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## THE INDEPENDENCE OF THE JUDICIARY

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### I. Introduction

It has been widely accepted legal doctrine that the English constitution begins and ends with the one principle that Parliament is supreme—that there is nothing a particular parliament cannot do by an appropriately worded statute. This is said by many authorities to be the result of the revolutionary settlement worked out in 1688 and the years immediately following. Yet there are both historical and theoretical reasons to doubt whether the completely unlimited supremacy of Parliament in this sense was established at that time or at any time. Indeed history rather indicates that other principles also assumed very great importance constitutionally at the end of the seventeenth century, and these other principles—then reaffirmed or established—could operate only as limitations in some degree at least on the supremacy of a particular parliament.<sup>1</sup>

We have the recent testimony of Dr. A. L. Goodhart that the English are not as much without a constitution as they profess to be. He gives four principles which he maintains are equally basic as first or original principles of the English constitution. They are briefly as follows: (1) "That no man is above the law" (among

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<sup>1</sup>A. L. Goodhart, *English Law and the Moral Law* (Stevens & Sons Limited, London, 1953) p. 55.

other things, this means that all official persons, the Queen, the judges and members of Parliament included, must look to the law for the definition of their respective positions and powers). (2) "That those who govern Great Britain do so in a representative capacity and are subject to change. . . . The free election of the members of the House of Commons is a basic principle of English constitutional law." (3) That there shall be freedom of speech, of thought and of assembly. (4) That there shall be an independent judiciary. "The fourth and final principle which is a basic part of the English constitution is the independence of the judiciary. It would be inconceivable that Parliament should to-day regard itself as free to abolish the principle which has been accepted as a corner-stone of freedom ever since the Act of Settlement in 1701. It has been recognised as axiomatic that if the judiciary were placed under the authority of either the legislative or the executive branches of the Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail."<sup>2</sup> Sir William Holdsworth expressed a very similar view on the status of the judiciary. He said:<sup>3</sup>

The judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers. . . . it is quite beside the mark to say that modern legislation often bestows undivided executive, legislative and judicial powers on the same person or body of persons. The separation of powers in the British Constitution has never been complete. But some of the powers in the constitution were, and still are, so separated that their holders have autonomous powers, that is, powers which they can exercise independently, subject only to the law enacted or unenacted. The judges have powers of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution. It is true that this view of the law was contested by the Stuart kings; but the result of the Great Rebellion and the Revolution was to affirm it.

The purpose of this essay is to examine judicial independence in Canada, but here as in other respects England is the source of

<sup>2</sup> *Ibid.*, pp. 56-60.

<sup>3</sup> Sir W. S. Holdsworth, *His Majesty's Judges* (1932), 173 *Law Times* 336, at pp. 336-377.

our inheritance, and Dr. Goodhart's remarks at least emphasize the great and continuing importance of autonomous courts. It will be necessary to return to the general issues he has raised in the last part of this essay, because they are basic for Canada as well as Britain. Indeed, in the context of a federal constitution judicial independence has special significance. Meanwhile, other connected matters require review. First, the elements of judicial independence as developed in England will be examined historically, a movement culminating in certain provisions of the Act of Settlement of 1701. Then the delay in the extension of these principles to British North America until after the American Revolution will be explained, leading to an exposition of the position under Imperial constitutional law in British North America on the eve of Confederation. Next an attempt will be made to expound the present constitutional position in Canada affecting the independence of the judiciary under the relevant federal statutes and the pertinent sections of the British North America Act, 1867. There are certain problems for Canada of current importance the understanding and solution of which depend in part on English judicial history and development, for instance: (i) What is a superior court within the meaning of section 96 of the B.N.A. Act? (ii) May the salary of a superior-court judge be reduced or stopped by authority of a federal statute while his commission continues in effect? (iii) May a retiring age be imposed on superior-court judges by federal statute? (iv) In constituting federal courts under section 101 of the B.N.A. Act, is the federal parliament limited by sections 99 and 100 of that act on the tenure and salary of superior-court judges? Finally, there will be some theoretical analysis and assessment of the nature of the judicial function and the modern importance of judicial autonomy, with a view to bringing certain substantial considerations, in addition to the historical ones, to bear on problems of the Canadian judicial system.

## II. *The Elements of Judicial Independence Historically Considered*

A brief examination of some high points in the development of the principal English courts is needed for appreciation of judicial independence as we have come to know it in the Anglo-Canadian legal world. As usual, history and constitutional exposition go hand in hand.

### (a) *The emergence of central royal courts and of a judiciary*

There was no professional judiciary in the localized communal

courts of Saxon England or in the private courts held by feudal lords for their tenants. Centralization of the judicial function in the hands of a special class of officials awaited the strong government of the Norman kings in the centuries immediately following the Norman Conquest. At this time great power was successfully asserted for the central government and was concentrated in the king and his immediate entourage of magnates, chosen counsellors and officials. This group constituted the *Curia Regis*. At first the *Curia Regis* was undifferentiated in functions, acting as a unit in all types of political decisions and governmental acts. The king personally presided at many of its sessions, including those involving a judicial function, and it followed him in his extensive travels about his country.

But soon some significant specialization did occur under Henry II (1154-1189). Sir William Holdsworth tells us that "The legislation of Henry II added enormously to the jurisdiction of the *Curia Regis*. . . the king's court acquired a wide civil and criminal jurisdiction, and wide powers of supervision over the conduct of all the local courts and officials."<sup>4</sup> It did not take long to find that the *Curia Regis* could not directly handle this great press of new business, and so some delegation and division of labour became necessary. Henry's predecessors had made some desultory use of royal commissioners, travelling apart from the *Curia Regis* but as delegates of it, to supervise local government and dispense royal justice. Henry extended and regularized this practice with his system of itinerant royal justices, who were invested by their commissions with wide governmental powers, very prominent among which were powers to hear and determine pleas concerning possession of land and pleas of the Crown. In 1176 eighteen justices were assigned to six circuits, and from this year there were always some itinerant justices functioning. Here we have the direct precursors of the judges of assize and the beginning of a separate judiciary.

Nevertheless there was some dissatisfaction with the itinerant justices—certain of them no doubt were rather arbitrary—so that in 1178 Henry decided to supplement the itinerant-justice system with an alternative for litigants in the form of a regular central body. A contemporary account quoted by Holdsworth records that "He selected five men only, two clerks and three laymen, who were all of his own household. And he ordained that

<sup>4</sup> Sir W. S. Holdsworth, *A History of English Law* (Little, Brown, and Company, Boston, 3rd ed., 1922) p. 47. Henceforth this work will be referred to as Holdsworth, followed by the volume and page numbers.

those five should hear all the suits of the realm, and adjudicate upon them, and that they should not depart from the *Curia Regis*, but should remain there to hear men's suits; provided that if any question arose among them which they could not solve; it should be reserved for the king's hearing, and should be settled as it should seem good to him and the wiser men of the realm."<sup>5</sup> This was the beginning of the Court of Common Bench or Common Pleas. Within a century this tribunal was clearly established as a separate body sitting apart from the king under its own chief justice. Moreover, it had become specialized in jurisdiction to common pleas (these being roughly private-law matters between citizen and citizen as distinct from public-law issues touching the person or powers of the king or touching the central government). Originally the new court was to remain with the king and the *Curia Regis* and hence to follow them in their travels, but by 1215 this was altered, Magna Carta providing that "Common pleas shall not follow our court but shall be held in some certain place". Even in early times this "certain place" was usually Westminster, and before long it was permanently fixed there. Later the other central royal courts were also located there.<sup>6</sup>

In the story of the Court of Common Pleas we see the pattern for the emergence of the other common-law courts and later of the Court of Chancery; hence the historical origins of these other bodies will not be pursued here in any detail. The Court of King's Bench split off from the *Curia Regis* by a gradual process terminating about the end of the fourteenth century. It exercised important criminal jurisdiction, extensive civil jurisdiction (for example, trespass *vi et armis*, the fertile mother of actions) and "a general superintendence of the due observance of the law by officials and others".<sup>7</sup> Then also the Court of Exchequer emerged about this time. The Exchequer itself as a distinct government department of revenue and finance had developed in the twelfth century, and by the early fourteenth century the separation from this department of a Court of Exchequer had occurred. This court was composed of a bench of "Barons of the Exchequer" with power originally to determine revenue and taxation cases.<sup>8</sup> By the fourteenth century then, except for the Court of Chancery, the shape of the modern central judicature is apparent in England.

<sup>5</sup> Holdsworth, Vol. I, p. 51; T. F. T. Plucknett, *A Concise History of the Common Law* (Butterworth and Co., London, 3rd ed., 1940) p. 136. Henceforth this work will be referred to as Plucknett, followed by the page number.

<sup>6</sup> Holdsworth, Vol. I, pp. 196-197.

<sup>7</sup> *Ibid.*, p. 212.

<sup>8</sup> *Ibid.*, pp. 231-235.

But the original status of the king and his council as the source of justice still had much force, and in the latter part of the fourteenth century special petitions to the king for justice multiplied. In large measure this came about because the procedure and remedies of the common-law courts were becoming settled and not a little complex, so that they were no longer flexible enough to be able to cope with all grievances. Where these special petitions concerned issues of private law between citizen and citizen, an over-worked King and Council soon delegated disposal of them to the Chancellor. He was a logical choice for the purpose because he was a principal royal official constantly in attendance at court and moreover was in charge of the royal writ system and the necessary secretarial staff.<sup>9</sup> Thus, soon there was a Court of Chancery. But when the special petitions concerned grave issues of criminal justice or public law, involving for example complaint of injustice or oppression at the hands of local magnates, they were not passed on to the Chancellor but reserved to the King and his Council. By the time of Henry VIII the King's Council in this aspect became the Court of Star Chamber.<sup>10</sup>

Having thus cursorily surveyed the history of the central courts, our interest now lies in the selection of judges and the appearance of a legal profession.

(b) *The selection of judges*

"With the establishment of the Court of Common Pleas, the decisive step was taken: the future of the common law was put into the hands of judges. Everything will therefore depend on the mode of selection of these judges and the position assigned to them."<sup>11</sup> In the late twelfth century and early thirteenth century, when the central royal courts were appearing, judges were drawn from the nascent civil service of the day. Governmental servants or officials were in the main clerics of the minor orders, for to hold the status of clerk was at this time the key to advancement in diplomacy, finance and the royal civil service, as well as in purely ecclesiastical pursuits. For a time, "in the great tradition of Norman administration", these civil-servant judges did their work well, but this state of affairs did not last. Henry II was succeeded by Richard I, who was absent from England for most of his reign, and then came King John, whose administration was, if anything, too vigorous. He fell into serious contention with the barons and smaller land owners, and eventually they wrung Magna Carta

<sup>9</sup> Plucknett, p. 162.

