THE INDEPENDENCE OF THE JUDGES. *

A short time ago my friend the Honourable Mr. Rowell, the worthy President of this Association, did me the honour of asking me to address this meeting, leaving it to me to choose the subject and I hope my choice may meet with your approval.

My reason for selecting this subject is that on two occasions within the last few years the Parliament of Canada has been moved to pass two measures calculated to introduce the element of uncertainty in tenure of office of judges of the Supreme Court of Canada and of the Superior Courts of the Provinces, thereby in my opinion impairing the independence of the Bench.

The first of those measures was an Act passed by the Parliament of Canada in the year 1927 which materially changed the tenure of office of Judges of the Supreme Court of Canada. The Act of 1875 which established that Court in effect declared that its Judges should hold office for life, but the Act of 1927 declared that each judge "Whether heretofore appointed or hereafter to be appointed shall cease to hold office upon attaining the age of seventy-five years or immediately if he has already attained that age."

The objectionable feature of that Act was its application to judges who had been appointed for life and were then in office and who, in breach of contract with them, were to be dismissable without cause on reaching a certain age.

The other measure was a Bill introduced into Parliament in the year 1933, which proposed to reduce the salary of any judge of the Superior Courts of the Provinces, who, although appointed for life, remained in office after attaining a certain age. It passed the House of Commons but not the Senate.

The objectionable feature of that measure was its application to judges actually in office. They had been appointed for life at an annual salary fixed by Statute, but the Bill proposed to reduce their statutory salary if they remained in office after reaching a certain age.

A Liberal Government was responsible for the former, a Conservative Government for the latter, measure.

The views which I am about to express apply equally to both measures.

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*Address of the Rt. Hon. Sir William Mulock, P.C., K.C.M.G., before the Canadian Bar Association at its Annual Meeting in Montreal, September 5th-7th, 1934.

Any material alteration, to the prejudice of a judge in the terms upon which he has been appointed is, I think, open to at least two objections; that it is unfair to the judge, and that it establishes a precedent for further prejudicial alterations, applicable to all future judges actually in office, in the terms upon which they may have accepted appointment.

Each of the measures in question introduced the element of uncertainty of tenure of the judicial office.

Before this Association it is unnecessary to labour the priceless value to the country of an independent judiciary.

Any circumstance which may interfere with the absolute neutrality of a judge between litigants may imperil his impartiality and thus endanger the administration of justice.

It is the right of every citizen to enjoy judicial protection in respect of his property and liberty against unlawful interference from any source be it Governments, mobs, dictators or individuals.

Whatever be the sovereign law of the land, every citizen is subject thereto and is entitled to whatever rights or benefits that law confers upon him.

Abstract law is one thing; applied law is another. Parliament enacts laws but cannot apply them. It is for the judges to enforce them, and any interference with the independence of judges in dealing out impartial justice to every citizen is an unconstitutional invasion of the citizen's rights.

In all ages, writers on the subject of the independence of judges have expressed the view that, in the interest of justice, judges should be independent of every influence that may threaten the sound administration of the law.

One of those most baneful influences is uncertainty in tenure of the judicial office.

In England until the reign of William and Mary judges held office at the pleasure of the Sovereign and daily stood in danger of dismissal, not because they decided according to law but because of their refusal to prostitute the judicial office in order to comply with the wishes of the Sovereign.

Let me cite some authorities in support of that statement. Lord Birkenhead in his Fourteen English Judges, page 62, says:

> "Charles the First has shewn that judges held their office *durante placito* (during pleasure). If the King and the Law did not agree a judge who acted on the side of the law might find himself in his old age compelled to practice in competition with those who had lately

submitted to his decision. The Restoration had not given the judiciary security of tenure. A second revolution was necessary to bring about that essential condition of judicial impartiality. The result was that judges who, in civil cases, decided fairly and impartially became timid and ineffectual in any trial where Court influence might have an interest. It must be remembered that Hale was succeeded by a Scroggs and a Jeffreys, men who by their life and conduct both on and off the Bench brought the judges of England into contempt."

