".

In Barrington's case in 1830, the Government actually initiated the proceedings and actively supported an address for removal in both Houses. Indeed, the Attorney General and the Solicitor General conducted the case against Sir Jonah Barrington, in the House of Lords, after a resolution for an address for his removal had been passed in the Commons.

#### **"Good behaviour": the case of Justice Luke Fox (1805)**

So, to proceed to the second question, what is, or what is not "good behaviour" or what constitutes "bad behaviour"?

A look at the four cases chosen for this examination casts light on this. Luke Fox had three petitions presented against him in the House of Lords in 1805. Mr. Justice Fox was alleged to have introduced political topics into his instructions to the Grand Jury at Assizes.

It is said that he told them it was their duty to address His Majesty to have the Lord Lieutenant of Ireland removed. He was also charged with having tried to persuade the commanding officer of a regiment to do the same. Likewise, he was accused of imposing a fine of five hundred pounds on the High Sheriff for being late in meeting him when he went to Assize, and with insulting a petty jury. So it seems political interference and bias went hand in hand with high handed behaviour as a judge. In his case a special statute was passed by Parliament "to continue the proceedings in the House of Lords touching the conduct of Luke Fox...notwithstanding any prorogation or dissolution of Parliament".

#### **"Good behaviour": the case of Judge Robert Johnson (1805)**

Only one case is recorded in modern times of a superior judge prosecuted for a criminal offence. In 1805 Robert Johnson, one of the judges of the Irish Court of Common Pleas, was prosecuted upon an indictment for criminal libel on the Earl of Hardwicke, Lord Lieutenant of Ireland, and other high officials. The words complained of were contained in a series of articles published in England under a false name. The publisher was convicted and revealed the name of the contributor: put not your faith in publishers!

Because the publication had taken place in England, the trial also took place in England. The indulgence of Mr. Justice Johnson in political controversy and the use of very strong terms were utterly inconsistent with his judicial office and might have justified his removal from the bench. So what did he write? Here is an extract:

“It(the publication) defames the Lord Lieutenant as a man only fit to be a feeder of sheep, states that his head is made up of particles of a ligneous tendency: and then, comparing it with the Trojan Horse, adds that, notwithstanding its innocuousness, its hollowness would soon be filled with instruments of mischief. As to the Lord Chancellor of Ireland, it degrades him in terms no less libellous...it likewise traduces Mr. Justice Osborne, and states him to have acted corruptly under the influence of Mr. Marsden, the Secretary of State, whom it accuses of having washed his stained hands in the very fountain of justice”.(9)

Judge Robert Johnson was convicted in the King’s Bench in Westminster, on November 23, 1805, of a libel on the Earl of Hardwicke, Lord Redesdale, the Lord Chancellor, and Mr. Justice Osborne, a judge of the Irish Court of King’s Bench.

An opportune change of government saved him from worse. It brought in a new Attorney General, who entered a Nolle Prosequi between conviction and sentence, and the judge retired from the bench on a reduced pension. Saved not by the bell, but the ballot box! Proceedings had been already instituted against him, but of course died with the new political ascendancy.

### **“Good behaviour”: the case of Sir Jonah Barrington (1830)**

The third case is that of Sir Jonah Barrington in 1830. It was charged that Sir Jonah on several occasions had appropriated for his own use money paid into his court, the Admiralty Court of Ireland. This money concerned the sale of various derelicts, including the “Nancy” and the “Redstrand”, and the sums were 682 pounds, two hundred pounds, and forty pounds, not inconsiderable for those days! This did not catch up with him until 1828, and he must have thought he had got away with it. Sir Jonah’s embezzlement was exposed by the 18<sup>th</sup> report of the Commissioners on the Courts of Justice in Ireland. The report was laid before the House of Commons and referred to a Select Committee which investigated the matter, and confirmed the charges against the judge. Sir Jonah did not accept the Committee’s invitation to appear before it, or to state the persons whom he wished to be examined by the Committee.....