<sup>10</sup> *Ibid.*, pp. 163-164.

<sup>11</sup> *Ibid.*, p. 210.

from him. Under Henry III the struggle with the greater and lesser magnates continued, culminating in the Barons' War of the third quarter of the thirteenth century.

In these circumstances the royal civil service deteriorated badly. Royal incompetence, financial mismanagement and neglect of administration were largely to blame. Holdsworth tells the story in the following passages:<sup>12</sup>

During the reign of Henry III the absence of a vigorous ruler had made itself felt in the growing and widespread corruption of the constantly increasing tribe of royal officials. Bracton . . . bears witness to the deterioration of the bench; and the political songs of the times are full of similar complaints. The cause is not far to seek. The royal officials, even the judges, were both poorly and irregularly paid. Generally the other officials of the courts had no salaries, but were paid either from the damages recovered, or for the services which they performed for litigants. . . . Such being the case, the Crown cannot be altogether acquitted of blame. 'That the king's servants were miserably underpaid', says Mr. Hall, 'was admitted even then, and yet it was notorious that in most cases they were able to amass considerable fortunes'.

Finally complaints became so vehement that in 1289 Edward I appointed a commission of inquiry with all necessary powers.

The result was disgraceful to all branches of the civil service, and especially to the bench. It constitutes, to use Maitland's words, 'our one great judicial scandal'. Of the judges of the Court of King's Bench two out of three were removed; of the judges of the Court of Common Pleas four out of five. . . . Five of the itinerant justices . . . were found guilty of various crimes.

Thus we have here our first encounter with the bearing of salary and finance on the integrity and competence of the judiciary, a subject to which we shall return. In any event, Edward I and his advisers had a crisis in the courts on their hands and necessarily considered reforms and changes for the judiciary. Where were persons suitable for judicial office to be found? Almost inevitably the royal civil-service had at first supplied the judges, but by the end of the thirteenth century an alternative source was at hand. By this time a separate and autonomous legal profession had emerged, having developed in response to the needs of litigants resorting to the new central royal courts.

It is trite to say that the origins of the legal profession are somewhat obscure, but the point for our purposes is that one had arisen by the thirteenth century. At first the profession was a group of pleaders and advocates before the royal courts, which Plucknett describes as "small, active, learned and (like the court

<sup>12</sup> Holdsworth, Vol. II, pp. 294-295.

itself) centralised".<sup>13</sup> And Dean Pound tells us, "All through the thirteenth century we find reference to pleaders. The Year Books of the time show a small group of them doing all the work of framing the pleadings in a colloquy with the judges. Also the opinions of these pleaders are cited or reported in the earlier Year Books on a par with those of the judges."<sup>14</sup> This seems to have been a natural development parallel to the rise of separate courts with increasingly complex procedure. Accordingly we find that Edward I and his immediate successors turned from the civil service to the legal profession for judges. Except for the Court of Exchequer, where the change occurred later,<sup>15</sup> the displacement of royal clerks (civil servants) by lawyers was complete early in the fourteenth century.<sup>16</sup> Perhaps the king was influenced in making the change by the example of the Pope, who at this time was appointing judge-delegates *ad hoc* from among eminent practitioners of the canon law, to hear and determine particular ecclesiastical causes. But whereas the Pope was appointing judge-delegates for certain controversies only, it had become accepted in England, no doubt *because* the royal courts were at first part of the civil service, that they should be manned by full-time judges with some continuity of tenure. Moreover, anything less would reverse the current trend away from the direct personal influence of the king. So, though the king now took his judges from the

<sup>13</sup> Plucknett, p. 211.

<sup>14</sup> Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing Co., St. Paul, 1953) p. 81.

<sup>15</sup> From the emergence of the Court of Exchequer in the early fourteenth century, the Chief Baron was usually a lawyer, but this was not usually true at first of the other barons. Until the sixteenth century the latter were usually civil servants raised to the Exchequer Bench because of their practical knowledge of the revenue acquired in lesser offices connected with it. But, as the jurisdiction of the Exchequer expanded to include some "common pleas", it became desirable that the barons should all be legally qualified as were the other judges; hence in 1579 the definite practice of appointing them from the serjeants-at-law was instituted. Holdsworth, Vol. I, pp. 235-237.

<sup>16</sup> "We shall see that by 1316 the order of serjeants at law had been formed. This order consisted of the leading practitioners who were promoted to be members of the order by the crown; and, when the judges ceased to be chosen from the royal clerks, they naturally came to be chosen from this order of serjeants, and soon came to be chosen solely from its members. Probably this rule began with the court of Common Pleas. In the course of the fourteenth century, it was extended to the King's Bench; but it was not till the latter part of the sixteenth century that the same rule was applied to the court of Exchequer. By that time, however, the rule that only a serjeant could be made a judge had become somewhat of a form. From the middle of the sixteenth century onwards it became the custom to make any lawyer, whom it was desired to raise to the bench, a serjeant at law, merely that he might be made a judge. But the rule that no one could be made a judge unless he was a serjeant was not altered until the Judicature Act of 1873." Holdsworth, Vol. I, p. 197.

legal profession, they were full-time judges as had been their civil-servant predecessors. The distinguished legal historian, Professor Plucknett, testifies to the very great importance for the future of this new policy of appointment from the legal profession:<sup>17</sup>

If the old system had persisted, and if the judges had continued to be members of the civil service, with different careers from the bar, we should have had in England (and probably in America too) something like the system prevailing in several continental countries to-day. According to this system, the young lawyer has to decide very early in his career whether he will go to the bar or to the bench. Naturally these two careers attract different types of men. At the bar the competition is severe, progress slow, but success brings considerable wealth and great social and political influence. Brilliant and adventurous men are attracted by a career at the bar. A candidate who elects for the bench has very different prospects. He has a salary instead of prospective profits, certainty instead of a gamble. His first post is in a petty court in the provinces; like other functionaries, satisfactory service will bring him advancement from lower to higher courts, from distant towns to the metropolis. The mentality which such a career attracts is very different from that of the advocate, and the result is that bench and bar are divided by differences of interest and training.

. . . . .

. . . the way of combining the permanent courts with the legal profession was to choose the permanent judges from among the serjeants (who for the moment were the branch of the profession that mattered most). The system has persisted, with very little modification, to the present day both in England and in all jurisdictions where the common law prevails. Its great characteristic is the intimate connection between bench and bar. In the middle ages this was emphasized by the fact that the serjeants during term time lived together in their inns and discussed their cases informally together simply as serjeants, without distinction between those on the bench and those at the bar. Even with the rise of newer branches of the profession, the decline of the serjeants and the rise of the attorney and solicitor general, the same fundamental situation remained. . . . The judges were men who had passed a large portion of their life in the world of practical affairs and had won success there. And finally, the common experience and training unite bench and bar in an understanding of each other which is difficult to attain when their professional lives are spent in different careers. This cooperation between bench and bar is of the utmost importance for the working of the common law system.

Henceforth judicial competence and integrity would depend in a large measure on the quality of the legal profession—upon its training, learning and experience. Here then is one of the important elements of judicial independence as we know it. But, although

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<sup>17</sup> Plucknett, pp. 212-213.

the judges were no longer civil servants or controllable as such, the royal power over them was originally considerable.

(c) *Royal power to instruct judges and to preside in the royal courts*

In the early days of the common-law courts the influence of the king was often direct and great. Either he might himself be present and presiding over the justices or, if not, they might have had a specific directive from him what to do in a particular case or type of case. By about the end of the fifteenth century both these forms of personal royal participation in the judicial function had decayed. Concerning the first, Holdsworth says, "In early days the king actually decided cases; and there are instances of this practice in Henry III, Edward I and Edward II's reigns. But, when Fortescue wrote at the end of the fifteenth century, it had ceased to be usual; and Coke merely stated the existing practice in answer to James I's claim to decide cases for himself."<sup>18</sup> It is true that James I did, on occasions, preside over the Court of Star Chamber and give judgment there.<sup>19</sup> But this no doubt helped to cause the abolition of that tribunal by Parliament within a few years. Concerning royal power to issue instructions to the judges, Plucknett (when speaking of the growing independence of the courts) has this to say: "A great step in this development was the solemn enactment of the Statute of Northampton in 1328 which declared that no royal command under the Great or Smaller Seal shall disturb the course of the common law, and that if such a command is issued, the judges shall ignore it. Slowly but steadily the judges ventured to enforce the plain words of this important act, and so to assume the detached position which is typical of most modern judiciaries."<sup>20</sup> Thus, while the king was and is still in theory the fountain of justice, this came to be true only in the sense which Blackstone has explained in a much-quoted passage from his *Commentaries*:<sup>21</sup>

But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts, which are the grand depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain established rules, which the Crown itself cannot now alter but by act of parliament.

Although these developments represent further progress toward

<sup>18</sup> Holdsworth, Vol. I, p. 194.

<sup>19</sup> Holdsworth, Vol. I, p. 500; Plucknett, p. 162.

<sup>20</sup> Plucknett, p. 145.

<sup>21</sup> Sir William Blackstone, *Commentaries on the Laws of England* (Lewis Edition, Philadelphia, 1898) Book I, p. 267.

judicial independence, nevertheless all was not yet safe or settled. The power to appoint to judicial office and to determine conditions of removal from office remained with the king, and any real abuse of his powers could subvert judicial autonomy. It was this type of pressure that played so large a part in the turbulent relations of the Stuart kings with the judiciary in the critical seventeenth century.

(d) *Tenure of judges (their appointment and removal)*

The judges were able to develop the principles of private law with impartiality and free of royal or executive interference from the early days of the common-law courts. But until the eighteenth century, on public-law issues of moment touching the royal power or position, great pressure was at times applied by the king to the judges through the royal power of dismissal from office. As a rule, before the seventeenth century, judges had been granted their offices during the king's good pleasure (*durante bene placito*) and thus could be dismissed by him at any time without cause. The Chief Baron and other Barons of the Exchequer were exceptions, their royal commissions being granted to endure during good behaviour (*quamdiu se bene gesserint*). Such grants of office were conceived to be in much the same category legally as grants of estates in land. The relatively modern notion of contract simply did not exist in these earlier times and thus played no part in the legal conception that was developed of the nature of judicial office. As we shall see, the grantee during good behaviour could be removed from office at the instance of the grantor (the king) for breach of the condition of the grant, that is, for failure to conduct himself well in the office.

