

## CELEBRATING OUR PAST, LOOKING TO OUR FUTURE – OSGOODE SOCIETY CONFERENCE, OCTOBER 30, 2009

### “Disciplining Rogue Judges: The Canadian History”

**John McLaren, Professor Emeritus of Law, University of Victoria**

As Chief Justice Tresillian of the Court of King’s Bench in the reign of the weak Richard II discovered, navigating the porous line between law and politics could be a perilous enterprise. Having backed the losing horse, his monarch, in a dispute with the barons, the jurist paid with his life.<sup>1</sup> Episodically, during the late medieval and early modern period of English history more noted jurists were to suffer for their choices either in dynastic disputes, as did John Fortescue, a successor of Tresillian, in his backing of the hapless Henry VI against Edward IV during the Wars of the Roses,<sup>2</sup> or in resisting royal stratagems, the situation of Lord Chancellor Sir Thomas More in his conscientious resistance to the dynastic and sexual ploys of Henry VIII.<sup>3</sup> During the 17<sup>th</sup> century the dangers associated with opposition to the royal will and the Prerogative reached their peak, and those who rose to the challenge, rather than remaining loyal or compliant, were typically given their marching orders. Sir Edward Coke provides the classic example.<sup>4</sup> Few were the judges who like Sir Matthew Hale were ready to be firm in the face of executive pressure but kept their seats, in his case under both Oliver Cromwell and Charles II.<sup>5</sup> That century also marks the loosing of another force into the charged atmosphere of law and politics in the Royal Courts - the increasing involvement of Members of Parliament in seeking to influence judicial behaviour against the royal interest, not least through the initiation or threat of impeachment proceedings.<sup>6</sup> A controversial Chief Justice of King’s Bench, Sir William Scroggs, during the reign of Charles II, was only saved from this fate at the hands of Whig M.P.s and Peers by that monarch’s dissolution of Parliament.<sup>7</sup>

With enactment of section 3 of the *Act of Settlement* establishing appointment during good behaviour for the English judiciary and the development of a separation of powers in the British constitution, judicial independence became a mantra of the constitutional order.<sup>8</sup> True there were examples of English judges using their office to make aggressive political statements, for example Lord Abinger in his pronouncements during the 1840s trials of Chartists.<sup>9</sup> However, it was generally supposed that English judges were impartial, and both committed and limited to finding the legal answers to the problems before them. Moreover, it was, at least, unlikely that they would be called to account for finding against the government even in highly charged circumstances, for example the actions of the Chief Justice of Common Pleas, Charles Pratt (later Lord Camden) in rejecting “act of state” arguments to justify trespass to land and false arrest by government agents during the Wilkite unrest of the 1750s and 60s.<sup>10</sup>

The reality is that tensions surrounding judicial accountability and independence shifted to the colonies where the writ of the Act of Settlement did not run and judges were appointed at pleasure.<sup>11</sup> Conflicts that arose between colonial jurists and the executive or legislative branches were peppered with references to the battles of 17<sup>th</sup> century England

and the formal grant of judicial independence in that jurisdiction.<sup>12</sup> By 1805 troublesome colonial judges could be disciplined in three ways: removal on the advice of the Privy Council on a petition from a colonial legislature; recall by the Colonial Office; or, removal by a colonial governor for misconduct under *Burke's Act* of 1782.<sup>13</sup> London expected colonial judges to be loyal to the colonial state. In a context in which the separation of powers was only dimly perceived or ignored for pragmatic reasons, colonial judges were expected to be political animals. This was especially true of Chief Justices. As Peter Oliver and Murray Greenwood demonstrated in Upper and Lower Canada, they occupied a role as important advisers to governors on both legal and political matters, were expected to sit on Executive and Legislative Councils (under some regimes occupying the role of "Prime Minister") and support executive decisions, and, where necessary, to draft legislation.<sup>14</sup> Until the end of the first decade of the 19<sup>th</sup> century it was also not considered amiss for judge to occupy seats in legislative assemblies, as government supporters.<sup>15</sup>

