

FEDERAL IMPEACHMENTS.*

WHAT THEN ARE THE OFFENCES WHICH MAY RESULT IN IMPEACHMENT?

In answering this question it is not possible to prepare a final list thereof, any more than it would be if it were to include only statutory crimes, in view of the fact that each session of Congress, and each session of every state legislature, adds to the number of crimes. It may be said in this, as in relation to everything else human, "The times change and we change with them." That which would be entirely justifiable at one time, in one place and under one set of circumstances, might be unjustifiable at another time, in another place, and under another set of circumstances. The Constitution itself recognizes this fact when it says: "The privilege of the writ of habeas corpus shall not be suspended except when in case of rebellion or invasion the public safety may require it."¹

But *inter armes silent leges* stands not alone. The standard of conduct required of a public official in a highly civilized community may be very different from that required of another in a place peopled only by miners, cowboys, and the like. A public officer, especially a judicial one, who, without cause, persists in parading the streets and appearing in his office in grossly fantastic costume, or who insults or abuses all those who have public business to transact with him, might well be impeached for a wilful disregard of those proprieties recognized by the community in which the business of the office is transacted, and necessary to be observed in order that the public may be properly served.

So, also, the circumstances surrounding the particular individual may vary the standard of conduct. For instance, that which was permitted of Judge Field during the time he was under threat of death by David S. Terry, would not be permitted

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¹ Art. I, Sec. 9.

of another under no such stress. One has only to read *Cunningham v. Neagle*,² to be satisfied of the necessity for that distinction.

But that impossibility does not permit of the conclusion that there is no limitation to the offences for which impeachment will lie. If that were so then the words "treason, bribery or other high crimes and misdemeanors" would themselves be meaningless words, and that which was intended to be a measure for preserving the government "pure and undefiled," might become a means of oppression, and therefore of impurity and defilement of that very government. As Judge Story well puts it in his *Commentaries on the Constitution of the United States*:³

"The doctrine, indeed, would be truly alarming that the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. What, otherwise, would become of the rules of evidence, the legal notions of crimes, and the application of principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly, that while every citizen of every state, originally composing the Union, would be entitled to the common law, as his birthright, and at once his protector and guide; as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. . . . If the common law has no existence, as to the Union, as a rule or guide, the whole proceedings are completely at the arbitrary pleasure of the government and its functionaries in all its departments."

In defining the power it is clear that the offence must be one of a serious character. The use of the word "high" imports that. It is said by Bryce in *The American Commonwealth*:⁴

"Impeachment . . . is the heaviest artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at. Or to vary the simile, impeachment it what the physicians call a heroic medicine, an extreme remedy, proper to be applied against an official guilty of political crimes, but ill adapted for the punishment of small transgressions."

² 135 U. S. 51 (1890).

³ 3rd Ed., Sec. 798.

⁴ 1st Ed., p. 208.

A public officer may be criminally convicted of trespass, though acting under a claim of right, or for excessively speeding his automobile, yet neither would justify impeachment. If, however, the conviction was followed by imprisonment, impeachment might be well maintained, for the office would be brought into contempt if a convict were allowed to administer it. It may be said that, in that event, impeachment would depend on the severity or lenity of a trial judge, and this would be so, but for the office's sake, a man may be said to be guilty of a "high misdemeanor" if he so acts as to be imprisoned. Surely the whole matter can well be left to the sound judgment and discretion of the House and Senate, which doubtless would see that spite and enmity did not result in conviction on impeachment.

For the same reason, while the misdemeanors for which impeachment will lie are not necessarily indictable offences, yet they must be of such a "high" character as might properly be made criminal.⁵ That far, at least, the maxim *noscitur a sociis* is applicable; for it is inconceivable that disconnected and unassociated matters would, in the same sentence, be made subject to the same criminal treatment, with possibly the same measure of punishment in case of conviction. The human mind does not travel, at one and the same time, along diverging lines, any more than the human body does; and hence those who framed and those who adopted the Constitution must alike have construed this clause as dealing with subject matters of the same generic kind.

Clearly also the offence must be one against the United States. Article II, Section 2, implies that.

Clearly also the offence must be one in some way affecting the administration of the office, from which it is sought to exclude the offender. This does not necessarily mean that it must have been an offence committed while performing the duties of the office; but it does mean that the character of the offence, or that which flows therefrom, must tend to bring the office, if the

⁵ Foster on the Constitution, Sec. 93; "Law of Impeachment," 20 Case and Comment, 454.

incumbent is continued therein, into ignominy and disgrace. It will not do to say that a convicted wilful murderer could defend himself from impeachment upon the ground that the murder was not committed *virtute officii*. Nor, on the other hand, will it do to say that an alleged offence justifies impeachment simply because the House and Senate is of opinion that the respondent should have acted differently, if that which he did in no way affects the administration of the office. It is highly improbable that "treason" would be committed *virtute officii*, and bribery may not be, yet both are impeachable whether so committed or not. Hence the maxim *noscitur a sociis* would seem to exclude that as a necessity in the cases of high crimes and misdemeanors.

In endeavoring to define this power, so as to give a working and workable rule, as well as a guide to the "civil officers of the United States" who may be impeached, as to the Senate, which may try them if they overstep the bounds, one naturally turns to the Constitution itself to see if there is anything therein which will aid in the definition. In viewing the matter from that high plane it must be admitted that the limits are negatively rather than positively expressed. For instance, the First Amendment would be construed to debar an impeachment on religious grounds, or for freedom of speech or of printing, or for peaceably assembling to petition for redress of grievances; notwithstanding the numerous instances of impeachment therefor in England. But beyond these, and a few similar matters, the Constitution does not aid the definition.