So far as appointees at pleasure were concerned, although there had been some arbitrary dismissals of judges in the disturbed conditions of the fourteenth century, in practice their security of tenure then improved somewhat. "In the fifteenth century the atmosphere was very different, and the judges (with the sole exception of Fortescue) kept resolutely apart from the wars of the roses. Under the Tudors the judges were scarcely any more disturbed by political changes: the chief justices were dismissed at the accession of Mary, whose accession they had tried to impede, and Elizabeth is suspected of dismissing a judge from political motives, but beside these facts we must place others showing how the judges could take an independent stand against both queen

and council.”<sup>22</sup> Thus there had been in practice a real measure of judicial independence and security of tenure in Tudor times, though appointments were at pleasure. Moreover the quality of the bench at this period was high, for the sixteenth century was the golden age of legal education at the Inns of Court and Chancery, and many lawyers and judges had first attended the Universities of Oxford or Cambridge. Holdsworth testifies to the beneficial effects for the legal system and the country. “On the whole the distinguished lawyers and judges of this period were better educated men than their predecessors in the fourteenth and fifteenth centuries; and this was, no doubt, one of the main reasons why the common law showed so many signs of improvement and so marked a capacity for expansion. Those who administered it were not wholly untouched by the new learning. They could therefore in some degree emancipate their minds from barren technicalities, and appreciate the large changes which were taking place in all spheres of the national life.”<sup>23</sup>

But, with the advent of the Stuart kings early in the seventeenth century, a change for the worse set in which was not reversed until very late in the century. A great constitutional struggle was joined over the scope of the royal prerogative powers as against both the common law and Parliament. To what extent did the king have discretionary powers unfettered either by the “ancient common-law rights” of Englishmen or the need for parliamentary sanction by statute? The strict legal position was not so clear and a rather good case could be made on the basis of Tudor and mediaeval precedents for a very considerable and independent prerogative power. The Stuart kings lost in the end, but what they did, so to speak, was badly to overplay a rather good hand.<sup>24</sup> Frequently, and no doubt inevitably, the basic issue of the extent of the royal prerogative power was forced before the courts in legal form and the judiciary became involved in a partisan way.

It is not surprising that the Stuart kings used their undoubted royal powers to dismiss judges at pleasure, and appoint others, to secure so far as they could a bench of royalist sympathies. For instance, Sir Edward Coke’s opinion against the Crown in a constitutional case in 1616 brought his immediate dismissal.<sup>25</sup> This use of the power of dismissal was of course regarded as improper by the parliamentary party and many of the common

<sup>22</sup> Taswell-Langmead’s *Constitutional History* (10th ed. by T. F. T. Plucknett, Sweet and Maxwell, London, 1946) p. 519.

<sup>23</sup> Holdsworth, Vol. V, p. 346.

<sup>24</sup> *Ibid.*, Vol. VI, p. 30.

<sup>25</sup> Plucknett, p. 52.

lawyers, and so we find that, during the period of the Commonwealth (1649-1660), the Exchequer practice became the general rule and all judicial appointments were made during good behaviour. Unfortunately this new policy did not long survive the Restoration, for soon Charles II reverted to appointments during pleasure. Both he and James II turned once more to the power of dismissal as a means of securing judicial decisions favouring the Crown in every litigation or prosecution that in any way touched the extent of the royal power or position. Such an assault on the integrity of the central royal courts was all the more necessary for the restored Stuarts because the Courts of Star Chamber and High Commission, which had served James I and Charles I so well, had been abolished by the Long Parliament.<sup>26</sup> The position steadily worsened for the courts, and so far indeed did James II carry dismissals that virtually all judges of ability and integrity were driven from the bench.

Their replacements in judicial office were incompetent or corrupt, or both, for only the incompetent or corrupt would take up the posture of extreme subservience the king was demanding.<sup>27</sup> Typical of this sorry group were the notorious Chief Justices Scroggs and Jeffreys. We are told, for example, that Jeffreys made large sums of money out of those accused of complicity in Monmouth's rebellion—one bribe alone being £4,000. As a contemporary report puts it, "Ye poor and miserable were hanged, but ye more substantiall escaped".<sup>28</sup> Thus, by the eve of the Revolution of 1688, the courts had been brought very low indeed in public and professional esteem. All the decent legal talent of the day (including several ex-judges) was in practice at the bar, none of it was on the bench. "Westminster Hall was indeed standing on its head."<sup>29</sup> When James II fled England, Jeffreys (by now Lord Chancellor) was nearly killed by a mob in the streets. He took refuge in the Tower of London, where he died within a few weeks.<sup>30</sup>

It is no surprise then to find that reform of the tenure of judicial office took some priority in the revolution settlement. William III quickly dismissed the judicial lackeys of James II and restored the Commonwealth practice of issuing all judicial commissions

<sup>26</sup> Holdsworth, Vol. X, p. 416.

<sup>27</sup> For the full story, see Holdsworth, Vol. VI, pp. 501-512.

<sup>28</sup> Holdsworth, Vol. VI, p. 508. <sup>29</sup> *Ibid.*, p. 511.

<sup>30</sup> "By Jeffrey's own request he was taken, in a frenzy of terror, to the Tower, guarded by two regiments of militia, whose strongest efforts could scarcely keep off the thousands who pressed around the cavalcade with execrations and threats of vengeance." Edward Foss, *The Judges of England 1066-1870* (John Murray, London, 1870) p. 373.

during good behaviour. His new judges were of course chosen from lawyers who had supported the revolution settlement, but as they were the bulk of the bar good candidates were not lacking. Still, no statute yet required that the king *must* appoint judges during good behaviour, though apparently it was by inadvertence only that such a provision had been omitted from the hastily-drawn Bill of Rights.<sup>31</sup> Parliament sought to repair the omission in a bill passed in 1692 to ascertain the commission and salaries of judges, but William III vetoed the bill (by refusing royal assent) because he had not been consulted beforehand about its financial provisions: that judges' salaries were to be charged on the hereditary revenues of the Crown.<sup>32</sup> But, almost ten years later, William did give his assent to the Act of Settlement,<sup>33</sup> which provided in paragraph seven of its third section that, from the accession of the House of Hanover, "*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*". With the accession of George I in 1714 this provision took effect.

It should be explained at this point that when the Act of Settlement spoke of "judges" it meant the judges of the central courts of common law, so far at least as the English judicature was concerned. The Court of Chancery, owing to its peculiar history, was in a unique situation and was not included. Until the nineteenth century, the only Chancery "judges" were the Lord Chancellor and the Master of the Rolls. The Lord Chancellor, who remained a principal privy councillor and later became a principal cabinet officer, always had held and still holds his office at the pleasure of the Crown. This was a mark of the primary status of the Lord Chancellor in early times in the *Curia Regis* or King's Council, and no doubt the same can be said of the original tenure at royal pleasure of the judges of the Common Pleas and King's Bench. This marked their high origin as members of the *Curia Regis* close to the king himself. Presumably this tenure has persisted for the Lord Chancellor because, in addition to judicial duties, he has retained other primary official functions at the center of government, whereas the judges of the Common Pleas and King's Bench became separated from the *Curia Regis* and wholly specialized in the judicial function. In this respect, then, the modern position of the Lord Chancellor as a judge is anomalous.

<sup>31</sup> Taswell-Langmead, *ante*, footnote 22, p. 518.

<sup>32</sup> Holdsworth, Vol. VI, p. 234 (footnote).

<sup>33</sup> 12 and 13 William III (1701), c. 2.

The Master of the Rolls provides an illuminating contrast in the matter of tenure. He never enjoyed primary status as a member of the *Curia Regis*; rather he was originally just what his title suggests: chief of the clerks or masters in the Chancery and principal custodian of its records. The usual feudal or mediaeval system to provide for the discharge of such lesser governmental offices was to grant a life estate (or even an estate of inheritance) in the office, as if it were a parcel of land. The grantee was given the duty and power of performing the functions of the office and was rewarded by exclusive personal entitlement for the term of the grant to collect fees from members of the public who desired him to act officially. Such a grantee of office could not be dispossessed of his functions or fee-income so long as the term of his grant was running and he observed its conditions. This was certainly the mediaeval position of the members of the official staffs of the Chancery and the central courts of common law; indeed it continued to be their situation until the judicial reforms of the nineteenth century. Now, though appointed by the Crown, the Master of the Rolls originally belonged to this lower level of government, and hence it seems that he enjoyed the life estate in office usual to this category of official.<sup>34</sup> One may also conjecture that the same considerations explain the customary life tenure, already mentioned, of the Barons of the Court of Exchequer, that court having developed out of the Exchequer as a government department and not directly from the *Curia Regis*. Initially then we have feudal property-conceptions to thank for the idea of life tenure in office, though of course the generalizing of this tenure for judges occurred long after the mediaeval period for reasons relevant to later times and not dependent on feudal conceptions.

Though the Master of the Rolls' grant of office did not refer to judicial duties, nevertheless he accumulated them by delegation from the hard-pressed Lord Chancellor and by custom. The Master of the Rolls first appears with some judicial functions in the fifteenth century, and from the seventeenth century he was invariably a lawyer.<sup>35</sup> His independent position as a judge of first instance with customary chancery jurisdiction was confirmed by statute in 1730,<sup>36</sup> to dispose of a controversy then current that in status the Master of the Rolls was a mere delegate of the Chan-

<sup>34</sup> Holdsworth, Vol. I, pp. 246-252, and 416-428, and see the biographies referred to in footnote 35 *post*.

<sup>35</sup> These things appear from a perusal of biographies of the earlier Masters of the Rolls in Foss's work cited in footnote 30.

<sup>36</sup> 3 Geo. III, c. 30.

cellor. Finally, just to complete the story of the judges of chancery jurisdiction, the Lord Chancellor and the Master of the Rolls were eventually reinforced. In 1813, by statute, a Vice-Chancellor was provided for the Court of Chancery who was to be a barrister of fifteen years standing and to enjoy tenure during good behaviour, subject to removal by joint parliamentary address as in the Act of Settlement.<sup>37</sup> In 1841 a further statute provided for two more Vice-Chancellors on the same terms.<sup>38</sup>

It may now be emphasized that to make judges commissions *quamdiu se bene gesserint* was a grant of their offices *for life*, subject to observance of the condition of good behaviour. This was made clear in the case of *Harcourt v. Fox* in the King's Bench in 1692-3.<sup>39</sup> A statute of 1689 had provided that the appointment of the clerk of the peace for a county (an important official) must be "for so long time only as such clerk of the peace shall well demean himself in his said office", that is, *quamdiu se bene gesserit*. The power of appointment rested with the keeper of the county records (*Custos Rotularum*) but was henceforth to be on these terms only.