So, colonial judges could and did engage in politics. But which politics was the rub. The conservative constitutional thought that guided imperial policy towards British North American colonies for three decades after American War of Independence assumed that government was the role of those born to rule, or of those who by their loyal exertions and merits had risen to the top. Commitment to a shared vision of an ordered, deferential society built round and sustained by the accepted institutions of state and the established church was what counted.<sup>16</sup> Two of the most feared words in the conservatives' lexicon were "party" and "faction" that for them embodied the devilish designs of radicals and even reformers committed to change, and thus out to destabilize the established and providential order. It was these anxieties, which in colonial societies had often become obsessive that explain in part the vigorous resistance of the colonial state to judges who wandered from the straight and narrow political path and advocated subversive reformist ideas and unduly liberal readings of the rule of law. Robert Thorpe, puisne justice of the Upper Canada King's Bench (1805-1807),<sup>17</sup> and John Walpole Willis, puisne justice of the same court (1827-1828)<sup>18</sup> provide prime examples.

It is true that both men possessed difficult personalities. They had streaks of vainglory in their make up, could be bad tempered, and were quick to treat those who crossed or even disagreed with them as mortal enemies. They were also capable in their correspondence with the Colonial Office of using inflated rhetoric in describing conditions in the colony and the characters and alleged foibles of those they despised.<sup>19</sup> Along with these irksome personality traits, both judges were in fact shrewd observers of colonial politics and the power dynamics which prevailed in Upper Canada during their tenure, and had developed insights into what they thought was needed to improve the state of the colony both politically and legally. Thorpe, prompted by Irish Whig sentiments, wrote a tract which set out a blue print of a prototype for responsible government, an early inspiration to later, more judicious reformers, such as the Baldwins.<sup>20</sup> In his addresses to juries he drew from the well of liberal British and Irish constitutional ideas in talking of the rule of law and its importance in both governance and the administration of justice.<sup>21</sup> Willis, whose political inspirations remain elusive, but was moved by both the power of rational observation and his own personal ambition, noted the partial nature of the administration

of justice in the colony and its manipulation by the Law Officers and brother judges. In hearing the prosecution of radical newspaper man, Francis Collins, the jurist took a vigorous, indeed blistering, public stand on what he saw as an impulse to pursue the prosecution of opponents for accusatory words, while overlooking the physical depredations of both young and older Tory hoods.<sup>22</sup> The judge was also persuaded that the colonial elite more generally had been lax in its operation of the colonial constitution, not least in the operations of the Court on which he sat, and consequently refused to conduct trials until the issue had been resolved by the Colonial Office.<sup>23</sup>

These strong views by themselves might not have been sufficient, at least in London, to have warranted their dismissal. Parliament, perhaps recognizing the dangers of unfairly victimizing judges challenging injustice in these fractious micro-communities, allowed a jurist removed or suspended under *Burke's Act* to appeal to the King in Council.<sup>24</sup> What spoke against them and played into the hands of their enemies in the colony was the manner in which they expressed their concerns and talked about desirable changes to the colony's constitution. Both communed with "party" (in Thorpe's case a group of disgruntled Irish Whigs, and in that of Willis, Baldwinite reformers). They were, accordingly, labeled by their antagonists as encouraging the sort of factionalism which was the very antithesis of conservative British notions of political and legal order, and thus the welfare of the colony. Injudicious conduct on the part of the jurists, Thorpe's election to the House of Assembly and shameless assumption of the role of opposition leader and Willis' making a public, non-negotiable issue of his constitutional reservations about King's Bench sittings, was to strengthen their opponents' view of them as impious trouble makers.<sup>25</sup> Thus it was that Lieutenant Governor Francis Gore in removing Thorpe branded him as a closet United Irishman, and Peregrine Maitland and his advisers in firing Willis treated him as a running dog of the reformers.<sup>26</sup> Interestingly, despite approving their removal from office, the Colonial Office considered both men as potentially remediable, if only they would sublimate their political instincts. It appointed them to judicial positions in other colonies, with warnings to stay out of local politics.<sup>27</sup>

Although the Upper Canadian Legislative Assembly did not feature significantly in the debate over Thorpe's removal, the reformist elements in that chamber did voice strong support for Willis and, indeed, made his removal the subject of a petition to George IV seeking constitutional change, and an issue in the 1828 election in which they secured a majority.<sup>28</sup> It was the Chief Justice of Newfoundland, the arch-Tory former Solicitor and Attorney General of Upper Canada, the scourge of radicals and reformers alike, Henry John Boulton, who was the British North American judge who met his Waterloo at the hands of a legislative assembly.<sup>29</sup> The jurist was inexplicably appointed to this post in 1833 by one of the hard men in British politics of that era, Smith Stanley, later Lord Derby. Boulton's selection was made in the wake of the Great Reform Act in the United Kingdom and the grant of an assembly to the island colony with a franchise broader than anywhere else in the Empire.<sup>30</sup> The choice proved to be a disastrous one.