The assertion so frequently made, that in the case of judges, Article III, Section 1, which says that the judges "both of the supreme and inferior courts shall hold their offices during good behavior," furnishes a guide, is necessarily a fallacious one for three reasons:

(1) It would exclude "good behavior" as a test in the case of those officers, like the President and Vice-President, specifically named in the impeachment clause, because they hold for a term and not simply "during good behavior." The words "other high crimes and misdemeanors" being applied in that clause to both classes of officers alike, must be defined alike in

its application to both. If we assume that the standard of conduct would vary with the different offices, yet that would result by reason of the character of the offices, and not by reason of the fact that one class held "during good behavior," even though it be said that the difference in the term of office is a constitutional recognition of a difference in the classes. Would any one pretend that if, by constitutional amendment, the judges would hold their offices for a term of years, that the character of offences for which they could be impeached would thereby be changed? Yet so it must be if the effect claimed must be given to the words "during good behavior." It is not meant to assert thereby that a lack of "good behavior" is not to be considered, whether in the case of a judicial or any other civil officer; but it is meant to say that the term of the judge being "during good behavior" only, is not the determinative factor in considering what, as to him, constitutes an impeachable offence.

(2) It is only by reasoning in a circle, which always ends nowhere, that even a specious character can be given to the argument. Judges, like other civil officers, can only be impeached for "treason, bribery or other high crimes and misdemeanors." Their tenure of office is "during good behavior." To say then, that "treason, bribery or other high crimes and misdemeanors" is defined, *quoad* judges only, by "good behavior," is only to say that a judge is entitled to retain his office because of "good behavior," so long as he has not been impeached and convicted of "treason, bribery, or other high crimes and misdemeanors," for only by impeachment can he be removed; and we are exactly where we started.

(3) The argument is historically inaccurate. Prior to 1700, judges, like all other officials, were removable at the pleasure of the king. By a statute passed in that year (13 William III, c. 2) it is provided:

"Judges' commissions shall 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."

Under that statute a judge was safe from removal by the king alone, but his "good behavior" did not save his commission from

lapsing upon the death of the king; and it was not until the passage of the statute of 1 George III, c. 23 (1760), that the judges remained in office, despite the king's death. This statute provided:

"The commissions of judges for the time being shall be, continue and remain, in full force, during their good behavior, notwithstanding the demise of his Majesty (whom God long preserve) or any of his heirs and successors; any law, usage or practice to the contrary thereof in any wise notwithstanding."

The whole argument on this question may be stated syllogistically. Either the word "misdemeanor" does or does not include misbehavior. If it does, it needs not the aid of the "good behavior" provision. If it does not, then as impeachment only lies for "misdemeanors," it is of no value.

Nor is the question as to the grounds for an impeachment one entirely at large, as has sometimes been argued because of the use of the word "sole" in Article I, Section 2, which provides that the House of Representatives "shall have the *sole* power of impeachment," and in Article I, Section 3, which provides that the Senate "shall have the *sole* power to try all impeachments." Those words simply emphasize the fact that, as to officers of the United States, those powers are exclusively in the House and Senate. Opponents of the Constitution, when it was before the various states for ratification, argued that they might be held to exclude the right of impeachment in the states, as against state officers, for offences against the states. The friends of the Constitution as strenuously denied this, and argued, from the character of the government itself, as a federated government—the amendments not having then been adopted—that only those powers vested in it which were granted expressly or by necessary implication, and hence, as the Constitution was intended to secure the United States as such, the language used could not be held to refer to the states or state officers. The answer was: But here it is expressly granted in the most exclusive terms. The arguments thus made formed part of the reasons for the immediate adoption of the Ninth and Tenth Amendments to the Constitution.

The argument, upon which the claim is made that the matter is in the sole discretion of the House and Senate, is substantially as follows. Article II, Section 4, says:

“The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.”

This is only a designation of the minimum punishment which *shall* be imposed in case of a conviction, in impeachment proceedings, of the particular officers named for the particular offences named, and is not a designation either of who may be impeached, or the offences for which they may be impeached; and, hence, as the House has the sole power to impeach and the Senate the sole power to try the impeachment, necessarily those matters are in the “sole” discretion of those two bodies.

If this is so, then as the Constitution contains no other provision on the subject, every citizen is liable to impeachment, just as in England. In that event trial by jury may be rightfully abrogated, at the option of the House and Senate, in all cases of crimes, charged against either a citizen or an official, and the citizen is powerless, for the Constitution provides no means for a review of a conviction by the Senate; and the non-office holding citizen may be impeached for any imaginary offence, and debarred, upon conviction, of ever thereafter holding office under the United States. *Were this so, it would be easy for the House and Senate to prevent the inauguration of an antagonistic President-elect.* Happily, however, all the authorities, both in and out of the Senate, disagree with that view, and it was admitted to be incorrect by the Managers of the House in the Belknap Impeachment, and also in the Swayne Impeachment.⁶

In Story's Commentaries on the Constitution of the United States, it is said:⁷

“From this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, including the President and Vice President. In this respect it differs mate-

⁶ 3 Hinds' Precedents, Secs. 2007, 2015.
⁷ 3rd Ed., Sec. 790.

