

THE IRRESPONSIBILITY OF THE JUDICIARY.

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It is one of the oldest and most firmly settled rules of the common law, that a judicial officer is not liable to an action for damages resulting from the doing of any act within his jurisdiction, whether done *bona fide*, in the discharge of what he honestly believed his duty, or done maliciously and from a corrupt motive. If he had jurisdiction, he is secure. This rule was adopted, as was said by Lord GIFFORD, in *Miller v. Hope*, 2 Shaw, Sc. App. Cas. 125, since, if such an action would lie, the judges would lose their independence, and the absolute freedom and independence of the judges is necessary for the administration of justice. HAWKINS, (P. C. b. 1, c. 7, p. 6,) states this reasoning a little more at length. "The authority of government cannot be maintained," he says, "unless the greatest credit be given to those who are so highly entrusted with the administration of public justice, and that if they should be exposed to the prosecution of those whose partiality to their own causes would induce them to think themselves injured, it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success."

This rule has been followed with the greatest unanimity. In *Floyd v. Barker*, 12 Co. Rep. 223, the judge and the grand jury were held not liable to be sued in the Star Chamber for a conspiracy in respect of their acts in court, in convicting a person of felony. In *Hamond v. Howell*, 2 Mod 219, a judge who committed for an alleged contempt, under a warrant showing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistake in judgment was no cause of action. The same was the basis of the decision in *Cave v. Mountain*, 1 M. & G. 257, where the justice had committed the plaintiff on an infor-

mation which contained no legal evidence either of any offence, or of the plaintiff's participation in that which was supposed to be an offence. In *Fray v. Blackburn*, 3 B. & S. 576, the judge was held not to be liable for having discharged a rule taken by the plaintiff against the defendant for the payment of costs. In *Scott v. Stansfield*, 3 L. R. Exch. 220, the defendant, a county court judge, was held not to be liable to an action of slander, for having said of the plaintiff, an accountant, then defendant in a cause pending before the judge, "You are a harpy, preying on the vitals of the poor." In *Haggard v. Pelicier Frères*, [1892] A. C. 61, it was held that an action for damages would not lie against the appellant, a judge of the consular court of Madagascar, for dismissing without proof an action which he held to be vexatious. And in the most recent English case, *Anderson v. Gorrie*, [1895] 1 Q. B. 668, the judges of the Supreme Court of one of the colonies were held not to be responsible in damages for committing the plaintiff to prison in default of excessive bail, and refusing to allow a *habeas corpus* to determine the validity of the committal.

Against this consensus of opinion there seems to have been, in England, but one dissenting voice, and that but an *obiter dictum*. In *Thomas v. Churton*, 2 B. & S. 475, Chief Justice COCKBURN declared: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable or probable cause, he is not to be liable to an action." This is of course open to the criticism of Lord ESHER, in *Anderson v. Gorrie*, [1895] 1 Q. B. 668, that he was convinced "that had the question come before that learned judge, he must and would, after considering the previous authorities, have decided that the action would not lie;" but it at least shows how strongly he felt the injustice of the rule in its application to particular cases, and the necessity for some qualification of it in order to secure suitors against the malice or the venality of the court.

The one exception to this rule which has been allowed, is, that the judge will be liable, if the matter in regard to which

he is charged with having acted unjustly was one without his jurisdiction. Yet even this has been emasculated by adding the qualification that he must have had the means of knowing that it was not within his jurisdiction: *Calder v. Halket*, 3 Moore, P. C. 28. This was undoubtedly the true ground of the decision in *Gwynne v. Pool*, 2 Lutw. 387, where the defendant was held not to be liable in trespass, although, as a judge of an inferior court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction; for, although the *capias* was issued without a previous summons, and was not made returnable at a certain time, it was held that he was justified, because he had acted as judge in a matter over which he had reason to believe that he had jurisdiction. The mistake as to jurisdiction, however, must be one of fact, and not of law; and if a judicial officer, with full knowledge of the facts, but under an erroneous impression that he has jurisdiction, acts to the injury of another, an action will lie against him: *Holden v. Smith*, 14 Q. B. 841.

This is the substance of the English decisions on this question; and the same principles have been applied with practical unanimity in the American cases. Of these, the leading case is *Yates v. Lansing*, 5 Johns. (N. Y.) 282; affirmed in 9 Johns. (N. Y.) 395. Mr. Yates, an officer in chancery, was committed by Mr. Lansing, then chancellor, for malpractice and contempt. One of the judges of the Supreme Court, on *habeas corpus*, discharged Mr. Yates, whereupon the chancellor recommitted him for the same offence. Mr. Yates then sued the chancellor for the penalty given by the *Habeas Corpus* Act of New York, against any one who should knowingly recommit or imprison for the same offence, any person thereby set at large; but the Supreme Court, in an able and exhaustive opinion by Chief Justice KENT, held that the *Habeas Corpus* Act did not intend to alter the rule as to the immunity of judges from suit, and that the action would not lie.