A committee was appointed to draft the address to the Crown, which was approved by the House. The address recapitulated the acts of which Sir Jonah had been found guilty, and concluded:

“...it is unfit and would be of bad example that he should continue to hold the said office. We therefore humbly pray Your Majesty that Your Majesty will be pleased to remove Sir Jonah Barrington from the office he holds, Judge of the High Court in Admiralty in Ireland...”

Certain members were appointed by both Houses to present the address to His Majesty. In his reply His Majesty said:

“I cannot but regret the circumstances which had led to this address. I will give directions that Sir Jonah Barrington be removed from the office he holds of Judge of the High Court of Admiralty in Ireland”.

This was, interestingly, one of the first acts of the new king, William IV., who had acceded on June 26, 1830. The king had been an admiral himself and knew all about derelicts!

Barrington went to France, where he died at Versailles on 8 April 1834.

A later authority, Professor A.D.Gibb, expressed the view that Barrington may have had a valid defence. It is more than probable that he did. (10)

Nevertheless, to date, he remains the one and only judge to have been removed under Article 7 of the Act of Settlement. Clearly, embezzlement of public monies constitutes bad behaviour.

It is noteworthy that, except for the case of Jonah Barrington, none of the complaints against judges since 1700 have been of a serious nature, and none have involved corruption, criminality or improper motives.

### **“Good behaviour”: the cases of Mr. Justice Grantham (1906 and 1911)**

The fourth case, that of Sir William Grantham (1835-1911), Mr. Justice Grantham, involved two investigations or inquiries, which took place in 1906 and 1911, known as Grantham I and Grantham II.

Cecil Harvey QC, writing in 1958, said that in his time at the bar “there had been some dreadfully bad judges. None worse than Lord Hewart, Lord Chief Justice”. He called Mr. Justice Darling “a real shocker”. (11) To add to this, Henry Cecil thought that “Mr. Justice Grantham was a really bad judge”.(12)

But this begs the question: in what way was he a really bad judge? And the answer seems to be in the question of unashamed political bias. Is political bias “some moral fault”?

The Act of Settlement is consistent, albeit implicitly, with the separation of powers, imperfectly developed or understood by most in 1700. The judge is appointed by the sovereign (on the advice of chief ministers) and is removable by the sovereign (but on an address by both Houses of Parliament).

So what did Grantham do? The 1906 case is known as the Yarmouth Election cases, and basically concerned a disputed election, upon which Grantham was called to adjudicate. This had been possible since the Election Courts were instituted after the Second Reform Act, in 1868. His fault lay in that he favoured the Conservative candidate.

Grantham’s political bias was well known, and it was of course unwise to have put him in the Election Court in the first place. He was widely seen as Conservative. He gave conflicting decisions which riled both Liberals and his colleagues, as “flagrantly partisan”.(13)

It is said that his name would not be known to posterity but for this case, but he had already become well known for the outspoken political prejudices. The trouble with the phrase “real moral blame” is that mores change or adjust at different periods in history. The Grantham cases illustrate this. His conduct caused much dissatisfaction, to say the least, and in 1906, at the request of no less than 347 M.Ps, time was found (it was an election year) to debate a motion in the House of Commons to consider his conduct in the trial of the Yarmouth Election petition.

Enter the usual Irishman, this time in the form of Swift McNeil, Nationalist M.P. for South Armagh. On 6<sup>th</sup> July 1906 he introduced a motion in the House of Commons to consider the judge’s conduct. The House, at the suggestion of the Prime Minister, Campbell Bannermann, declined to take the first step in a course which must have led to nothing less than the removal of the judge from the bench. This would have been the first successful removal of a **High Court judge** under the procedure provided by the Act of Settlement.

Grantham felt the stigma deeply, but was unwise enough to revive the memory of the debate five years later by an indiscreet speech to the Grand Jury at Liverpool on 7<sup>th</sup> February 1911. This brought him a severe rebuke from the Prime Minister, Asquith, in the House of Commons, one of the severest ever dealt to an English judge by a minister of the Crown.

It is interesting to see the contrast between this and the speech of Arthur Balfour in the course of the debate in 1906, when he said:

“a more transparently natural candid man than Mr. Justice Grantham never exercised judicial functions”. So perhaps it depends where one stands!