rially from the law and practice of Great Britain. In that kingdom all the king's subjects, whether peers or commoners, are impeachable in parliament, though it is asserted that commoners cannot now be impeached for capital offences, but for misdemeanors only. Such kinds of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual ground for this kind of prosecution in parliament. There seems a peculiar propriety, in a republican government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal and ought to have the same security of a trial by jury for all crimes and offences laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties, by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges."*

The same conclusion must necessarily be reached when the Constitution is considered in the light of the Tenth Amendment, which says:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The maxim *expressio unius est exclusio alterius* applied to Article II, Section 4, necessarily excludes the claim that citizens can be impeached, for impeachment is therein limited to civil officers. Moreover, as only office-holders can be removed from office, it necessarily follows that the provision applies to them only. If this is not so, then the decision in the Blount Impeachment is incorrect, whether it be treated as decided that a Senator is not within the category of "civil officers of the United States," or as deciding that one not in office when the proceedings began is not amenable to the action; for Howell's *State Trials* are full of impeachments of members of the House of Lords. So, too, the reasoning and conclusion in the Belknap

* The same thing is said in Rawle on the Constitution (2nd Ed.) p. 213; Pomeroy's Constitutional Law (9th Ed.) Sec. 716; Tucker on the Constitution of the United States (1899) p. 414; Black's Hand Book of American Constitutional Law (3rd Ed.) p. 137; Foster on the Constitution, Vol. 1, pp. 566-570; Hinds' Precedents of the House of Representatives (1907) Vol. 3, Sec. 2315. These authorities quote the Senatorial decisions on this question, and preclude the necessity of repeating them here.

Impeachment is wrong, whether the majority or the minority were correct on the question of his liability to impeachment, because of his successful "race with the law" in getting the President to accept his resignation a few hours before the House of Representatives voted to impeach him. These considerations justify Madison's criticism of that claim as made in the Blount case as "the most extravagant novelty that has been broached."⁹

Many attempts have been made to define this power, quite commonly by those who were trying to make the definition fit the facts of a particular case, rather than to have it accord with the constitutional provisions only.¹⁰ A notable exception to this, however, though part of the argument upon which his conclusion is founded, has hereinbefore been shown to be fallacious, is what was said by Manager (afterwards President) Buchanan in the Peck Impeachment:¹¹

"What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution, or some known law of the land. This, I think, is the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate on the Articles of Impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offence impeachable it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal as the usurpation of a power that has not been granted."

Perhaps that statement should be broadened to include offences of so weighty a character, and so injurious to the office, that every official is bound to know that they are of the same general character as crimes, and might well be made criminal by statute; but the *terra incognita* beyond, no one can properly be asked to explore under the existing constitutional provisions, if for no other reason than because it is a fixed and salutary

⁹ 2 American Political and Social Science Review, 386.

¹⁰ Suppl. to Cong. Globe, 2d Sess. 40th Congress, pp. 50, 254; 3 Hinds' Precedents, Secs. 2357, 2379; Story on the Constitution (3rd Ed.) Sec. 764; 1 Foster on the Constitution 591-598.

¹¹ 3 Hinds' Precedents, Sec. 2381.

principle that penal provisions shall be so construed that the persons to be affected by them may certainly know what things they are forbidden to do. That rule, which Chief Justice Marshall said, "is perhaps not much less old than construction itself,"¹² is of enduring importance, for it ever must be, in the language of Coke, that "the known certaintie of the law is the safetie of all," and if it be true that in this matter there is no definiteness, then it is the only matter in Anglo-Saxon jurisprudence in which a man may be punished for an offence the nature of which it was not intended that he should know.

It is said that the learned Chairman of the Managers for the House of Representatives in the Archbald Impeachment, said that in convicting the respondent, the Senate had adopted "a code of judicial ethics for the first time in American history."¹³ If by that was meant that "for the first time in American history" a judge was successfully impeached for doing that which was governed by no law except the universal law of good conduct, which every judge is supposed to know and give heed to, no objection can be taken thereto. But if it was meant to say that it was thereby determined that a judge can be impeached for a mere breach of "a code of judicial ethics," then may we recall that "it was long ago remarked by DeTocqueville that a decline of public morals in the United States would probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office."¹⁴ For that unwritten "code" varies with the times and with the place, and almost with the individual citizen.

Ex-President Taft, in an address before the American Bar Association in 1913, stated that the result of that trial was a "liberal interpretation of the term 'high misdemeanor.'" He said:

"Most useful in demonstrating to all incumbents of the federal bench that they must be careful in their conduct outside of court as well as in the court itself, and that they must not use the

¹² U. S. v. Wiltberger, 5 Wheaton 76 (1820).

¹³ Harper's Weekly, Feb. 15, 1913, p. 9.

¹⁴ 1 Hare: Amer. Const. Law 211.

prestige of their official position, directly or indirectly, to secure personal benefit.”¹⁵

The objection to that statement is that so long as humanity remains as it is, “the prestige of their official position” will nearly always enure “directly or indirectly, to secure personal benefit” to a judge, if he transacts any outside business, or even makes investments or purchases. Moreover, as the Managers of the House in that case repeatedly stated that they did not challenge the Judge’s ability, integrity, or impartiality,¹⁶ perhaps a better way of expressing the result of the trial would be to say that it determined that a judge ought not only to be impartial, but he ought so to demean himself, both in and out of court, that litigants will have no reason to suspect his impartiality; and that repeatedly failing in that respect constitutes a “high misdemeanor” in regard to his office. If such be considered the result of that case, every one must agree that it established a much needed precedent.