*Gregory Justice*: I conceive that by this Act the clerk of the peace has his office for his life, by these words, 'to have and enjoy so long as he shall well demean himself in the office'. If these words had been annexed to a grant of any other office in Westminster Hall, without all question the grantee had been an officer for life.<sup>40</sup>

*Holt Chief Justice*: I knew the temper and inclination of the Parliament, at the time when this Act was made; their design was, that men should have places not to hold precariously or determinable on will and pleasure, but having a certain durable estate, that they might act in them without fear of losing them; we all know it, and our places as Judges are so settled, only determinable upon misbehaviour. . . . Now I think since the making of this last statute in the first of this King and Queen, he [the clerk of the peace] has absolutely an estate for life in his office . . . determinable only upon misbehaviour.<sup>41</sup>

Appeal was taken by writ of error to Parliament and the judgments of the justices of the King's Bench were there affirmed. The Attorney-General, presumably before the House of Lords, is reported to have given his opinion as follows:

When an office is granted *quamdiu se bene gesserit*, it is a freehold, and to last during the parties' life. It is so even in the case of the King, whose grant shall be taken most strictly against himself. If the king grant an office *quamdiu se bene gesserit*, it is a freehold for life.<sup>42</sup>

<sup>37</sup> 53 Geo. III, c. 24.

<sup>38</sup> 5 Vict., c. 5.

<sup>39</sup> 1 Show. 426, at pp. 506 and 556; 89 E.R. 680, at pp. 720 and 750.

<sup>40</sup> 89 E.R. at p. 728.

<sup>41</sup> *Ibid.*, at p. 734.

<sup>42</sup> *Ibid.*, at p. 750. Apparently Coke took the view that the king could not change the customary tenure during pleasure of the judges of the

The authoritative passages just quoted make very clear the proprietary conception of the legal nature of these offices. It will be noted also that the historical definition of this tenure is inconsistent with any requirement for an automatic or compulsory retirement age. Compulsory retirement of judges for age alone could only be imposed by specific statutory modification of the historical and established legal meaning of tenure during good behaviour. The appropriate legislative or constitution-amending body in this respect for the country concerned would have to act. We shall return later to this problem in considering the position of the Canadian judiciary.

Now, to complete the story of the establishment of judicial security of tenure in office, only one weakness remained: the peculiar effect of a demise of the Crown. The rule was that on the death of the king all royal appointees, judges included, vacated their offices whatever their tenure. An act of 1760 altered this so far as judges were concerned by providing:<sup>43</sup>

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

Thus we reach the modern position in England on security of judicial tenure, though strictly speaking the relevant provisions of the Act of Settlement and the Act of 1760 are now superseded by later provisions to the same effect in the modern statutes governing the English judicature.<sup>44</sup>

We must now turn to a detailed examination of the means of removing judges from office that obtain in England, the modern position not necessarily being as clear as one might expect. To effect removal of a judge appointed for life during good behaviour there are apparently four methods other than a parliamentary joint address under the modern statutory equivalents of the seventh paragraph of the third section of the Act of Settlement. When ap-

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Common Pleas and King's Bench, and that hence he could *only* make such appointments on these terms. In this view, a *statute was essential* to authorize as well as to require that judges' tenure be for life during good behaviour. *Harcourt v. Fox* is to the contrary, and it is a King's Bench case confirmed in the House of Lords. But this was apparently an issue before the Act of Settlement. See Joseph Chitty, Jun., *Prerogatives of the Crown* (Butterworth, London, 1820) p. 76.

<sup>43</sup> 1 Geo. III, c. 23. The Demise of the Crown Act of 1901 is the corresponding modern provision.

<sup>44</sup> Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. 5, c. 49), s. 12(1).

pearing as counsel for the Irish judge, Sir Jonah Barrington, before Parliament in 1830, Mr. Denman (afterwards Lord Chief Justice) is reported by Todd to have said 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".<sup>45</sup> In addition, a judge might in some circumstances be removed by a special statute of Parliament which, for instance, simply abolished his office in a judicial reorganization.

As a fourth method, impeachment for corruption in office before the House of Lords presumably is still possible for judges, but the removal procedure of the Act of Settlement by joint address would no doubt always be used now. As a matter of parliamentary procedure, it involves a careful and fair parliamentary hearing upon which the old impeachment procedure would not improve. As for proceedings at the instance of the Crown in the Court of Queen's Bench by writ of *scire facias* or criminal information, Todd has this to say:<sup>46</sup>

The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury. When the office is granted for life, by letters patent, the forfeiture must be enforced by a *scire facias*. These principles apply to all offices, judicial or ministerial, that are held during good behaviour.

<sup>45</sup> Alpheus Todd, *Parliamentary Government in England* (Longmans, Green, and Co., London, 1887) Vol. II, pp. 858-859.

<sup>46</sup> *Ibid.*, pp. 857-858. The writ of *scire facias* is still available for this purpose and was not abolished by the Crown Proceedings Act of 1947. See Halsbury's *Laws of England* (3rd ed.) Vol. 11, p. 154. The opinion of Professors Cowen and Derham to the contrary is therefore doubtful. Otherwise, they support what Todd has said. See their article, *The Independence of the Judges* (1953), 26 *Aust. L.J.* 463.

It is noteworthy that a grantee can fail in "good behaviour", that is to say, can fail to "well demean himself in his office", by "incapacity from mental or bodily infirmity" as well as by the wilful means mentioned.

Several authorities on the English constitution agree with Todd that these proceedings in the Queen's Bench, without any reference whatever to Parliament, are still available for the removal of superior-court judges,<sup>47</sup> but Sir Ivor Jennings is more doubtful: he says, "They can be removed—and this perhaps means they can be removed only—on an address from both Houses of Parliament".<sup>48</sup> If the statutory provision for joint parliamentary address originating with the Act of Settlement is to be construed as exhaustive on means for the removal of judges, then Jennings' conjecture is correct. Likely the older methods do survive, but probably would now be used only in painfully obvious cases. As we shall see later, their survival may have a bearing on the validity of certain provisions of the Canadian Judges Act.

In any event, it seems that the scope of the statutory power of removal by joint parliamentary address is wider than the older possibility of forfeiture in the Queen's Bench for misconduct. Todd tells us: "This power is not, in a strict sense, judicial, it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof."<sup>49</sup> Parliament of course would be unlikely to act except on imputation and proof of grave misconduct, but the point is that the parliamentary concept of misconduct is potentially wider and more various than that the Court of Queen's Bench would take notice of under the common law. It was Anson's opinion that misbehaviour, so far as Parliament is concerned, might cover "any form of misconduct which would destroy public

<sup>47</sup> Sir W. Anson, *Law and Custom of the Constitution* (Keith, 4th ed.) Vol. II, Part I, pp. 234-235; Chalmers and Hood Phillips' *Constitutional Law* (6th ed. by Hood Phillips, Sweet and Maxwell, London, 1946) pp. 391-392; A. B. Keith, *Constitution of England from Queen Victoria to George VI* (Macmillan and Co., London, 1940) Vol. II, p. 327; E. C. S. Wade and G. G. Phillips, *Constitutional Law* (Longmans, Green and Co., London, 1946) p. 215; Viscount Sankey, *Parliamentary Debates* (House of Lords) Vol. 90 (1933) pp. 76-77.

<sup>48</sup> Sir Ivor Jennings, *The Law and the Constitution* (University of London Press, London, 4th ed., 1952) p. 227.

<sup>49</sup> Todd, *ante*, footnote 45, Vol. II, p. 860. Note the punctuation, and the disjunctive "but", in the relevant passage from the Act of Settlement, quoted earlier.

confidence in the holder of the office".<sup>50</sup> Finally, there is no reserve royal discretion when a parliamentary address for removal has been made. By constitutional convention, the sovereign must act as requested.<sup>51</sup>

There is not much to say about removal of judges by special statute. If the British Parliament *may* do anything by statute, no United Kingdom judge is out of reach. In fact, no judge is beyond reach of the House of Commons, for concurrence of the House of Lords now can be dispensed with soon enough. Todd does mention one case in 1867, when the Court of Admiralty in Ireland was being invested with a new common-law jurisdiction, for the exercise of which the incumbent judge was not considered competent by training or experience. The parliamentary bill proposed in one clause to alter his status from "good behaviour" to "pleasure of the Crown", obviously so that he might be compulsorily retired. "The judge protested strongly against this proceeding, and his friends took the sense of the House upon the clause. But as it was provided in another part of the Bill that the judge should be entitled, on his retirement, to receive an annuity equal to his full salary, the proposed clause was agreed to by a large majority."<sup>52</sup> This seems reasonable. Parliament could hardly be denied the power to make a bona-fide re-arrangement of a part of the judicature for such reasons and on such terms as in this case. I doubt if Dr. Goodhart would consider this an attack on the general principle of tenure during good behaviour for superior-court judges.

(e) *Parliamentary debate concerning judicial conduct*

Apart from debates on judicature statutes, parliamentary rules impose much restraint on debate concerning judicial conduct. "By the theory of our constitution, those to whom the administration of justice is entrusted are not responsible to Parliament, except for actual misconduct in office."<sup>53</sup> And even then parliamentary consideration of allegations of misconduct against a judge is not to proceed unless (1) preliminary investigation has revealed a prima-facie case of misconduct that would, if fully proven, warrant the judge's removal, and (2) a definite motion to proceed with the determination of the issue is made. Obviously the cabinet has responsibility to take a position in such an extreme case. But, saving extreme cases, constitutional usage for-

<sup>50</sup> Quoted by Chalmers and Hood Phillips, *ante*, footnote 47, pp. 391-392.

<sup>51</sup> *Ibid.*, p. 392.

<sup>52</sup> Todd, *ante*, footnote 45, Vol. II, pp. 877-878.

<sup>53</sup> *Ibid.*, Vol. I, p. 571.

bids either House of Parliament to consider or debate any matter civil or criminal which is before the courts for determination or is about to be submitted to them. As Todd puts it, quoting Mr. Gladstone:<sup>54</sup>

But nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law; or of the decisions of a competent legal tribunal,—or that it should tamper with the question whether judges are on this or that particular assailable and endeavour to inflict upon them a minor punishment by subjecting their official conduct to hostile criticism.