Referring to the effect of the dependence of judges for retention of office on the will of the reigning Sovereign, Alpheus Todd at page 855 of vol. 2 of his valuable work on Parliamentary Government in England, says :

"Previous to the Revolution of 1688, the judges of the Superior Courts as a general rule held their office at the will and pleasure of the Crown. Under this tenure there were frequent instances from time to time of venal, corrupt or oppressive conduct on the part of judges and of arbitrary conduct in the displacements of upright judges on the part of the Crown, which gave rise to serious complaints and led to several attempts during the 17th century to limit the discretion of the Crown in regard to appointments to the Bench."

Holdsworth in his History of English Law, vol. 6, commencing at page 502, discussing the appointment of the judges in the time of Charles II, says :

"Speaking from the standpoint of the King: It was necessary to appoint the judges during pleasure and to make the fullest use of the Royal pleasure in order to secure decisions favourable to the King . . . The effect upon the quality of the Bench was disastrous. The Court wanted as judges men of whom it could be sure . . . It was certain that a judge who was both learned and honest would hold his seat on the Bench by a very precarious tenure."

And at page 509 referring to James II, the writer continues :

"The spirit in which he expected his judges to administer what he was pleased to call justice is very fairly represented by a sentence from Jeffrey's speech as Chancellor to Herbert when he was made Chief Justice of the King's Bench. 'Be sure,' he said, 'to execute the law to the utmost vengeance upon those that are now known and we have reason to remember them by the name of Whigs, and you are likewise to remember the snivelling trimmers, for you know what our Saviour Jesus Christ says in the Gospel' that 'they that are not for us are against us.' James, as he told Sir Thomas Jones when he dismissed him from the post of Chief Justice of the Common Pleas, was determined to have 12 judges of his opinion . . . The least disobedience was a signal of dismissal. Herbert . . . was removed because he refused to order a soldier who had been condemned and sentenced to be executed, and Withens who had concurred with him was dismissed. Holt lost his place as Recorder of London for refusing to sentence to death a soldier found guilty of desertion. Jones . . .

> was dismissed because he declined to uphold the dispensing power . . . The least disobedience by a judge in doing the King's bidding was a signal for dismissal. Chief Baron Montague and Baron Neville were dismissed for the same cause . . . Levintz was dismissed because he refused to sentence a soldier for desertion and for opposition to the dispensing power. Sir John Powell and Sir Richard Holloway for their opinions in the Seven Bishops Case. Their successors were objects of contempt to the nation at large . . . . From the earliest times down to the reign of William and Mary, Superior Court judges held office at the pleasure of the Sovereign, were subject to dismissal by him should they encounter his displeasure, and many were the cases of such dismissal because of their refusal to deliver unjust judgments."

We in Canada, having for long years enjoyed the blessing of an independent judiciary, may have difficulty in realizing that the people of England were not always equally fortunate, but it is the fact that in England until the end of the Stuart dynasty the power of the Sovereign, of his own arbitrary motion, with or without cause, to dismiss any judge hung like the sword of Damocles over the head of every judge, and he knew not at what moment some judgment of his might meet with the Royal displeasure and the sword might fall.

For long years the patient suffering people of England struggled against the Crown in order to free the judges from sinister interference with the impartial discharge of their duties, but it was not until after one revolution which ended in the execution of Charles the First, and another which ended in the deposition of James the Second and the establishment of the House of Hanover on the throne of England, that the independence of judges against interference by Sovereigns or Governments was secured.

In winning that blessing, England proceeded with the utmost deliberation and care.

Before the crown was conferred upon William and Mary, a Committee of the House of Commons was appointed to consider what steps should be taken in order that the rights of the people should be fearlessly and impartially determined, and the committee recommended to Parliament that it adopt the principle, the precise words of the recommendation were "that the judges should hold office for life."