Now comes the next great question.

CAN AN OFFICER BE IMPEACHED FOR OFFENCES COMMITTED BEFORE HIS INDUCTION INTO OFFICE?

Those who pin their faith to the argument that the “good behavior” clause in the case of judges, determines the grounds for their impeachment, must logically limit impeachments to a date after that of the official’s commission; for by that argument the whole matter is one of implied contract, the officer agreeing by the acceptance of a “good behavior” contract that when he ceases to exercise “good behavior” he may be ousted by impeachment.

The matter is beset with difficulties however it is viewed, but it would seem clear that if the offence is directly connected with the attainment of the office he occupies when impeached, as a violation of the Corrupt Practices Act in relation to his nomination or election, as was alleged in the Sulzer case, the impeach-

¹⁵ 36th Annual Report Am. Bar Assn. 431.

¹⁶ Archbald Impeachment, 888, 889, 892, 906, 915.

ment ought to prevail. So, too, if the offence was the subject of consideration, and the facts in regard to it were substantially known at the time of his election, or appointment and confirmation, it should not again be brought forward. It is within the memory of all of us that a candidate for president was charged with and admitted during the campaign the commission by him of a grave moral offence in his early life, yet, because during the years thereafter, he lived a life "void of offence towards God and towards man," he was wisely elected by the people, and became one of the best of our presidents.

In the Archbald impeachment the question was directly raised, the respondent being charged with offences alleged to have been committed while a District Judge, though at the time of his impeachment he was a Circuit Judge assigned to sit in the Commerce Court. He was acquitted on all such charges, but some of the votes for acquittal were because the offences were not deemed serious enough; some because the Senators were not certain and did not feel it necessary to become certain as to the proper decision of the legal question now being considered, in view of the respondent's conviction on other articles; and some because the Senators did not think he could properly be tried upon such charges. A number of Senators were excused from voting on those articles. The matter cannot be said, therefore, to have been decided in that case. Its importance, and the possibilities rising out of it, was clearly pointed out by Judge Archbald's counsel in their brief, when in speaking of ex-President Taft, and of his manifold public activities, they said:¹

"The President of the United States at one time held the office of Solicitor General; at another time he was a Circuit Judge of the United States; at another time he was Governor of the Philippine Islands; at another time he was Secretary of War. Is it possible that he can now be the subject of impeachment for any act committed by him at the time he held any one of those offices? If so, he may be removed from his present office as President of the United States by a majority of the House and two-thirds of the Senate for alleged offences charged to have been committed while he held any one of the other positions above mentioned."

¹ Archbald Impeachment, 1104.

And the further importance and possibilities thereof will appear from the statement that a House and Senate could, if there were an antagonistic two-thirds, prevent a president-elect from assuming office, if he were or ever had been a federal official.

In the state impeachments the decisions seem all to be the one way. Judge Barnard was convicted in New York of offences committed during a prior term, after a learned argument citing many precedents.² So was Judge Hubbell in Wisconsin.³ And a number of other instances were given by the Managers in the Archbald case.

Where then should the line be drawn? The Constitution does not draw it, unless it is drawn at the point that the offence must have been committed during the then existing term of office, though it does not directly say so. As in all such matters much must be left to the sound judgment and discretion of the representatives of the people, who presumably will do what is right, moved thereto partially, as both branches of Congress now are, by their direct responsibility to the people. It would be strange indeed, in this day when all men are moving to a higher goal, and when facts are spread nation-wide in a fraction of a day, if the people were to abandon all ideas of right and justice, for prejudice or partisanship or both, and if they do not two-thirds of their representatives never will. Responsibility must always be lodged somewhere, and federal responsibility must be lodged in federal officials. In the past but few, if any, errors have been made in impeachment proceedings of which the respondents could justly complain, and it becomes less likely every decade that such errors will be made in the future. In all human probability the line never will be drawn at any other point than one where the offence is connected with the office; or is near in point of time to the acceptance of the office, and it is found that the incumbent has shown no "fruits meet for repentance;" that the public good—the vital thing—requires the impeachment. If that be so, how-

² Impeachment of Geo. G. Barnard, 147-191.

³ 16 Law Reporter 601-622.

ever much the accused and his partisans and friends may complain, the citizenship may look on with undisturbed serenity.⁴

This leads us to the last great question.

CAN ONE BE IMPEACHED AFTER HE HAS CEASED TO BE A
"CIVIL OFFICER OF THE UNITED STATES"?

Judge Story was of opinion that this question should be answered in the negative,¹ but the question is by no means so clear as he seems to think. In Blount's Impeachment the question was raised but not decided, he having been expelled by the Senate before impeachment, and the case being decided upon the ground that a Senator is not "a civil officer of the United States" within the impeachment clause, for the reason that by Article I, Section 3, of the Constitution "each house shall be the judge of the election, return and qualification of its own members."

In Belknap's Impeachment the question was raised and perhaps decided, but so decided as not to be of value in future cases, for a majority of the Senate, but less than two-thirds thereof, held that his resignation and the acceptance thereof, after the testimony on the question of his impeachment had all been taken by a committee of the House of Representatives, and but a few hours before the articles of impeachment were actually adopted by the House, was inefficacious. More than one-third of the Senate held, however, that he could not be impeached even under such circumstances, and hence he was acquitted. Whether even a majority would have held him liable had he been out of office before the House began its inquiry, cannot be known. It should be clear, however, that a "race with the law," such as he made, ought not to be successful; and as a practical question it ought to be equally clear that if he is out of office before an investigation into his conduct is asked, and does not afterwards take office, that the pro-

⁴ For a very full article, claiming that impeachment will only lie for offences committed while in office, see 23 *Yale Law Journal*, 60-87.