Although London had assumed that the House of Assembly would be effectively controlled by Protestant merchants, a developing disinterest on the part of the latter in its cut and thrust and the strategic sophistication of the largely Roman Catholic reformers

who moved quickly into the vacuum left by the elite, meant that it was the latter group who managed to control and later dominate that body.<sup>31</sup> Boulton who was seen by these people and the Church hierarchy, especially Bishop Michael Anthony Fleming, as an avenging angel sent to harass and persecute them became the lightning rod for all the complaints of this section of the island's population against British colonial rule.<sup>32</sup> Unfortunately, the Chief Justice was, as Sean Cadigan has noted, not well attuned to the culture in which he was now implicated.<sup>33</sup> He was excoriated for what were viewed, sometimes unjustly, as his harsh administration of the criminal law and jails, his attempts (on general instructions from the Secretary of State) to replace local customs with English Law, his overly sensitive reaction to radical press criticism, and a perceived inclination to discriminate against Roman Catholics in the rules for jury selection, and in setting the terms of entry to the legal profession.<sup>34</sup> Boulton was in many ways the model of the loyal, unwavering judge contemplated by British government colonial policy for decades. Active and vocal in both the Executive and Legislative Councils he played the Tory curmudgeon to the hilt. He publicly attacked the reformers, their policies and their nefarious insults, and praised the merchants.<sup>35</sup> Moreover, he took to using his own court to protect himself from the calumny heaped on him to the embarrassment of even his associate judges. His insistence that results of the 1836 election be declared void because of the formal inadequacy of the writs issued, was to prove the straw that broke the camel's back.<sup>36</sup> The Assembly petitioned the Privy Council in 1837 to advise the monarch to order him removed from office. The Colonial Office which had persuaded itself that his appointment had proven a great mistake almost certainly put pressure on the committee of the Privy Council charged with hearing the case to recommend Boulton's removal.<sup>37</sup> The committee obliged, although it couched its terse advice in wording that emphasized the judge's ill-considered involvement in politics and party rhetoric, and rejected the charges of misbehaviour in his judicial role.<sup>38</sup> London wanted nothing further to do with the former Chief Justice and he was forced to return to Upper Canada, without a pension, and to take up the practice of law.

In these three brief pen portraits we get a good sense of the traditional role of the colonial judiciary vis-à-vis the colonial state and the perils involved in a jurist taking a stand against the executive in the first two instances, and a legislature in the third. Before the 1830s the British Empire was no place for a vocal, reformist judge with a hazy appreciation of the line between the judicial role and political involvement. The fact that during the 1830s the opposition from the legislative as opposed to the executive branch, might be determinative of the fate of a colonial judge, especially one of high Tory pedigree, indicates that by that decade changes were taking place in the constitutional balance of power in the British North American colonies and that seeds of doubt about Britain's domineering relationship with those possessions were being sown. Moves to dissociate the colonial judicial branch from executive and legislative functions and to appoint judges during good behaviour were under way or contemplated.<sup>39</sup> During the 1840s a debate over representative government occurred, leading to its ultimate, if grudging, concession by the British Parliament in 1848. After that date and in Australia and New Zealand from the mid-1850s tensions between the judges and the executive and legislatures became largely local matters and the judiciary by and large insulated from politically inspired discipline. In much of the empire, however, especially the

multiracial possessions, the old policies of control and demanding loyalty of judges not only remained but were strengthened. Dramatic events such as the Indian Mutiny in the late 1850s and the imposition of martial law by Governor Eyre in Jamaica in 1865 penetrated the imperial consciousness, and, as they did so, caused a backlash in powerful segments of British opinion against the “coloured races”.<sup>40</sup> The imperial government in turn felt moved to strengthen its direct control over politics and law in those territories, and in the process to rein in troublesome judges. But those are the sites of other “ripping yarns” which I would be happy to share with those interested, at the drop of hat, on another occasion.

## End Notes

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<sup>1</sup> Edward Foss, *Biographia Juridica* (London: Willey & Son, 1971) 670-672

<sup>2</sup> E.W. Ives, “Sir John Fortescue” *Oxford Dictionary of National Biography On Line (ODNBOL)*.