In 1770 the English Parliament by the Act of Settlement adopted that recommendation thereby substituting certainty for uncertainty of tenure of the judicial office.

That Act, establishing the independence of the judges, was a victory of the people over autocratic power.

Its effect on the administration of justice is thus described by Holdsworth in vol. 6 at page 234 :

> "It removed the Bench from the political arena; made it impossible for the Crown, the House of Commons or the House of Lords to exercise pressure upon it and thereby guaranteed the impartial administration of the law. In consequence the supremacy of the law has become the best of all securities for the liberties of the subject against both the claims of the Royal Prerogative and the claims of Parliamentary privilege."

As we all know, from then until to-day, that Act has been in force in England. For over two centuries the wisdom of the principle—certainty in tenure of the judicial office—has been on trial in England. What is the world's verdict? Is it not to be found in the reverence of all justice-loving people for what is known the world over to-day as British justice?

One of the most important, if not the most important of subjects that engaged the attention of the Fathers of Confederation and the British Government when framing the British North America Act, was the administration of Justice in Canada. The question for their determination was whether certainty or uncertainty of tenure of the judicial office should obtain in Canada. They had the choice between two principles: uncertainty which obtained in England prior to the Act of Settlement, and certainty established by that Act.

History having furnished them with evidence of the merits of the two systems, their decision was that, every citizen of Canada being subject to the law and entitled to enjoy whatever rights it conferred on him, neither Sovereigns nor Governments should be free to interfere with Superior Court Judges in administering impartial justice, and having reached that conclusion, they unanimously asked the Imperial Parliament to incorporate in the Confederation Act the provision for certainty of tenure of office of Judges of the Superior Courts of the Provinces of Canada as found in the Act of Settlement, and this was done.

There may be room for difference of opinion as to whether such tenure should be for life or for other fixed period, but the principle which I am discussing is whether once a judge is appointed, be it for life or for a term of years, is it in the interest of fearless, impartial administration of justice that the appointing power should without cause be entitled to dismiss him?

Let us now consider the two measures of the Canadian Parliament to which I have referred, and first that respecting the Supreme Court Act of 1927.

Until the passage of that Act, which substituted an age limit of 75 years for life tenure, every Supreme Court Judge, as provided by the Act of 1875, was entitled to hold office for life.

The Act of 1927 violated the Statutory right of every judge of the Supreme Court to hold office for life—an unconstitutional breach of contract.

Apart from the general proposition that uncertainty of tenure of the judicial office may interfere with judicial impartiality, the circumstance that the Dominion Government is a frequent suitor before the Supreme Court is an added reason why judges of that Court should hold office for a definite period, whether it be for life or otherwise.

Parliament as a rule acts on the advice of the Government of the day.

The precedent established by the Act of 1927 in substance is notice to every present or future judge of the Supreme Court that Parliament, acting on the advice of the Government of the day, may from time to time disregard any contract fixing the duration of a judge's right to remain in office.

In other words, that Act introduces the vicious principle of tenure of office by judges at pleasure of the Government of the day.

Under such a system what class of men will be available for appointment? That question answers itself.

With all respect I submit that it is not in the interest of fearless, impartial administration of justice that judges shall hold office at pleasure of any power be it Sovereign or Government, and the Act I think constitutes a dangerous precedent.

I now turn to the other measure, the Bill of 1933, which in effect declared that every Superior Court Judge whether then in office or thereafter appointed but who did not retire on reaching the age of seventy-five years, should suffer a reduction in salary.

As already observed the appointment of each Superior Court Judge is for life and The Judges' Act declares what his annual salary shall be. That Act is always speaking and no annual or other parliamentary salary vote is needed.

These two Statutes constitute a statutory contract with each Superior Court Judge that during his tenure of office he shall be entitled to payment of the full annual salary fixed

by the Judge's Act. Any Act in violation of that contract, is, I think, unconstitutional.