Henry Cecil had no doubts when commenting on his political prejudices: “He was known to be a dyed-in-the-wool Conservative, who was almost incapable of seeing any good in a Liberal”, and Sir Henry Campbell Bannermann himself, the one who defended him in the House of Commons, said that “the judge is so saturated with party feeling and prejudice that he cannot help them coming out. Everyone who knows him knows that that is the real cause (of his behaviour during the election petition)”. The Prime Minister also said that the judge was “avowedly a party man. We all know he is!”

This sounds suspiciously like some kind of acceptance of political bias!

Importantly, Swift McNeil admitted that the motion introduced in the Commons was not justified unless there was no other procedure competent, but, he said, it was absolutely certain that both Houses had got what was called a controlling power over the judges. This latter part is not entirely correct, as in over 300 years now Parliament has steadfastly refused to take advantage of its power...unless some moral turpitude was found in him (the accused judge). In Mr. Justice Grantham's case the Attorney General Sir John Walton said the House would not inflict the penalty (of an address to the Crown for removal) except for some defect of moral quality on the part of the judge.

So what can be concluded from these cases? The judge needed "a corrupt mind", "some moral fault", "badness of heart", and unless these were present there was no proof of "misbehaviour" as interpreted by Parliament. These were the expressions used when the great Lord Ellenborough fell foul of the system, not one, but twice, in 1813 and 1816. Discussing the character of Lord Ellenborough, Lord Campbell spoke of "incorruptibility now common to all judges"!

During the eighteenth century a principle had been established in Parliament that the sovereign should not be asked to remove a judge unless there had been some real moral blame attributable to him, or unless he becomes incompetent by reason of mental or physical ill health.

This last was certainly assisted by the Judicial Pensions Act 1959, requiring judges to retire at 75 years.

These cases leave one with the impression that from these four leading cases "moral blame" includes criminal libel, unwarranted political persuasion, embezzlement and downright political prejudice. Whether this brings us nearer to a closer meaning of defects of moral quality is another question.

I would like to leave you in conclusion with the words of the leading authority on Judges on Trial, Shetreet:

"It is perhaps appropriate here to emphasise that incidents of judicial misconduct mentioned in this work and the criticism made of judicial failings must not give an imbalanced impression of the general standard of judicial conduct.

There can be no doubt that on balance English judges maintain high standards of conduct and their integrity is beyond any shadow of doubt. The intensity of the reaction of the profession and the public in general to the deviation of a judge from the accepted standards of behaviour, reflects the strength of the system and is evidence of the high standards expected from judges".

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**Notes and References:**

- (1) "A Constitutional Monarchy": Michael L. Nash, *Contemporary Review*, April 1989. Vol. 254, No. 1479, pp. 205-208
- (2) Quoted by Graeme Orr in "Suppressing Vote-Buying: the "War" on Electoral Bribery from 1868, in *Journal of Legal History*, Vol.27, No.3, December 2006, pp.289-314
- (3) 1944, California, National Conference of Judicial Councils
- (4) Quoted in Taswell Langmead, *Constitutional History of Great Britain*, p.46
- (5) Shetreet, *Judges on Trial*, Amsterdam, New York and Oxford, 1976, p.157
- (6) *Ibid.*, p.163
- (7) *Ibid.*, p.164, quoting 21 Parl. Deb. 3<sup>rd</sup> ser.,713 (1834) 1 *Mirror of Parliament* (1834) at 304 &c.
- (8) Sir Charles Wetherell (1770-1846) solicitor, who became an expert on Parliamentary procedure, but was not trusted in all quarters!
- (9) Shetreet, p.158, quoting 29 *State Trials* 81 et seq. (1805)
- (10) Gibb, *Judicial Corruption in the United Kingdom*, 1957
- (11) Cecil Harvey, *The Advocates' Devil*, 1958
- (12) Henry Cecil, *Tipping the Scales*, 1974
- (13) Graeme Orr, *Suppressing Vote-Buying*, op.cit., quoting Hanham, *Elections and Party Management*, pp.280-281