<sup>3</sup> Seymour Baker House, “Sir Thomas More, *ODNBOL*.”

<sup>4</sup> Allen D. Boyer, “Sir Edward Coke”, *ODNBOL*.

<sup>5</sup> Alan Cromartie, “Sir Matthew Hale”, *ODNBOL*.

<sup>6</sup> See W.J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (London: George Allen and Unwin, 1971); William Stacy, “Impeachment, Attainder and the ‘Revival’ of Parliamentary Judicature under the Early Stuarts” (1992). 11 *Parliamentary History* 40-56, at 48-54

<sup>7</sup> Lois G. Schworer, “Sir William Scroggs, *ODNBOL*.”

<sup>8</sup> Act of Settlement, (1701) 12&13 William III, c.2, s.3.

<sup>9</sup> Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing, 1976) 145-146; Great Britain, *Parliamentary Debates*, 66 *Hansard* 3<sup>rd</sup>. Series, 1037-1143.

<sup>10</sup> Peter D.G. Thomas, “Charles Pratt – First Lord Camden” *ODNBOL*. See, for example, *Entick v. Carrington* (1765), 19 *State Trials* 1045 and comment by E.N. Williams, *The Eighteenth Century Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1960) 385-386

<sup>11</sup> See Joseph H. Smith, “Administrative Control of Courts of the American Plantations” in David Flaherty ed., *Essays in the History of American Law* (Chapel Hill, NC: University of North Carolina Press, 1969) 309. Smith comments: “The essence of the objections to attempted interference with judicial commissions was the well-founded suspicion that unless appointment to judicial office depended on the Crown, colonial libertarian tendencies in any matter involving crown rights could not be properly restrained.” He adds: “it was an obvious maxim of administration that the judiciary in the dominions should be kept in the same state of dependency as it had been in Stuart days.”

<sup>12</sup> On the appropriation of English historical discourse in Canadian colonies and the reasons for it, see Greg Marquis, “In Defence of Liberty: 17<sup>th</sup> Century England and 19<sup>th</sup> Century Maritimes Political Culture” (1993) 42 *University of New Brunswick Law Journal* 69

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<sup>13</sup> The full title to *Burke's Act* was: An Act to prevent the granting in future of any Patent Office to be exercised in any Colony or Plantation, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed shall discharge the Duty thereof in person, and behave well therein (1782) 22 Geo. III, c. 75.

<sup>14</sup> Peter Oliver, "Power, Politics and the Law: The Place of the Judiciary in the Historiography of Upper Canada" in G. Blaine Baker and Jim Phillips, eds., *Essays in the History of Canadian Law, Vol. VIII, In Honour of R.C.B. Risk* (Toronto: Osgoode Society, 1999), 441-468, 450-451; F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: Osgoode Society, 1993) 27-34.

<sup>15</sup> See Greenwood, *Legacies of Fear*, 29-30. Judges were able to sit in the Lower Canadian Assembly until 1811, and several did so. As will be evident later in this paper, the same was possible in Upper Canada, as the career of Justice Robert Thorpe demonstrates.

<sup>16</sup> See John Manning Ward, *Colonial Self-Government: The British Experience 1759-1856* (Toronto: University of Toronto Press, 1976), 1-3; Robert Fraser, "'All the Privileges which Englishmen possess': Orders, Rights and Constitutionalism in Upper Canada", in Robert Fraser ed., *Provincial Justice: Upper Canadian Legal Portraits* (Toronto: Osgoode Society, 1992), xxi-xcii, xxv-xl, xlvii-xlviii

<sup>17</sup> G.H. Patterson, "Robert Thorpe" *Dictionary of Canadian Biography Online (DCBOL)*; John McLaren, "The King, the People, the Law . . . and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Early Upper Canada" in Jonathan Swainger and Constance Backhouse, *People and Place: Historical Influences on Legal Culture* (Vancouver: UBC Press, 2003) 11-24

<sup>18</sup> G.H. Patterson "John Walpole Willis", *DCBOL*; Robert Hett, "Judge Willis and the Court of King's Bench in Upper Canada" [1973] *Ontario Historical Society* 19-31; John C. Weaver, "While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court" (1990) 28 *Osgoode Hall Law Journal* 871

<sup>19</sup> Thorpe's correspondence with the Colonial Office is collected in Douglas Brymner ed., *Report on Canadian Archives*, 1892, "Political State of Upper Canada in 1806-7" (Ottawa: Public Archives of Canada, 1893), 32-136. Willis's correspondence can be found in *Printed Papers in Indian and Colonial Appeals, folio series* (P.C.I.C.A.), Vol. 15 (1829) in the Archives of the Judicial Committee of the Privy Council.