Nor can debate arise over the parliamentary provision of judicial salaries, for they are now permanently charged by statute on the consolidated revenue fund and hence do not come up for review and possible debate every year as do annual supply items. It seems that a judge also is not liable to proceedings for contempt of Parliament for what he says or does in the execution of his judicial office, even though adverse criticism of Parliament is involved.<sup>55</sup>

(f) *Payment of judges*

The detailed history of the payment of judges in England need not concern us. Holdsworth says that "From the first they were paid salaries by the crown which in the course of years were gradually and continuously increased".<sup>56</sup> Further, until the judicial reforms of the nineteenth century, their salaries were not the only source of income allowed to judges. They were entitled in various ways to share in the fees which litigants paid, and the chief justices in particular enjoyed very valuable patronage, in that they had the disposal of the non-judicial offices of their courts. In other words they were entitled to grant the offices for a price and the grantee was then deemed to have a freehold in the office just as if it were a parcel of land.<sup>57</sup> Certain legislative reforms of the judicature in the earlier years of the nineteenth century put an end to this situation and provided for generous salaries which were to be the sole income of the judges. But, until these changes, interests in fees and patronage were important elements in the financial independence of the judges. Indeed, particularly for the chief justices, the royal or parliamentary salary was at times quite a secondary source of income. Furthermore,

<sup>54</sup> *Ibid.*, Vol. I, p. 574.

<sup>55</sup> *Stockdale v. Hansard* (1839), 112 E.R. 1112, *per* Coleridge J. at p. 1203; Hugo Fischer, *Civil and Criminal Aspects of Contempt of Court* (1956), 34 Can. Bar Rev. 121, at p. 133.

<sup>56</sup> Holdsworth, Vol. I, p. 252.

<sup>57</sup> *Ibid.*, p. 248.

this judicial right to patronage had been successfully defended against the king.<sup>58</sup>

In any event, the seventh paragraph of the third section of the Act of Settlement dealt with payment as well as tenure of judges, providing that their salaries were to be "ascertained and established". It does not appear that financial pressure in the form of the withholding or reduction of salary had hitherto been used as a means of controlling judges, though, as we have seen, inadequate salaries contributed to the judicial scandals of the later thirteenth century. There were times also when the royal treasury was badly in arrears in paying judicial salaries, though not by design to put pressure on the judges. But apparently those who framed the constitutional settlement at the end of the seventeenth century foresaw the possibility of pressure and attempted to foreclose it. The possibility might have been in their minds because Parliament itself had been successfully using the power of the purse against the king for some time. It is worth recalling that the bill William III vetoed in 1692 attempted to "ascertain and establish" judicial salaries by making them a permanent charge against the royal hereditary revenues.

In the course of the eighteenth century, Parliament did make definite statutory provision for judicial salaries. Moreover the modern position in England seems to be that, unless and until Parliament has provided or in effect has promised a salary, no judicial vacancy exists to which the sovereign may appoint anyone. A dispute arose in the last years of the nineteenth century in New Zealand concerning this point, and the Judicial Committee of the Privy Council took the position that the English and New Zealand law was the same. Hence the Judicial Committee, which included on this occasion Lord Halsbury, Lord Watson, Lord Herschell and Lord MacNaghten, expressed itself on the English position:<sup>59</sup>

It appears certain that since the reign of James I, with two possible exceptions, the latest of which dates back as far as 1714, no addition has been made to the number of judges without express parliamentary sanction. In the Act of Settlement it was provided that the judges' commissions should be made *quamdiu se bene gesserint*, 'and that their salaries should be ascertained and established'. The latter provision was not completely carried into effect until a subsequent period. The remuneration was in former times derived partly from fees and partly from the civil list of the Sovereign. By several Acts passed prior

<sup>58</sup> *Bridgman v. Holt* (1693). See Holdsworth, Vol. I, p. 261.

<sup>59</sup> *Buckley v. Edwards*, [1892] A.C. 387, at pp. 392-393.

to the reign of George III, the salaries of the judges were in part provided by certain sums charged upon the duties granted by those Acts.

Then came a statute of great importance, chapter 23 of the first year of George III (1760), entitled "An act for rendering more effectual the provisions in [the Act of Settlement] relating to the commissions and salaries of judges". It is worth rather full quotation. The preamble is, in part, as follows:

Whereas your Majesty has been graciously pleased to declare from the throne to both houses of parliament, that you look upon the independence and uprightness of judges, as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of your loving subjects, and as most conducive to the honour of your crown; and in consequence thereof, your Majesty has recommended it to the consideration of your parliament, to make further provision for continuing judges in the enjoyment of their offices during their good behaviour, notwithstanding the demise of your Majesty, or any of your heirs and successors; and your Majesty has also desired your faithful commons, that you may be enabled to secure the salaries of judges, during the continuance of their commissions; and whereas in return for this paternal goodness, and in the justest sense of your tender concern for the religion, laws, and liberties, of your people, we have taken this important work into our consideration, and have resolved to enable your Majesty to effectuate the wise, just, and generous purposes of your royal heart:

Section one of this act (on the continuance of judicial commissions in spite of a demise of the sovereign) has already been quoted. Section two merely reiterated the royal power to remove a judge on a joint address from Parliament requesting removal. Section three is as follows:

And be it enacted by the authority aforesaid, That such salaries as are settled upon judges for the time being, or any of them, by act of parliament, and also such salaries as have been or shall be granted by his Majesty, his heirs, and successors, to any judge or judges, shall, in all time coming, be paid and payable to every such judge and judges for the time being, so long as the patent or commissions of them, or any of them respectively, shall continue and remain in force.

Section four in effect reinforced section three by providing that, to the extent that judges were dependent upon salaries granted by George III, those salaries were to remain a charge upon the duties and revenues supporting the royal civil list of George III's successors after his death. The further story of the mode of paying judges out of public moneys is complex, but the trend was consistent and the result clear. In 1787 the consolidated fund was created by statute and some of the payments due to judges charged against it. The process of statutorily charging all salary moneys

payable to the judges on the consolidated fund was substantially complete by about 1799, but not finally complete in every detail until 1875. It has already been mentioned that the result of this development is to prevent any routine or frivolous discussion of the conduct of judges by Parliament in financial debate.<sup>60</sup>

Speaking of the significance of the statute of 1760, Lord Herschell for the Privy Council had this to say: <sup>61</sup>

Their Lordships think that the Act of 1 Geo. 3, c. 23, would render it difficult to contend that the Crown could after that date appoint additional judges for the payment of salary to whom Parliament had given no sanction. For the salaries of the judges were then, by the authority of Parliament, secured to them during the continuance of their commissions, and after the demise of the Sovereign were charged upon the revenues granted by Parliament for the civil government of the realm. The recital which precedes this legislation shews that, with a view to their independence, it must have been intended that all the judges should be in this position, and it certainly cannot have been the intention of Parliament to enable the Sovereign to increase without its sanction the charges which after the demise of the Sovereign were to be imposed on the revenues of the realm.

Two significant conclusions seem warranted, then, on the English position: (i) parliamentary provision for a salary is necessary for the creation of a judicial vacancy to which the sovereign may appoint, and (ii) once there has been an appointment, the judge is entitled to have his salary continue so long as his commission is in effect, that is, for life during good behaviour. In both the Act of Settlement and the later Act of 1760 for rendering the Act of Settlement more effective, tenure during good behaviour was coupled with what was in effect a prescription that judicial salaries were to be assured for the same period. Sir William Blackstone was in no doubt that this was the intention, purport and effect of the two enactments, and, on the Act of 1760, he is a contemporary authority. In his *Commentaries*, published in 1765, he says: <sup>62</sup>

And now, by the noble improvements of that law [the Act of Settlement], in the statute of 1 Geo. III c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, . . . and their full salaries are absolutely secured to them during the continuance of their commissions. . . .

Finally, it is of interest to find that, as late as 1931, the ques-

<sup>60</sup> See The Parliamentary Debates (fifth series) Vol. 90 (1933-34) The House of Lords, *per* Lord Rankeillour at p. 63 and Viscount Sankey L.C. at pp. 77-80.

<sup>61</sup> [1892] A.C. at p. 393.

<sup>62</sup> Blackstone, *ante*, footnote 21, Book I, pp. 267-268 (italics mine).

tion whether a judge's salary might be reduced during the currency of his commission became a point of controversy in Great Britain. One of the measures taken to meet the financial emergency of the period was the National Economy Act of 1931, which authorized the remuneration "of persons in His Majesty's Service" to be reduced by order in council, even where the amount of the salary for the office had been specified by statute. The Government ordered reduction of judicial salaries by one fifth, along with a great many others, but the constitutional propriety of this action was widely doubted. Sir William Holdsworth argued that judges were not "in the service of His Majesty" within the meaning of the National Economy Act. Only public officers who could be instructed in the name of the Crown how to perform their functions (he said) could be described as "servants of" or "in the service of" His Majesty.<sup>63</sup> As we have seen, royal power to instruct the judges in this sense was on its way out by 1328.

Professor E. C. S. Wade took issue with Holdsworth,<sup>64</sup> arguing that judges were properly described as "in the service of His Majesty", and that, as a matter of statutory construction, the words in issue were intended to include the judges. Government spokesmen took the same line, and the cuts were put in effect. But the most significant development was that the judges themselves sent a confidential memorandum on the subject to the Prime Minister on December 4th, 1931, which became public when it was read into the record of the House of Lords on July 24th, 1933, by the Lord Chancellor at the request of the Lord Chief Justice and the Master of the Rolls.<sup>65</sup> It is clear from this unique document that the judges themselves fully agreed with Sir William Holdsworth:

The judges of His Majesty's Supreme Court of Judicature think it their duty to submit certain considerations in regard to the recent reductions of the salary payable to judges which seem to have escaped notice.

It is, we think, beyond question that the judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive

<sup>63</sup> Holdsworth, *The Constitutional Position of Judges* (1932), 48 L.Q. Rev. 25.

<sup>64</sup> E. C. S. Wade, *His Majesty's Judges* (1932), 173 Law Times at pp. 246 and 267. A reply by Holdsworth is printed in the same volume at page 336.

<sup>65</sup> Reproduced starting at p. 103 of (1933), 176 Law Times. The quotation is not quite the whole of this memorandum.

and the subject. They have to discharge the gravest and most responsible duties. It has for over two centuries been considered essential that their security and independence should be maintained inviolate.

The Act of Settlement made clear provision for this in the following terms: 'That after the said limitation shall take effect as aforesaid, 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'. . . . Further by sect. 12 of the Act of 2 and 3 Will. 4, c. 116, judges were exempted from taxes.

It was long ago said that there can be no true liberty in a country where the judges are not entirely independent of the Government; and the soundness of the remark has never been questioned. Art. III of the Constitution of the United States runs as follows: 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office'.

In this matter our country has set an example to the world, and we believe that the respect felt by the people for an English judge has been partly due to his unique position, a feeling which will survive with difficulty if his salary can be reduced as if he were an ordinary salaried servant of the Crown.