¹ Story on the Constitution (3rd Ed.) Sec. 790.

ceedings should not be begun. In the cases of Lord Somers, the Earl of Macclesfield, Warren Hastings, Lord Melville, and perhaps in other English Impeachments, the respondents were out of office before the impeachments were begun, but there there are no constitutional provisions on the subject.

The constitutional provisions which are alleged to govern the matter with us are Article I, Section 3, and Article II, Section 4. The first provides:

“ . . . Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States. . . . ”

And the latter states:

“ . . . The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.”

The argument seems to be:

(a) Inasmuch as removal from office is required in case of conviction, and as one not holding office cannot be removed from office, therefore one not holding office cannot be impeached.

(b) Those who can be impeached are “the President, Vice-President and all civil officers,” and one not holding office cannot be placed in either class.

That argument, however, is illusory under both heads. Article I, Section 3, is simply a limitation upon the penalty. It is not a designation of the time when an impeachment must be begun. It might just as well be said that because a statute says that punishment of a public official who violates the Corrupt Practices Act shall not extend further than removal from office and fine and imprisonment, that one who resigns his office cannot be tried at all. So also Article II, Section 4, simply says that the officials named “shall be removed” on conviction. It does not say that if they are convicted they may not be otherwise punished, or that by their act of resigning they may escape all punishment. It might just as well be said that as Article II, Section 4, says that they shall be removed upon conviction, that

that meant, as to the officers named, that they could not be disqualified as to future office holding, notwithstanding the provisions of Article I, Section 3. The two constitutional provisions taken together simply mean that, if still holding office, they must be removed upon conviction, and that the limit of punishment beyond that is disqualification for the future. That is the reasonable meaning of the words, and, as already pointed out, that is the rule of construction for the Constitution.

The question is perilously near being simply a moot one. With Congress having more to do than time within which properly to do it, it is not likely that an ex-official will ever be impeached, unless he later accepts a federal office; and it is not likely that he will accept, or having accepted will retain such office, if he knows that he will be impeached. Those who are so much interested in the question as not to be satisfied with the brief statement here made, will find that all that can profitably be said on either side thereof, was said by the Managers and counsel for respondents in Blount's and Belknap's cases.

It is thought that the questions so far considered are the most important that arise in connection with the subject of this discussion. Several others naturally suggest themselves, however, which might well be considered at this time.

WHAT RULES RELATING TO EVIDENCE AND THE COMPETENCY OF WITNESSES ARE APPLICABLE IN IMPEACHMENT TRIALS?

Shall the rules of evidence be such as were in force when the Constitution was adopted; or those in force in the District of Columbia, where impeachment is tried; or those in force where the acts complained of occurred? And what shall be done in that regard where the acts complained of occurred in more than one jurisdiction? In view of the fact that the state rules in which a federal district is, are applied in the federal courts, those questions would seem to be quite difficult; and they might be most important, for in some jurisdictions the impeached person and his wife would be excluded from testify-

ing, as would also any person who might succeed the accused in office if he were removed therefrom, as for instance, the Vice-President, on an impeachment of the President. In practice, however, they are not, for the Senate has invariably received all the evidence which it deemed relevant, from any witness who had personal knowledge of the facts, no matter by whom it was to be proved, and left its weight to be determined upon final consideration.

EFFECT OF THE SIXTH AMENDMENT TO THE CONSTITUTION.

At one time it was very strongly urged that under the Sixth Amendment an impeached person was entitled to a jury trial. That view was urged by Senator Tazewell in the Blount case, though he did not vote on the question of dismissing the impeachment, and by correspondence and in his speeches. The Amendment provides as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”

Senator Tazewell's contention, however, never was taken seriously, for the reason that contemporary history shows that the fifth, sixth, and eighth amendments were well known to have been passed to meet complaints, made with great force while the Constitution was under consideration by the various states, that it nowhere provided for jury trials in the ordinary civil and criminal suits, and that, therefore, the people would be worse off in that regard than they were before they threw off the yoke of Great Britain. Those complaints never dealt with impeachments any more than they did with martial law, and hence the amendments were construed to effectuate the purpose intended by them, and were not extended to proceedings never intended to be reached thereby. In one sense impeachment is a “criminal prosecution,” but those words as used in the Sixth Amendment evidently refer to ordinary crimes, as does the Fifth Amendment.

ATTENDANCE OF SENATORS AT THE TRIAL.

Turning from the legal to the practical side of an impeachment trial, the thing that strikes a common law lawyer most is the few Senators who in fact listen to the evidence. During the Archbald Impeachment the membership of the Senate exceeded ninety, yet rarely over twenty members were present. Perhaps a hundred times the members present were privately counted with the result stated. At times some Senator would suggest the absence of a quorum, when the bells would sound throughout the Senate wing of the Capitol, the Senators would troop in and remain long enough to answer to their names, the presiding officer would gravely announce: "On a call of the roll of the Senate fifty-four Senators have responded to their names. A quorum of the Senate is present," and the trial would proceed, though the merest glance around the chamber would show that a quorum of the Senate was not present when the announcement was made. Perhaps the usual twenty or so were at that time increased to thirty or thirty-five, the additional number remaining for a few moments, and then returning from whence they came, leaving the Senate as bare as it had been before. While that result was, and in all such cases must be regretted, yet it is not so much to be wondered at. Most of the work of Congress must now be done by committees, and the Senator who really attends to that work, and is present at the important legislative sessions of the Senate, has all his official time fully occupied. An impeachment trial encroaches very much on that time, and for that reason probably is partly neglected.