That Bill was open to grave objections. It proposed the violation of the contractual terms upon which every Superior Court Judge in Canada accepted office.

Its passage would have constituted a precedent for further parliamentary disregard of the contractual rights of judges, and would have introduced the element of uncertainty of tenure of office of every judge in Canada no matter of what Court, for if Parliament to-day disregards the terms upon which every Superior Court Judge took office may it not to-morrow do the same in respect of Judges of every other Court throughout Canada?

The Bill was, in substance, a declaration that no matter upon what terms judges may be appointed to office, such contracts may be treated as scraps of paper and that every Canadian judge shall hold office at the pleasure of the Government of the day.

It has been the practice in Canada to appoint to the Bench men who have passed middle age who, if legislated out of office would soon be too old to engage in any other bread-winning occupation. It happens that most Canadian judges possess little or no private means.

The Bill in question if it had passed into law would have constituted a precedent for further salary reductions. It is the first downward step that costs (*facilis descensus Averno*). You cannot peg reductions by Parliament as you might those on the stock market, and in this age of unsettled and shifting political and economic and socialistic views who can say that the reduction in salaries, once begun, would cease until every judge had been starved out of office, or made to feel that his tenure of office depended upon the pleasure of the Government of the day.

What an effective method, starvation, for destroying the independence of judges won by the people of England after centuries of struggle, revolution and bloodshed and conferred on Canada when the Mother of Parliaments gave us our constitution.

Permit me to bring to your attention some weighty opinions as to the relation of salaries to the independence of Judges.

Viscount Buckmaster in an article which appeared in *The Spectator* of 1st September, 1933, referring to the provision

in the Act of Settlement for ascertained and established salaries says :

> "The Statute contained no reference whatever to any power to reduce their salaries during their commission and there is no record from that time to this day it has ever been done. The reason is plain. Tenure of office is inseparably connected with the security of income and it is just as easy to threaten the independence of the Bench by a continual adjustment of the salaries paid as by other means." And, discussing an Act under which it was sought in England to reduce judges' salaries by taxation, he says that if judges are to be subject to that Act "we may bid a long farewell to the greatest object of our national pride, a pride which has been justified before all nations of the world."

In the case of *O'Donoghue* v. *United States*, 289 U.S. 516, a judge of the Supreme Court of the District of Columbia and a judge of the Court of Appeal of that District sought to recover sums withheld from their respective salaries by the Comptroller-General of the United States, and the question before the Supreme Court was whether their salaries were subject to such diminution. Mr. Justice Sutherland, in delivering the judgment of the Court, said:

> "In framing the Constitution therefore [of the United States] the power to diminish the compensation of the Federal Judges was explicitly denied in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favour or avoid the displeasure of that department which as master of the purse would otherwise hold the power to reduce their means of support . . ." Alexander Hamilton declared that "next to permanency in office nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

In his judgment, Mr. Justice Sutherland, with approval, quotes as follows from the judgment of the Supreme Court in *Evans* v. *Gore*, 253 U.S. at p. 248 :

> "With what purpose does the Constitution provide that the compensation of the judges shall not be diminished during their continuance in office? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution such as expressly reducing the compensation from a greater to a less sum per annum and thereby leave the way open for indirect yet effective diminution such as withholding or calling back a part as a tax on the whole? Or does it mean that the judge shall have a sure and continuing right to the compensation whereon he confidently may rely for his support during his continuance in office so that he may have no apprehension lest his situation in this regard may be changed to his disadvantage?"

And, after referring to certain statements, proceeds :

> "These considerations make it very plain as we think that the primary purpose of the prohibition against diminution was not to benefit the judges, but like the clause in respect of tenure to attract good and competent men to the Bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect of persons and with equal consideration for the poor or the rich. Such being its purpose, it is to be construed not as a private grant but as a limitation imposed in the public interest."