It was owing to the general acceptance of these views that on the one hand the salaries of High Court judges have never been the subject of a House of Commons vote, but have been charged on the Consolidated Fund, and that on the other hand the judges hold their office as expressed above during good behaviour and are removable only on an Address to the Crown by both Houses of Parliament.

If the salaries of the judges can be reduced almost *sub silentio* by the methods recently employed, the independence of the Judicature is seriously impaired. It cannot be wise to expose judges of the High Court to the suggestion, however malevolent and ill-founded, that if their decisions are favourable to the Crown in revenue and other cases, their salaries may be raised and if unfavourable may be diminished.

We must express our deep regret that no opportunity was given to the judges of offering a voluntary reduction of salaries for an appropriate period; but we recognize that the Government was in a grave difficulty and that the time for consideration was very short. . . .

Late in 1933, Viscount Buckmaster gave notice of a motion in the House of Lords that, among other things, in the opinion of the house judges' salaries should not be diminished during their continuance in office. In the debate that followed, Viscount Sankey, the Lord Chancellor, defending the Government's action in 1931, pointed out that there had been several adjustments by statute of

judicial salaries since the Act of Settlement, some, he said, being increases and some decreases. He then continued:<sup>66</sup>

On constitutional grounds the action then taken is not open to challenge on the ground that it strikes at the constitutional position of the judge. But then it is said: 'If you cut off twenty percent of the Judges' salaries you can cut off eighty percent or one hundred, and what then becomes of the Judges' independence?' You can do these things of course. But grave measures taken in grave political emergencies are not to be measured and criticised by such a *reductio ad absurdum*. They must be looked at in common sense and with due sense of proportion. When anyone makes an attempt so to deal with the Judges' salaries that their position is really threatened, these arguments will be open to those who oppose so ill advised and, I make bold to say, so wicked a proposal. They do not touch the action taken by this Government or their predecessors.

At least the Lord Chancellor admitted that salary reductions could be carried to the point where they would threaten judicial independence and thus raise a grave constitutional issue. Moreover it is not clear that there *were* other statutory salary reductions in the period since the Act of Settlement. The changes to which Holdsworth refers in his *History* all seem to be increases,<sup>67</sup> though it is difficult to be sure what the net effect was when the mode of payment was being slowly changed from charges on special taxes and royal revenues to charges on the consolidated fund, and when judicial income from patronage and fees was being progressively eliminated. Many statutes and many years are involved. In any event, it seems that the balance of authority definitely favours the view that it is unconstitutional in Britain to cut the salary of an individual judge of a superior court during the currency of his commission. It would seem to be unconstitutional also for Parliament to attempt a general reduction of the judicial salary scale to an extent that threatens the independence of the judiciary—as I have shown, even Viscount Sankey left this question open. Subject to these two limitations, Parliament has power to adjust the level of judicial salaries.

Further, there is the problem of the liability of the judges to income tax, a question that has arisen in Canada, Australia and South Africa, as well as in Britain. In their memorandum just quoted, the English judges referred to the plenary tax exemption granted them in a statute of 1832. The exemption did not remain for long. In the Income Tax Act of 1842<sup>68</sup> the judges were speci-

<sup>66</sup> Parliamentary Debates (House of Lords) Vol. 90, p. 80.

<sup>67</sup> See Holdsworth, Vol. I, pp. 252-254 and 262.

<sup>68</sup> 5 and 6 Vict., c. 35, Schedule (E), third paragraph.

fically mentioned as liable along with all others. In the Canadian case, the Judicial Committee of the Privy Council asked itself whether "judicial emoluments are in a class apart, protected by some paramount principle making inapplicable to that form of income a tax imposed by statute in terms wide enough to include it". Their answer was "Neither the independence nor any other attribute of the judiciary can be affected by a general income-tax which charges their official incomes on the same footing as the incomes of other citizens".<sup>69</sup> This seems to be the accepted position then in Commonwealth countries including Britain. It is here perhaps that the British government of the day should have rested its case for the cuts effected under the National Economy Act of 1931. That reduction was non-discriminatory in the sense that all salaried public offices of whatever nature were affected on the same terms, and those relying on private incomes also were suffering, under the impact of the economic depression. The principles of general applicability and non-discrimination are essential to keep in mind.

(g) *Disqualification of judges for interest*

Possible pressures from the executive or parliament are not the only threats to the independence or impartiality of judges. There are more subtle pressures to guard against. During the British controversy on the National Economy Act, it was mentioned by Sir William Holdsworth and by the judges themselves that no normal judicial determination of the applicability of the statute to the judges was possible, for, one and all, they were disqualified by interest from deciding such an issue. This points to a very old principle favouring the impartiality of the royal courts—that no man should be judge in his own cause. In 1701, Chief Justice Holt went so far as to say "That if an act of Parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; . . . it cannot make one who lives under a government judge and party".<sup>70</sup> Chief Justice Hobart had said the same thing almost a hundred years earlier, stating that the principle was one of immutable natural law.<sup>71</sup> The modern position no doubt is that a statute of this kind would prevail, though the courts would con-

<sup>69</sup> *The Judges v. Attorney-General for Saskatchewan* (1937), 53 T.L.R. 464, at p. 466.

<sup>70</sup> *City of London v. Wood* (1701), 12 Mod. 669.

<sup>71</sup> *Day v. Savadge* (1615), Hobart 85. This case and *City of London v. Wood* are referred to in J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955) pp. 38-39 and 145, respectively.

strue against making a person judge in his own cause if any alternative meaning could be fastened upon the statutory words. The importance of the principle in any event is demonstrated by the fact that it was discussed in terms of natural law. Interested judges are expected to disqualify themselves by declining to adjudicate, but if, inadvertently or for other reasons, they do not do so, what then?

The leading case is *Dimes v. Grand Junction Canal Company* in 1852 in the House of Lords,<sup>72</sup> involving a dispute over valuable rights in land. A decree had been made in the Court of Chancery by the Vice-Chancellor and then appealed to and affirmed by the Lord Chancellor. But the Lord Chancellor had a large interest as shareholder in the canal company. Appeal was taken to the House of Lords and the judges were summoned to advise on the position created by the Lord Chancellor's interest. The result was that the Lord Chancellor was ruled to have had a disqualifying interest, his affirmation of the decree was therefore voidable, and the House considered the Vice-Chancellor's decree on its merits as if under direct appeal. The house accepted the unanimous opinion of the judges delivered by Baron Parke: "We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a Judge; that it was a voidable order, and might be questioned and set aside by appeal or some application to the Court of Chancery, if a prohibition would not lie."<sup>73</sup>

If interest is alleged against the judge of an inferior court or tribunal, disqualification is tried and if necessary enforced in the appropriate superior court by one of the prerogative writs. But these writs do not lie against one of the central royal courts, so apparently the procedure then is to apply to the other judges of the court for the avoidance of the voidable order of their interested colleague, or to take the same step by way of appeal, if there is a regular channel of appeal open to a disinterested tribunal. Baron Parke did concede that cases of necessity might exist where the decree or order of an interested judge would stand. Presumably such an order might have to be made in a court of first instance to lay the foundation for appeal to a disinterested tribunal, where the latter had only appellate jurisdiction. The words of Baron Parke

<sup>72</sup> 3 H.L.C. 758; 10 E.R. 301.

<sup>73</sup> 10 E.R. at p. 312. This is an interesting example of "lifting the corporate veil" to identify the shareholder with the company, something usually done only to advance some high public purpose.

were that in "a case of necessity . . . the objection of interest cannot prevail. Of this the case in the Year Book . . . [1430] . . . is an instance, where it was held that it was no objection to the jurisdiction of the Common Pleas that an action was brought against all the Judges of the Common Pleas, in a case in doubt which could only be brought in that court."<sup>74</sup> In 1936 the Saskatchewan Court of Appeal was confronted with the problem of the liability of all the provincial judges to provincial income tax following a direct reference of the question to it by the provincial cabinet under the Constitutional Questions Act of the province. The interested judges took the view that they were in a position of necessity within the meaning of the *Dimes* case,<sup>75</sup> and they were affirmed in this view by the Judicial Committee of the Privy Council.<sup>76</sup> The Privy Council judges of course were disinterested, and the necessity here may be said to have consisted in laying a basis for appeal to that tribunal. In any event, the Saskatchewan justices of appeal had to answer by an opinion because the statute said so, regardless of the bearing of common-law necessity.

But now the question arises, Why could not the appropriate branch of the Supreme Court of Judicature in England have determined the applicability of the National Economy Act in 1931 to the English judges as a matter of common-law necessity? This issue figured in the exchanges between Professors Wade and Holdsworth at the time, with the latter taking the view (in which the judges' memorandum supported him) that the objection of interest was insurmountable. He said: "The case of *Dimes v. Grand Junction Canal* . . . shows that the slightest suspicion of a particular and personal interest will debar a judge from sitting in judgment. Sect. 17 of the Judicature Act 1925 shows how wide this principle is. A statutory permission to adjudicate was needed to get rid of the objection, even when the judge's interest was a general interest as one of a class of persons affected by a tax. The statutory permission would clearly not apply when the interest was particular and personal."<sup>77</sup> Professors Wade and Holdsworth did agree at least that a disinterested board of the Judicial Committee of the Privy Council might have been composed and the question referred there by the Crown under section 4 of the Judicial Committee Act of 1833.

In concluding this topic, I might note briefly further detail

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<sup>74</sup> *Ibid.*, at p. 313.

<sup>75</sup> *Re The Income Tax Act*, [1936] 4 D.L.R. 134, at p. 135.

<sup>76</sup> (1937), 53 T.L.R. 465.

<sup>77</sup> (1932), 173 Law Times at p. 337.

on the nature of disqualifying interest for judges of any rank. "A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is, subject to any statutory authority to the contrary, a bar to the justice acting, but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter. That which then has to be considered is the effect likely to be produced upon the minds of the public as to the fairness of the administration of justice, and this is a question of degree to be decided in every case."<sup>78</sup> It is a sign of their primary constitutional status that the superior-court judges must be trusted to apply to themselves the rules they have a duty to enforce for inferior tribunals.

(h) *Other powers and privileges contributing to the autonomy of the courts*

As has been shown, the central royal courts developed to the point where they could hold the king at arm's length (and later the cabinet as well, when that body came to control the king). The final position was as Blackstone described it, that the king had irrevocably delegated the whole of his judicial power to his judges, and that he could not instruct them beforehand, or remove them (during good behaviour), or stop their salaries. But, on the other hand, precisely because they were royal delegates, albeit singularly autonomous ones, the judges did benefit in power and position in ways that furthered their constitutional independence. They had attributed to them certain powers and privileges originally characteristic of the king himself when, in the early years after 1066, he did *personally* perform substantial judicial functions. They include the power to punish for contempt of court, the infallibility of court records, and the personal legal immunity of judges from liability to aggrieved litigants complaining of absence of jurisdiction, misconception of law or fact, bias or corruption. As the matter of appeals is closely related to the last two of these topics, it will also be briefly considered.