Yet certain Senators were always present, and always courteous and considerate, however great the strain upon them and however limited the time at their disposal. It would be discriminatory to name those whom the writer can now recall; but without subjecting himself to that charge, he can say that the presiding officer, Senator Bacon of Georgia, was always present, and that it is a pleasure now to recall, as it was a pleasure then to feel, that he courteously, conscientiously, and fairly ruled every question he was called upon to decide:

SUGGESTIONS AS TO METHODS OF OBTAINING EVIDENCE.

Whether or not the present method of impeachment is continued, it is evident that radical changes ought to be made in the matter of the production of the evidence. With Congress now sitting a large part of the entire year, and with the rapidly growing legislative business of the country, due time cannot be given by the whole Senate to the hearing of the witnesses. In the Archbald Impeachment portions of seven days were taken in preliminary arrangements in the Senate, the trial consumed from December 3rd to December 19th, 1912, inclusive, and from January 3rd to January 8th, 1913, inclusive, and the decision was rendered January 13th, 1913. The Senators could not afford that time and properly attend to their other duties, and the result was, as heretofore stated, but few of the Senators really heard the whole case.

Inasmuch as the method for obtaining the evidence and of hearing the case, is in the exclusive control of the Senate, it is evident that much of the difficulty may be remedied by appropriate rules of procedure. The rules in force at present were adopted many years ago, the latest revision being at the time of the impeachment of President Johnson. So great was the necessity felt for amendment immediately succeeding the Archbald Impeachment, that constitutional amendments were proposed to remedy some of the difficulties again made plain in that trial, as they had been made plain in all the later impeachments. A constitutional amendment, however, is practically impossible of attainment.

But much can be done by a change of the rules. It has not been unknown in the past to have the testimony taken before other than the trying body. In Jefferson's Manual, in referring to impeachments before the House of Lords, it is said:¹

"The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand."

An examination of the proceedings in Parliament not only bears

¹ Seld. Jur. 120, 123.

out the foregoing statement, but shows also that the Lords at times decided the case upon the testimony taken for the Commons, or upon that testimony added to by other testimony taken by the Lords.

If the plan of having a committee of the Senate take the testimony were adopted, much time would be saved, except as to the Senators who were members of the committee. But it would not alone give all the relief desired, nor, in the opinion of the writer, is it the best plan within the narrow limits intended to be covered by it. An Act of Congress could be passed which would provide that the testimony should be taken before United States judges within a reasonable distance of the places where the witnesses were, under such regulations as Congress should prescribe, representatives of the House of Representatives, and counsel for the accused, to examine and cross-examine as in other trials, and such testimony to be available both in the preliminary hearing before the House and in the trial before the Senate. Thereby the United States would be saved great expense, the witnesses great inconvenience, the accused great loss, and the Senators much time. In the Swayne Impeachment most of the witnesses were brought from Florida to Washington, and in the Archbald Impeachment they were brought from the Middle District of Pennsylvania. A positive benefit growing out of the course of procedure suggested would be that the rulings on the question of evidence would be more accurate than they now are, for they would be decided by judges accustomed to consider such matters, a point wherein the Law Lords who ruled thereupon in English impeachments had a very decided advantage over our Senators. It is true that there would be a loss in that the Senators would not see the witnesses, as they now may, but generally speaking do not, just as they would not if the evidence were taken by a committee of the Senate; but *salus populi suprema lex*.

SUGGESTIONS AS TO CHANGES IN PROCEDURE.

But even that change would not be adequate, nor by any means all that could be obtained by an amendment of the rules. In the Archbald Impeachment the evidence did not in any

degree controvert the answer of the defendant. In the view which the Senate took of the matter, it could just as well have been heard and decided upon the Articles of Impeachment and the answer thereto. Yet days were spent in proving only admitted facts. It may be said that if an impeachment is in its nature criminal, and the rule that there can be no crime where there was no intent to do wrong, is to be applied, that the Senate cannot determine whether or not the intent exists if it is averred in the Articles and denied in the answer, unless evidence is taken from which the intent can be found or negatived. It is a little difficult to see how intent can be extracted from documentary proof, as usually it is, any more than from written answers, unless the weight of the evidence contradicts the one or the other. On the other hand, if the defendant is conclusively presumed to intend the natural consequences of his own acts, evidence will not be required in many cases; and in those instances where the articles and answer leave that matter in doubt evidence can be ordered. In those where no such doubt exists, and they are the more numerous instances, it is a waste of time to take evidence. Moreover, many of the facts now deemed necessary to be proved have no bearing upon the question of intent, as for instance, the status of the respondent, the result of the alleged wrongdoing, *etc.*, yet, under the present practice, they must all be proved—a clear waste of time.