Further on Mr. Justice Sutherland makes the following quotation from a remonstrance of the Judges of the Court of Appeal of Virginia against an Act which had the effect of reducing their compensation :

> "The propriety and necessity of the independence of the Judges is evident in reason and the nature of their office, since they are to decide between Government and the people, as well as between contending citizens, and, if they be dependent on either, corrupt influence may be apprehended, sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich. And this applies more forceably to exclude a dependence on the Legislature, a branch of which in case of impeachment is itself a party. For, vain would be the precaution of the founders of our Government to secure liberty if the Legislature though restrained from changing the tenure of judicial offices are at liberty to compel a resignation by reducing salaries to a copper."

A thoughtful and well reasoned article by Mr. Stewart E. Perry, a member of the American Bar and of the Michigan Judicial Council appeared in 1933 in Vol. 169 of the Annals of the American Academy and is well worth perusal and study. Time does not admit of my giving more than the following quotations from that article :

> "From the time of the Act of Settlement the British Judiciary was fully independent of any important source of disturbing influence . . . It was independent of the Crown itself and of Parliament. This independence was carried across the sea to the American colonies where it continued for nearly half a century after the War of Independence. Then a new form of influence arose undreamed of at the time of the Act of Settlement and destined gravely to undermine and pervert the administration of law in America — the influence of politics."

Mr. Perry after pointing out that in most of the States of the union political influence had resulted in practically doing away with the independence of the Judges proceeds :

"Thus the judiciary in America for more than a century safe guarded against executive or legislative interference was delivered into a bondage of policies. The safe guards established so effectually in the Act of Settlement failed to protect the Courts from this new powerful influence that was destined to weaken and discredit the administration of law in a large proportion of American Courts. In appraising the consequences we are not confined to deductive reasoning or doctrinary pronouncements because fortunately throughout this period the operation of the unaltered or less altered judiciary system in England, Canada and the New England States furnishes reliable control for our observations. Both in the historical view and in the light of such contemporaneous comparisons it is indisputably plain that the administration of law in States Courts has undergone a profound deterioration . . . the great principle of an independent judiciary so perfect in its logic and so salutory in its application has not been repudiated but only temporarily abandoned through misunderstanding of its true nature and validity."

Mr Perry further states that there is a strong movement in civic bodies and Bar associations to restore the independence of the judiciary and that many newspapers are pointing out the superior results attained under the appointive system in England and Canada and in such of the States as have an independent judiciary, and he concludes his article in these words : "There can be no fundamental and durable improvement in the administration of law in America until the judiciary is restored to genuine independence."

In the *Fortnightly Review*, vol. 140, 1933, at page 254, Sir Alfred Hopkinson, K.C., a member of the British House of Commons, evidently a keen student of history, warns the people of England against the not improbable consequences of judicial salaries becoming a parliamentary football.

He says :

"Unless the attack on the constitution involved in the attempt to alter the position of judges is successfully resisted it will be followed by others. The fabric which has been built up by successive generations of English law will be undermined and the safeguards of our individual liberties will disappear one by one. It is not the unfettered judgment of representatives in Parliament that will prevail but they themselves will be compelled to act from time to time as directed by some outside body. It may be a party caucus or the committee of some organized board to which they have promised obedience . . . Fluctuating majorities in a single chamber may determine policy, if such a word can properly be applied to their action. This in a country having substituted arbitrary will for law as administered by independent judges and for constitutional morality would demand the firm rule of a Mussolini or a Hitler as a way of escape from the chaos into which it had fallen."

What more concerns the welfare of any country than efficient and impartial administration of justice?

The language of that great Judge, Chief Justice Marshall, often quoted, always with approval, now regarded as a classic, is as applicable to-day as when uttered a hundred years ago :

> "The Judicial Department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary."

If the people of Canada value the rule of law they will maintain the independence of the judges. If they prefer the rule of a Stalin, a Hitler, a Mussolini, or other dictator, let them destroy the independence of the judges.