(i) *Powers to punish for contempt.* Quite aside from history, the necessity is obvious for extensive judicial power to deal punitively with contempt of court, that is, with disobedience to court orders or processes and other forms of serious interference with or obstruction of the due administration of justice. One simply could not speak of the independence of courts not somehow armed

<sup>78</sup> Halsbury's Laws of England (2nd ed.) Vol. 21, pp. 536-537.

with reasonable means of defending themselves in this way. The early Norman kings enjoyed such powers as a feature of their plenary personal governmental jurisdiction, particularly over disobedience to royal writs and misconduct by court officials. Originally, then, contempt of court "consisted of an offence against the sovereign as the fountain of justice, or against his royal palace, where justice was said to have been dispensed by the king in person. Contempt was considered as an offence because it imputed to him a breach of the coronation oath to 'administer justice to his people'."<sup>79</sup> In due course these powers were transmitted to the judges of the central royal courts and elaborated by them in their precedents. In large measure definition of the nature and extent of the powers is still a matter for the common law in both Britain and Canada,<sup>80</sup> though from early times some statutory provisions have occasionally entered the picture.<sup>81</sup> A succinct description of what is involved has been given by Professor Hood Phillips:<sup>82</sup>

Contempt of Court may be either civil or criminal. Civil contempt of Court consists of disobedience to an order of the Court made in civil proceedings. Though punishable by fine or imprisonment, this is merely a form of civil process. Criminal contempt of Court is a common law misdemeanour, and may take such forms as: (i) contempt committed in face of the Court such as directly insulting the judge; (ii) interference with juries, parties or witnesses, or the publications of comments on a pending case which are calculated to prejudice a fair trial and so to interfere with the course of justice; (iii) the publication of matter scandalizing the court, e.g., scurrilous abuse of a Judge with reference to remarks made by him in a judicial proceeding.

For present purposes there is no point in a detailed consideration of the complexities of contempt-of-court jurisdiction. It is enough to say that, so successfully did the central royal courts develop their own powers in this regard, there are modern misgivings that they go too far. Particularly is this so about the power of a superior court summarily to punish by fine or imprisonment a contempt committed outside the court by a stranger to the criminal or civil proceedings concerned.<sup>83</sup> In any event, it is clear that contempt powers adequate to maintain judicial autonomy have been assured to the courts themselves.

<sup>79</sup> Fischer, *Civil and Criminal Aspects of Contempt of Court* (1956), 34 Can. Bar Rev. 121.

<sup>80</sup> See, *The Criminal Code*, 1953-54 (Can.), c. 51, s. 8.

<sup>81</sup> See, *The Criminal Code*, 1953-54, c. 51, ss. 108, 457, 514(2), 610 and 612.

<sup>82</sup> Chalmers and Hood Phillips, *ante*, footnote 47, pp. 398-399.

<sup>83</sup> See article by Fischer, *ante* footnote 79 (1956), 34 Can. Bar Rev. 121; also Holdsworth, Vol. III, pp. 391-394.

(ii) *The infallibility of court records.* The creation and status of records have been of great importance in the development of the separate status of the central royal courts, and here again we must start with the early Norman kings as personal dispensers of justice. Originally there was no systematic keeping of written records, and the personal memory of the king about what he had previously done in his court was taken to be infallible and conclusive when any question arose. The royal judges were soon invested with like infallibility of memory, so that their personal recollections about previous decisions of their courts also became incontrovertible. Soon the judges, when called upon, would cause a written record to be made of their recollections, and from that point it was a natural transition to the contemporaneous keeping of records of judicial proceedings.<sup>84</sup> Pollock and Maitland say that "In England at an early time the proceedings of the royal court were committed to writing. Thenceforward the appeal to its record tended to become a reference to a roll, but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices; and, as duplicate and triplicate rolls were kept, there was always a chance of disagreement among them."<sup>85</sup> The plea rolls date from about 1194 and form (in the words of these same historians) "a magnificent series of judicial records".<sup>86</sup> The final step was soon taken, and in a way that was to be expected: the infallibility of the royal memory was transferred to the written record itself, which thus acquired an independent status. Sir Edward Coke describes the result in these words: "It is called a record, for that it recordeth or beareth witness of the truth. . . . it hath this sovereign privilege that it is proved by no other but by itself".<sup>87</sup> Our modern terminology, which does not improve on Coke's way of putting it, is that court records are entitled to be judicially noticed.

Coke also gives us the reasons of substance which justify this privilege for judicial records. He said: "In this point the law is founded upon great reason; for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there will never be an end of a cause, but controversies will be infinite".<sup>88</sup>

<sup>84</sup> See Holdsworth, Vol. V, pp. 156-159.

<sup>85</sup> Sir F. Pollock and F. W. Maitland, *The History of English Law* (Cambridge University Press, 2nd ed., 1898), Vol. II, p. 670.

<sup>86</sup> *Ibid.*, Vol. I, p. 169.

<sup>87</sup> Quoted by Holdsworth, Vol. V, p. 158, footnote 6.

<sup>88</sup> Quoted by Holdsworth, Vol. VI, p. 237.

There are thus sensible roots of governmental necessity here. Some official person or tribunal at some point must have the last word if issues of public or private law are ever to be settled and the legal system maintained as a going concern. It has been characteristic of the central royal courts that, within their wide and important jurisdictions, they have had the last word—subject to occasional appeals to Parliament as a court. This is another clear sign of their primary constitutional status.

The central courts of common law, the Common Pleas, King's Bench and Exchequer, were for obvious reasons the first tribunals to acquire records of the sanctity described, and hence they were the first courts of record. As time went on and they had to contend for jurisdiction and status with the Chancery, the Star Chamber, the ecclesiastical courts and others, the judges of the central courts of common law went so far as to maintain that their courts were the *only* courts of record, that the records of these other bodies, if any, did not have the same quality of finality as those of the common-law courts. This was clearly just a way of asserting the constitutional superiority of the common-law courts and the common law against other tribunals and the law they administered. Accordingly much was made in the sixteenth and seventeenth centuries of the differences between courts of record and courts not of record, and this has left some residue of unhistorical and unmeritorious distinctions.<sup>89</sup> Anyway, the Court of Chancery more than held its own, but, except to note this, further details need not concern us.

In any event, the original and correct idea persisted that the infallible official record was a mark of highly-placed and powerful courts of direct royal ancestry. This infallibility of record had important implications that were soon to be worked out. The only way of going behind the record of a court of record to question its decision by way of appeal was by a writ of error, whereas the decisions of lesser courts could be more easily attacked. The writ of error, as will be seen later, was about the only means of appeal available from the central royal courts until the nineteenth century. The infallibility of the formal record of the courts of common law also had a definite bearing on the development of the total personal legal immunity of the judges of those courts for anything done by them in their judicial capacity, a subject now to be examined.

(iii) *The personal legal immunity of judges.* The development of

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<sup>89</sup> See *ibid.*, Vol. V, pp. 157-161.

the complete immunity of judges for their judicial acts is historically connected with the idea of the superiority of a court of record and the earlier and imperfect types of appeal from or review of original judicial decisions. The mediaeval conception was that to complain of a judgment one must attack the judge himself. For instance, a writ of false judgment could be brought in the king's court against the decision of a local communal or feudal court and, if the complaint succeeded, not only would the decision be altered, but the erring judge would be fined and perhaps subjected also to a suit for damages at the instance of the aggrieved litigant. But, after an initial period of some uncertainty in the thirteenth century, it became established that a writ of false judgment would not lie against a royal judge. "In the case of courts of record, . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction."<sup>90</sup> With the writ of error came the idea that the record of an original judicial decision could be removed from one royal court to another and reviewed in the latter for error on the record. Correction then followed if need be, without rendering the erring judge in any way personally liable either to pay a fine or to compensate an aggrieved litigant. Thus, by the writ of error procedure, review and possible correction of the decision of a royal judge was separated from any question of his personal legal liability. One exception to this was made by statute in favour of the liberty of the subject. "Judges of the Supreme Court are liable to a penalty of 500 pounds for wrongfully refusing to issue a writ of habeas corpus in vacation in the case of a person in custody on a criminal charge."<sup>91</sup> Saving this, by the eighteenth century we find judges of the central royal courts enjoying total personal immunity for judicial acts.

In theory, even superior-court judges would be liable if they acted completely without jurisdiction, for then their purported judicial acts would not be judicial acts but private ones only. A hypothetical example of this given by the older writers is the Court of Common Pleas assuming to hear and decide a charge of felony. But alleged lack of jurisdiction came to mean little or nothing in the case of the judges of the central royal courts, for they had power finally to hear and determine issues on the extent of their

<sup>90</sup> Holdsworth, Vol. VI, p. 235; and see Pollock and Maitland, *ante*, footnote 85, Vol. II, p. 666.

<sup>91</sup> Chalmers and Hood Phillips, *ante*, footnote 47, p. 396.

own jurisdiction. Hence, if such a judge purported to act judicially, the worst that could be said of him, even if he did go quite outside his jurisdiction, would be that he was mistaken in deciding something he had undoubted power to decide—the nature and extent of his own jurisdiction.<sup>92</sup> Thus, though acting in error, he would still be acting judicially. And so the modern position is reached, as expressed by Lord Esher in 1895 in *Anderson v. Gorrie*:<sup>93</sup>

... the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule rests is that, if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice.

The result is that superior-court judges may proceed with their judicial duties secure in the knowledge that they cannot personally be harassed by disappointed litigants, however vexed or powerful. The only recourse against such a judge personally, if he abuses his position, is to effect his removal from office by parliamentary address or possibly one of the other extraordinary means considered earlier. Even after removal, liability would not attach personally to the ex-judge for harm done by the abusive judicial acts that were the reason for his removal. The superior-court judge then is in a different position from all other official persons in government. Generally speaking, if any other official person acts quite beyond his jurisdiction, his actions are private and not official though he purports to act officially, and if he thereby does harm, in the sense of the normal law of property or tort, he is personally liable in damages as a private person.<sup>94</sup> Judges of inferior courts are in this position, because an inferior judge does not have the last word on the nature and extent of his own jurisdiction; in his case lack of jurisdiction can be established before a superior court by use of one of the prerogative writs.<sup>95</sup>

This is not to say that there are no basic rules of jurisdiction

<sup>92</sup> See Holdsworth, Vol. VI, pp. 236-240.