The same principle has been asserted in many other cases, among others, in the recent ones of *Harrison v. Redden*, (Kans.) 36 Pac. Rep. 325, and *Fawcett v. Dole*, (N. H.)

29 Atl. Rep. 693. In *State v. Whitaker*, 45 La. Ann. 1299; S. C., 14 So. Rep. 66, it was held, that though a judge who refuses to grant an appeal in an appealable case, on the ground that the issues raised have been repeatedly determined by the Supreme Court adversely to the party moving for the appeal, and that the applicant was seeking to abuse the right of appeal, acts unjustifiably in so doing, yet, from motives of public policy, he will be protected from liability for resulting costs; and in *Hombert v. Gleason*, 14 N. Y. Suppl. 568, though the mayor of a city refused to proceed with an examination when the accused was brought before him, adjourned the hearing to the following day, and held the accused to bail for his appearance on that day; and then refused to accept the bail tendered by the accused, or to accept any bail until after twenty-four hours, and directed that the accused be locked up until the following day; it was nevertheless decided that he was not liable in damages for having acted thus.

It will be evident from a review of these cases that this rule of the common law often fails to secure justice to a suitor; and it will also be evident, on reflection, that it fails to secure the very object for which, as we have seen, it was intended. While securing the independence of the judges, it also secures to them a license, which, in our days at least, they are not slow to abuse. If judicial officers were always selected as they ought to be, for their ability and probity, such protection might indeed be beneficial to them and to others; but in a state of society in which men are raised to the bench as a reward for their political services, even if those services have involved a violation of the laws, and when incompetent judges are continued in office from term to term, simply because they are useful to their party, it is the public who need protection against them, not they against the public. And descending from generals to particulars, experience has shown that men of this character will be sure to abuse the protection thus afforded, for the gratification of their own private prejudices and enmities. No clearer abuse of judicial power could be shown, than in the cases from New York cited above, in which, in the one case, a chancellor reimprisoned a person discharged

on *habeas corpus*, and a mayor refused either to examine or to admit to bail a person brought before him as a committing magistrate. Equally gross was the abuse in *Anderson v. Gorrie*, [1895] 1 Q. B. 668, which was found by the jury to be a fact. And yet in all these cases, the guilty persons were allowed to go scot-free, out of deference to a worm-eaten rule of the common law. There was another instance of a flagrant abuse of judicial power, which occurred some years ago, in one of the United States. An attorney, who had rendered very important services to a client in a suit over the estate of a decedent, charged, on the settlement of that estate, a sum which the court before which the matter came deemed exorbitant, and, thereupon, instead of reducing it, that learned body refused to allow him any fee whatever. He took an appeal to the Supreme Court; but that, while mildly reproving the court below for its hastiness, said in effect: This was a matter within its discretion. We are very sorry for you, but we can't help you. So he might have gone without his fee, if it had not fortunately happened that his client's share of the estate had been put into his hands. He therefore quietly pocketed his fee, in spite of the court's decree. This coming to the ears of the opposing attorney, he thought he saw an excellent chance for getting even with him, and lost no time in informing the court. That august body then issued an attachment, or something of the kind, against the disobedient attorney, and would have done all sorts of things to him, if several of the leaders of the bar had not offered themselves as his advocates, which made them a little careful. All this took place before the decision of the appeal, mentioned above; and they decided to await that. After it was rendered, they let the case drop. But, if they had not been frightened, they might have gone on and disbarred the attorney, cut him off from his profession, and ruined his life, without the slightest responsibility therefor.

In regard to such facts as these, the oratory of Chief Justice KENT reads like a satire: "No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the

degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

The good Chief Justice lived in a different age from ours. The bench was venerable then; and it was capable of being degraded. But no private prosecution can degrade a court where the judge sits and reads a newspaper, with his feet on the desk, his mouth full of tobacco, and a spittoon by his side, during the transaction of business; nor one where the judge pats his fat paunch and curses the hours that separate him from dinner, growing more snappish and less mindful of law as his appetite grows; nor one where the judge allows his views of a client's rights to be distorted by his hatred of the counsel; nor one where the judge presides over the trial of a case in which his bitterest enemy is interested. Yet there is not a state in the Union where scenes like these are not to be seen almost daily, and where the grossest injustice is not perpetrated by such means, without any adequate remedy.

Remedies there are, to be sure; but wholly inadequate. Of what use is it to ask a new trial of a court that refused to give you a fair one before? Of what use is it to appeal to a higher court, whose composition is no better, perhaps worse, than that of the court below? And of what use is it to impeach a judge, put in office for political reasons, and kept there by his political influence? Who could successfully impeach a Democratic judge in Texas, a Republican judge in Pennsylvania, or a Dispensary Judge in South Carolina? The idea is almost too absurd to mention.

The only possible solutions of the problem, therefore, if we would improve the administration of justice, are, either (1) To elect to the bench only men of the highest character, in which case no redress will be needed, for no wrong will be done; or (2) To make the judges responsible to the party injured for any damage that may be caused by their corrupt or malicious actions on the bench.