

the purpose of showing what extreme steps can be taken, and how rarely they are taken, for the purpose of removing Judges and impeaching their commissions,—

“To the same effect, Mr. (afterwards Lord Chief Justice) Denman stated at the bar of the House of Commons, when appearing as counsel on behalf of Sir Jonah Barrington, that independently of a parliamentary address or impeachment for the removal of a Judge, there were two other courses open for such a purpose. ‘These were—(1) a writ of *scire facias* to repeal the patent by which the office had been conferred; and (2) a criminal information [in the Court of King’s Bench] at the suit of the Attorney-General.’ By the latter of these, especially, the case might be decided. Elsewhere, the peculiar circumstances under which each of the courses above enumerated would be specially applicable have been thus explained: First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by *scire facias* to repeal his patent, “good behaviour” being the condition precedent of the Judges’ tenure; secondly, when the conduct amounts to what a Court might consider a misdemeanour, then by impeachment; fourthly, and in all cases, at the discretion of Parliament, by the joint exercise of the inquisitorial and judicial jurisdiction conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the Crown for the removal of a Judge. By these authorities it is evident the Crown is duly empowered to institute legal proceedings against the grantee of a judicial or other office held during ‘good behaviour’ for the forfeiture of such office on proof of ‘misbehaviour’ therein.”

Now, your Honours, for what it may be worth, it seems that the extreme proceeding by way of *scire facias*, if taken, would be taken on grounds analagous to those for the removal of a Judge by joint petition of the House of Commons—that is to say, as was done here, it must be on the ground of misconduct, good behaviour being the condition precedent on which he holds his office. That only brings me to point out again to your Honours that in this case it is going to a far greater extreme. It is a case—the only one in existence of its kind—in which it is sought to cancel and repeal a Judge’s patent, simply, not, of course, on the ground of misconduct or incompetency, but simply on the ground laid down in Foster on *Scire Facias*, “That the King hath granted something which by law he could not grant.”

Mr. Justice Richmond: Judgment in these proceedings would, of course, not be judgment of cancellation, but judgment of ouster.

Mr. Harper: No, your Honour; I submit that that would not advance the case any further. Mr. Edwards would still have his Commission unrepealed. This is a mixed case of *quo warranto* and *scire facias*. They are asking that the one may follow the other.

Mr. Justice Richmond: You suggest that they cannot be combined?

Mr. Harper: I suggest that most confidently—that you cannot deprive a person who is the holder of an office by Commission, except by cancelling the Commission. So long as that remains he could continue in office.

Mr. Justice Richmond: *Quo warranto*, then, is inapplicable?

Mr. Harper: It is not laid down as one of the modes of procedure where there is a patent issued.

Mr. Justice Richmond: *Quo warranto* is not?

Mr. Harper: It is only so where there has been a usurpation following a suspension of the office under which office was held. Take the case cited already, Regina v. Rogers (Victorian Law Reports). I would refer your Honours to that, for I think Mr. Justice Richmond’s question is answered by it. It seems to have been accepted by Justice Barry and Justice Molesworth, who were the Judges in the case Regina v. Rogers. During the course of the argument—

The Chief Justice: What was the procedure.

Mr. Harper: The Governor in Council had removed from office a County Court Judge because it was said a County Court Judge held office during pleasure. This the County Court Judge denied, and claimed to exercise his office, and then they went by *quo warranto* to oust him from office, it having been cancelled previously to the hearing. The practice is given on argument, which seems to have been agreed to. The counsel arguing in the case says (pages 344 and 345),—

“The Court will not on *quo warranto* inquire into its validity. It can only be inquired into by *scire facias* issued at the suit of the Attorney-General, or by an *ex officio* information.” Then Justice Barry says, “Or by *supersedeas*.” Then Justice Molesworth says, “The precise question is not whether Judge Rogers is a Judge of the County Court at all, but whether he is a Judge in these places. His Commission appoints him to these Courts, and so long as he holds that Commission under the Great Seal, this Court will not oust him by *quo warranto*.” There the question in dispute was not whether he held his patent, but whether the authority was during pleasure of the Governor. Now, in Foster’s book on the writ of *scire facias* it is said that the Queen can repeal her own grant; as when she hath granted anything which by law she cannot grant in her own right, and for the advancement of justice she may have a *scire facias* to repeal her own letters patent; or, where a patent is granted to the prejudice of the subject, the Queen, of right, is to permit him to use her name for the repeal of it, in a *scire facias*, at the Queen’s suit, and to prevent multiplicity of actions, for such actions will lie notwithstanding such void patent. And so in Bacon’s Abridgement, under the title *Scire Facias*, Vol. vii., at page 137, it says, “The writ of *scire facias* to repeal letters patent lieth in three cases: Firstly, when the King by his letters patent doth grant by several letters one and the self-same thing to several persons, the first patentee shall have a *scire facias* to repeal the second; secondly, when the King doth grant a thing upon a false suggestion, he, *prærogativa regis*, may by *scire facias* repeal his own grant; thirdly, when the King doth grant anything which by law he cannot grant, he, *jure regis*, and for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent.”

Sir R. Stout: That is the reason we coupled both in these proceedings.

Mr. Harper: Well, I said so at the commencement, that the proceedings probably could not—