<sup>93</sup> [1895] 1 Q.B. 668, at p. 670.

<sup>94</sup> See: E. C. S. Wade, Comment on *Roncarelli v. Duplessis* (1951), 29 Can. Bar Rev. 665; Harry Street, *The Law of Torts* (Butterworth and Co., London, 1955) pp. 97-102; Jennings, *The Law and the Constitution* (4th ed.) pp. 204-211. (This is not of course to be confused with problems of the vicarious liability of the Crown as an employer.)

<sup>95</sup> Concerning the prerogative writs and judicial review see C. M. Schmitthoff, *The Growing Ambit of the Common Law* (1951), 29 Can. Bar Rev. 469; and also Holdsworth, Vol. I, pp. 226-231.

for superior courts that their judges are obliged to observe, for there are of course. Once again we see, as a sign of their primary constitutional status, that superior-court judges must be trusted to apply to themselves the rules they have a duty to enforce against other officials and tribunals. In other words, while they have the legal duty and power to determine lack of jurisdiction in others, they are not themselves subject to a like determination at the hands of others. There is of course the safeguard of appeals within the hierarchy of the superior courts themselves, whereby the superior-court judges in effect check on one another, and the ultimate possibility of parliamentary removal of judges in extreme cases. Nevertheless, the clear implication is that superior-court judges participate in the original distribution of governmental powers effected by the first principles of the English constitution. Again this development is not merely fortuitous. The reason of substance already mentioned respecting the infallibility of the records of the central royal courts applies here also—that at some point there must be an end to disputation on the interpretation and application of statute law or common law (whether public or private). Hence the constitution necessarily designates certain officials or tribunals to speak the last word on these matters, and for the most part, in England, the superior courts have been so designated. (The House of Lords as a court has long been quite distinct from Parliament as a legislature.) If the House of Commons (led by the cabinet) is displeased with the judicial interpretation of a statute, then it can change the wording of the statute and try again.

(iv) *Appeals*.<sup>96</sup> The nature of the judicial system of appeals is clearly relevant to understanding the primary and separate status of superior courts. The writ of error has already been mentioned as the old form of appeal from the central courts of common law. Almost from the beginning some kind of appeal has been possible. As Pollock and Maitland say, "The king's court cannot be charged with false judgment; but gradually as it breaks into segments and throws off wandering satellites, something like an appeal from one segment to another or from the satellite to the central nucleus becomes possible. . . . The idea of a complaint against a

<sup>96</sup> For an extensive treatment of the subject see O'Halloran, *Right of Review and Appeal in Civil Cases before the Judicature Acts, 1875, and Development of the Right of Appeal in England in Criminal Cases* (1949), 27 *Can. Bar Rev.* 46 and 153. A third article in the series by Mr. Justice O'Halloran, *Problems in the Modern Appeal in Civil Cases*, is to be found *ibid.* at p. 259.

judgment which is not an accusation against a judge is not easily formed. But gradually in Edward I's day as the king's court assumed a triple form—Common Bench, King's Bench, King in Council—. . . men became familiar with the notion of a 'procedure in error' which does not call for a defence from the judges who are said to have made the mistake."<sup>97</sup> Writs of error from the Common Pleas went to the King's Bench, and then could go on to Parliament. Writs of error from the King's Bench originally lay only to Parliament, but by a statute of 1585 a Court of Exchequer Chamber was composed of at least six judges of the Common Pleas and Barons of the Exchequer to hear most writs of error from the King's Bench, with a further appeal possible to Parliament as a court. Writs of error from the Exchequer went to another statutory Court of Exchequer Chamber composed of the Lord Chancellor and the Lord Treasurer. Finally, by statute in 1830, the King's Bench lost its power to deal with errors from the Common Pleas "and the court of Exchequer Chamber was made a court of appeal intermediate between the three common law courts and Parliament. The court consisted of the judges of the two courts which had not given the decision against which the appeal was brought."<sup>98</sup> Within each of the common-law courts there was also from early times review of original decisions by way of the motion for new trial. By this means the judgment of the original judge might be reviewed and corrected by his colleagues of the same court "en banc".

As for the Court of Chancery, originally only the Lord Chancellor could re-hear a case, if he chose to do so. By the late seventeenth century, however, the right of the House of Lords to hear and determine appeals from the Chancery was established. But for this, the only review would be re-hearing by the Lord Chancellor of some case originally decided by himself or the Master of the Rolls. In the nineteenth century, the Vice-Chancellors were added to the Master of the Rolls as in effect judges of first instance, and in 1851 a statutory Court of Appeal in Chancery was created. "It consisted of two Lords Justices in Chancery and the Lord Chancellor if he liked to sit there. They could be assisted, on the request of the Lord Chancellor, by the Master of the Rolls, the Vice-Chancellors, or any of the judges."<sup>99</sup>

As for the House of Lords itself, from the fourteenth century the whole house heard and voted on appeals. Usually the judges

<sup>97</sup> Pollock and Maitland, *ante* footnote 85, Vol. II, p. 668.

<sup>98</sup> Holdsworth, Vol. I, p. 245.

<sup>99</sup> *Ibid.*, p. 443.

were summoned to advise on the issue concerned, and their advice was almost invariably followed. From 1844 it became the established convention that only lords learned in the law should vote upon appeals, and in 1883 the attempt of a lay peer to vote was ignored.<sup>100</sup> In 1876, by statute, provision was made for the appointment of Lords of Appeal in Ordinary, who must be barristers of fifteen years standing or persons who have held high judicial office for at least two years. They were afforded all the safeguards of the Act of Settlement. As is well known, the Judicature Act of 1875 consolidated the central royal courts and the old appeal systems under a general court of appeal, which became the intermediate court of appeal under the House of Lords as a court.

Enough has been said to make clear two things important for present purposes: (i) that some form of appellate jurisdiction has always been a feature of the powers of the central royal courts, along with their original jurisdiction; and (ii) that it was the judges of the central royal courts themselves, often re-grouped for the purpose, who exercised appellate jurisdiction over one another. Even before the House of Lords itself became a distinct professional superior court, the advice of the royal judges, summoned for the purpose, usually prevailed there when the house was functioning as a judicial appeal tribunal.<sup>100</sup>

(i) *The holding of non-judicial office by judges*

Originally the judges of the central courts of common law were primary members of the Norman *Curia Regis*, but soon they ceased to function in this way. Nevertheless they remained under a standing liability to be summoned to advise the King-in-Council, and the King-in-Council in this aspect turned into the House of Lords. This liability to attend the House of Lords, though only as advisers, rendered the common-law judges ineligible to sit in the House of Commons, just as the peers themselves were ineligible for the popular chamber.<sup>101</sup> But if a judge were a peer as well as being a judge, he was entitled to participate in the non-judicial business of the House of Lords, and there are many instances of his doing so. Indeed the Lord Chancellor normally presides over the House of Lords. The Master of the Rolls was also in an anomalous position. Until 1873, he was allowed to sit in the House of Commons, the last to do so being Sir George Jessel, who was

<sup>100</sup> See Holdsworth, Vol. I, pp. 376-377.

<sup>101</sup> Todd, *ante*, footnote 45, Vol. II, p. 324.

Member of Parliament for Dover while he was Master of the Rolls.<sup>102</sup> By statute all superior-court judges in Britain, including the Master of the Rolls, are now declared incapable of sitting in the House of Commons.<sup>103</sup>

Another critical question in this regard is whether a superior-court judge may also be a member of the cabinet. In theory the king could summon whomsoever he pleased to advise him as a privy councillor and cabinet member, and we find that this was done with some judges in the earlier years of the cabinet system. Unknown either to Parliament or the public, Lord Chief Justice Mansfield of the King's Bench was a member of the cabinet from 1757 to 1765. When the fact became known later there was much adverse comment. In 1806 the issue became one of public controversy both in and out of Parliament when Lord Grenville insisted on appointing Lord Chief Justice Ellenborough of the King's Bench to his ministry. Again adverse criticism was sharp. Todd is of opinion that, since this last incident, it has become established that such appointments are unconstitutional:

Such an appointment would now be regarded as open to grave constitutional objections . . . because, being an *independent* judicial office, it is incompatible, on true constitutional principles, with the position of a responsible adviser of the crown. For, however pure might be the conduct of one in such a situation, he would be sure to bring suspicion upon the administration of justice before him in all political cases.<sup>104</sup>

The position of the Lord Chancellor is anomalous, but he is the exception that proves the rule. In any event he observes conventional limits on partisanship.

Thus we find established in England the general principle that superior-court judges are to be judges only. They are not to participate in either legislative or executive government as members of the House of Commons or the ministry of the day.

This concludes the present survey of the development in England of the main elements of judicial independence. With respect to the status and function of the central royal courts and their judges, the survey supports Dr. Goodhart's view of judicial independence. One may insist that an autonomous judicature is a primary element in the English constitution without denying that Parliament is primary in law-making power. But parliamentary primacy, though it goes very far, does not extend to the point that Parliament could constitutionally overthrow the independent

<sup>102</sup> *Ibid.*, pp. 325-326.

<sup>103</sup> Supreme Court of Judicature (Consolidation) Act, 1925, s. 12(2).

<sup>104</sup> Todd, *ante*, footnote 45, Vol. II, p. 198.

judicature as a co-ordinate institution of first importance in maintaining the rule of law. "The people as a whole, and Parliament itself, recognise that under the unwritten Constitution there are certain established principles which limit the scope of Parliament. It is true that the courts cannot enforce these principles as they can under the Federal system in the United States, but this does not mean that these principles are any the less binding and effective."<sup>105</sup> Now we must turn to the extension of the principle of judicial independence to North America, a process by no means automatic and moreover long delayed.

(To be continued)

- p 1139

### Education for Revolution

Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. General Gage marks out this disposition very particularly in a letter on our table. He states, that all the people in his government are lawyers, or smatterers in law; and that in Boston they have been enabled, by successful chicane, wholly to evade many parts of one of your capital penal constitutions. The smartness of debate will say, that this knowledge ought to teach them more clearly the rights of legislature, their obligations to obedience, and the penalties of rebellion. All this is mighty well. But my honourable and learned friend on the floor, who condescends to mark what I say for animadversion [the Attorney General], will disdain that ground. He has heard, as well as I, that when great honours and great emoluments do not win over this knowledge to the service of the state, it is a formidable adversary to government. If the spirit be not tamed and broken by these happy methods, it is stubborn and litigious. *Abeunt studia in mores*. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple, and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze. (Edmund Burke, Speech on Conciliation with America, in the House of Commons on March 22nd, 1775)

<sup>105</sup> Goodhart, *ante*, footnote 1, p. 55.