So, too, many of the articles could be decided without taking any evidence, and they may be, and in some cases have been sufficient to impeach and remove from office, yet, under the present practice, the evidence must be heard as to all the articles before a vote can be taken on any. Whatever else may be said as to the impeachment of President Johnson, it was wise to adjourn the Court of Impeachment *sine die* as soon as it was demonstrated, by a vote on certain of the articles, that he could not be successfully impeached upon any. A court might just as well try a man for numerous murders, before executing him for admitted or proven guilt as to one, as to follow the present senatorial practice upon impeachments. Indeed, the Senate might very well, upon a consideration of the articles and answer, hear

and decide one charge alone before taking up any other, when that charge, if proven, would be sufficient to justify both removal and disqualification for the future. In many instances that would be fairer to the accused, who may be condemned on one article because of evidence not fairly applicable thereto, and not admitted because thereof. And it would leave him something to live on after his trial, instead of pushing him to the edge of bankruptcy as now.

Enough has been said upon this point to satisfy the most skeptical that modern methods call for a radical amendment of the procedure in cases of impeachment. The length to which this article has gone suggests, however, that it would be wiser, instead of going into greater details, to give elsewhere the suggested new rules.

IS IMPEACHMENT AN ADEQUATE REMEDY?

This is the really great and important question in all this controversy. As a practical matter, while there are many thousands of federal officers subject thereto, the cumbrous nature of the remedy limits it to the great officers of state. The decision in the Blount case resulted, and wisely so, in holding that Congressmen are not subject thereto. The power of the President to remove, and the great improbability that he will retain in office those wholly unfitted to perform the duties thereof, has resulted, with one exception, in the exclusion of his official family from actual impeachment. Notwithstanding that fact, it would be exceedingly unwise to relieve them from subjection thereto, for it is quite within the realm of possibility that the day may come when even a President will care less for the nation's good, than he does for the fulfillment of his then present desires. Happily none such has yet appeared.

Judging by the past, however, impeachment as a practical remedy applies only to the judges. Of the previous impeachments one was of a President, one was of a Senator, one was of a Secretary of War, and the other six were of judges. Inasmuch as the Senate held in the Belknap case, and also, though not so clearly, in the Archald case, that impeachments were in-

tended to reach only those then actually in office at the time of impeachment, it is reasonably certain that in future impeachments the cases of judges will be relatively more numerous than as above, for all other offices have but a brief tenure.

It is also reasonably certain, though most of the federal judges have been very satisfactory officials, that the public good would have been better conserved if a much greater number thereof had made way for others better qualified by learning, or more fitted by temperament, to fill the office. The cumbersome, expensive, and uncertain nature of the remedy by impeachment; the dislike to put so serious a stigma upon a judge; the reasonable certainty that other influences than either the public good or the law of the land would operate to affect the decision; the uncertainty of the offences which are impeachable offences; all operate to prevent calling the judge to account in this way.

While it is important, never more so than now, that the tenure of the judges should be stable, it is only so important *quoad* the public because the public good requires it. The good to the individual judge, while quite important to him personally, becomes so to the public only because of and only so far as it is bound up in the public good. The moment that stable tenure is given more weight than the public good requires, that moment it becomes a public injury. Every lawyer and many laymen can recall instances of judges who by reason of lack of learning or because of unjudicial temperament, for the public's sake, should have been removed from office, but who had not been guilty of "treason, bribery or other high crimes and misdemeanors," no matter how liberally you construe the "good behavior" clause of their commissions. Out of this fact has grown the clamor for the recall of judges, against which thinking lawyers ever have and ever should show an unyielding front. The objection of incompetency and unbecoming conduct unhappily found to exist in a few of the judges, is the substance of the complaint against the judiciary, and like everything else substantial it casts a shadow when the sun shines athwart it. Let us be careful, now that the sun of public opinion is shining athwart the judiciary, that in a vain endeavor to save the

shadow we do not endanger the substance. An independent judiciary is indispensable; but that furnishes no reason for preserving incompetent judges, whether they be mentally, morally, or constitutionally unfit.

It is evident, however, that it would be unwise to submit judges to impeachment and removal upon such uncertain charges as would have to be made to cover the grounds above referred to, because the very uncertainty of the definition of the offences covered by the power of removal would be an invitation to view the matter from the political rather than the public standpoint. This thought points out one of the reasons strongly urged against the power of impeachment as it now exists, a reason that sometimes, but happily rarely, has found exemplification in the trials heretofore held.

It is not to be lost sight of that the judicial department was intended to be not only a co-ordinate but also an independent branch of the government, as far removed as possible from the control of the other branches; and that impeachment of judicial officers by Congress was only permitted because no other or better way of protecting the public from the derelictions of their judges had been devised. That method, however, at once pitchforks the accused judge into the political arena, and invites him to seek favors from members of the House and Senate, when he should, so far as possible, be removed from even the temptation to ask favors from any one, and particularly from political public officials. And it invites him also to seek the influence of the President and other high officials of the executive department upon Senators and Representatives, to avoid or restrain contemplated action against him. This not only operates to defeat the intention of keeping the great departments separate and distinct from each other, but it also tends to destroy the fearlessness and independence of the individual judge.

It is evident, therefore, that any plan for the removal of incompetent judges which reduces to a minimum the influence of the legislative and executive departments of the government upon the judiciary, will be a benefit to the public, if it adequately protects the public from the continuance in office of those who

are unfitted therefor. Can such a plan be devised? And if so, will it require a constitutional amendment to make it effective?

It is evident that if there is vested in some judicial tribunal an effective supervision over the other federal judges, resulting in the removal of the latter in case they do not properly fulfill their duties, not only will there be a greater freedom in the judges, but there will also be a judicial determination of the questions at issue, and a greater benefit to the public because more unfit persons can be removed than by the present system. The trial of a District Judge by the appropriate Circuit Court of Appeals, preferably of another circuit, and of all other judges by the Supreme Court itself, would furnish judicial tribunals to try all but Supreme Court judges. It might be provided that the latter should be tried by judges of the inferior courts, but this would infringe upon the dignity of the Supreme Court, and would also subject the trying judges to a stress because they were sitting in judgment upon one who theretofore had and who thereafter might sit in judgment upon them and their rulings. It would seem better, therefore, that the remedy by impeachment should remain as it is for the Supreme Court judges, a remedy which will probably never again be applied to a member of that court. The plan suggested, however, would reach nearly all the judges.

Can it be obtained without a constitutional amendment? The tenure of the judges is "during good behavior." Nowhere is it stated what constitutes "good behavior," unless the impeachment clause is to be read not only as defining those words, but as supplying also an exclusive remedy in case of an alleged breach of duty. Article II, Section 3, of the Constitution simply says:

"The President, Vice President and all civil officers of the United States shall be removed from office, on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

But there is no provision that that shall be the only method of removal. Article III, Section 1, says, *inter alia*:

"The judges, both of the supreme and inferior courts, shall hold their offices during good behavior." . . .

But it is nowhere said how that "good behavior" is to be ascer-

tained, and the tenure determined if it does not exist. Article I, Section 8, says, *inter alia*:

"The congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

It would seem that under the latter clause Congress would have power to define what constitutes "good behavior," and to provide a method for ascertaining whether or not the judges are complying with the tenure under which they hold, and to cause them to forfeit their offices if they are not, subject, of course, to a review by the courts of the question as to whether or not the definition wholly or partially is within the meaning of those words as used in the Constitution. By this method the question becomes a judicial one, as it should be, and the accused judge will be safeguarded in his right to hold his office exactly as he is safeguarded in all the other rights vested in him by the Constitution. That Congress has the power claimed was expressly asserted by Senator Catron in the Archbald Impeachment.¹

It may be said that the course suggested would result in removing the judges still farther from contact with the people. But this can hardly be so. They do not come into contact with the people when they are impeached, and experience has shown that the judiciary is less subject to improper influences than any other branch of the government, whether by brother judges or otherwise. It follows that both the public and the accused would be better protected by the suggested than by the existing remedy. There is no reason to suppose that the Supreme Court judges would deal too leniently with derelict judges of the inferior courts. On the contrary, that just pride which they have ever had in maintaining the high standing of the judicial department would operate to counteract any of the influences of association, even if such there were. Moreover, there would be grounds for

¹2 Proceedings, *etc.*, on the Trial and Impeachment of Robert W. Archbald, 1661.

removal not now existing, and derelict judges have greater spheres of influence with political officers than they have with judicial.

It is not the writer's purpose to state all the things which would constitute bad behavior, nor is it intended hereby to specify the best method for ascertaining the fact of bad behavior, or of carrying into effect the judgment if and when ascertained. It may not be inappropriate, however, to quote from an address of Mr. Justice F. Miller before the New York State Bar Association, where in discussing the subject of impeachment he said:²

"It is not easy to suggest a better remedy. The tribunal would be rendered more efficient and more safe by a specific definition of the causes of removal. There are many matters which ought to be causes of removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.

"So, also, there are offences against the law, or conduct, which might be made so, that peculiarly unfit the man for the office of judge. A vile and overbearing temper becomes sometimes, in one long accustomed to the exercise of power, unendurable to those who are subjected to its humors. But I think the experience of observers will bear me out in saying, that habitual intoxication is of all this class of disqualifications, the most frequent.

"Two things may be suggested as worthy of consideration in any effort to amend the Constitution on this subject, namely: That the causes for which a judge may be removed from office shall be described with the same precision as that which is used in defining indictable offences. Second, that whatever may be the nature of the court before which he is tried, the fact of his guilt of the impeachable offence, or disqualification charged, should be found by a jury or similar tribunal. It is, however, to be remembered that a judge should, in the exercise of his functions, be tramelled as little as possible by fear of consequences to himself, and in view of the resentments of disappointed suitors the providing for removal should not be made too easy."

² 2nd Annual Report, p. 40.

And it may not be unimportant to note the practice in England. It has been said:³

"In England the Lord Chancellor, or the Chancellor of the Duchy of Lancaster, within their several jurisdictions, have power to remove any county judge for either 'inability or misbehavior.' No farce of an impeachment is required or allowed. A great and perhaps somewhat arbitrary power is entrusted to a great functionary, upon the faith of its judicious exercise, under the corrective influence of public opinion, and the system has not been found satisfactory."

It may well be thought that vesting so much power in one man, and the summary method provided, are alike too undemocratic for our form of government; but it would not be difficult to draft an act defining "good behavior" and providing for a trial by or under the control of the Supreme Court, by which both of these objections would be obviated, and those who had demonstrated their inability properly to perform the duties of their offices could be removed therefrom though not guilty of "treason, bribery or other high crimes and misdemeanors." "Good behavior" means good behavior in or as affecting the office, and a course of conduct which brings the office into disgrace or contempt is, therefore, a violation of the good behavior tenure of the incumbent. An act such as suggested would, therefore, tend to render the judiciary independent of the other great departments of the government, would answer the arguments of those who contend that the judges should be more responsible to the public will, and would greatly strengthen the judicial system generally.

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³6 Solicitor's Journal and Reporter, 804-805.