<sup>20</sup> Graeme Patterson, "Whiggery, Nationality and the Upper Canadian Reform Tradition" (2000) 41 *Canadian Historical Review* 25, 32-34; John McLaren, "The Rule of Law and Irish Whig Constitutionalism in Upper Canada: William Warren Baldwin, the 'Irish Opposition' and the Volunteer Connection" in Jim Phillips and John Saywell eds., *Essays in the History of Canadian Law, Vol. XI: In Honour of Peter Oliver* (Toronto: Osgoode Society, 2007).

<sup>21</sup> *Ibid.*, 30-32.

<sup>22</sup> Paul Romney, "Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins" in F. Murray Greenwood and Barry Wright eds., *Canadian State Trials, Vol. I, Law, Politics and Security Measures, 1608-1837* (Toronto: Osgoode Society, 1996) 505-521.

<sup>23</sup> Robert Hett, "Judge Willis and the Court of King's Bench" 23-27.

<sup>24</sup> (1782) 22 Geo. III, c. 75, s. 3.

<sup>25</sup> McLaren, "The King, the People, the Law" 12-13, 18; Hett, "Judge Willis and the Court of King's Bench" 23-27.

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<sup>26</sup> Ibid., 18; 27-29.

<sup>27</sup> Thorpe was appointed the first professional judge in Sierra Leone, a position from which he was recalled by the Colonial Office in 1814. Willis went on to be an associate justice in British Guiana, thence to New South Wales as puisne justice of the Supreme Court. His removal from office as the first resident judge in the Port Philip District of NSW was confirmed by the JCPC in 1846.

<sup>28</sup> See Gerald Craig, *Upper Canada The Formative Years 1784-1841* (Toronto: McClelland & Stewart, 1963) 192-193 on the political aftermath of the removal of Justice Willis.

<sup>29</sup> Hereward and Elinor Senior, "Henry John Boulton", *DCBOL*

<sup>30</sup> Gertrude Gunn, *The Political History of Newfoundland 1832-1864* (Toronto: University of Toronto Press, 1966) 3-13, 19.

<sup>31</sup> Ibid., 14-42.

<sup>32</sup> Boulton's opponents were assisted by the support in the British House of Commons from Daniel O'Connell, the "Great Liberator" who took a close interest in the welfare of his co-religionists in the colonies - John Fitzgerald, *Conflict and Culture in Irish Newfoundland Catholicism*. (Ph.D. dissertation, University of Ottawa, 1997) 194-195.

<sup>33</sup> Sean Cadigan, *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland 1785-1855* (Toronto: University of Toronto Press, 1995), 146. The author asserts that Boulton who was used to appealing to the "producing classes" in Upper Canada who would rally to support the Crown and its representatives when the tocsin of loyalty was sounded, simply "did not understand the new political ground on which he had to fight."

<sup>34</sup> Gunn, *Political History of Newfoundland*, 22-23, 25-26.

<sup>35</sup> Many of the documents and correspondence relating to Boulton's turbulent tenure as Chief Justice are contained in *Petition of the Newfoundland House of Assembly for the Removal from Office of Chief Justice Henry John Boulton* P.C.I.C.A., Vol. 28, (1838).

<sup>36</sup> Gunn, *Political History of Newfoundland*, 33-34.

<sup>37</sup> Peter Howell, *The Judicial Committee of the Privy Council 1833-1876: Its Origins, Structure and Development* (Cambridge: CUP, 1979) 32-34, 40-41 reveals that in the case of Boulton the JCPC requested not to be involved in hearing the petition because of the political nature of the charges against the Chief Justice. As a consequence, the case was heard by an *ad hoc* committee of Council with the Secretary of State for the Colonies, Lord Glenelg, sitting in on its hearings and decision. Gunn, *Political History*, 42-3 notes that even before the hearing Glenelg had at the urging of Governor Prescott decided to remove Boulton from the Legislative Council. This was in a move to divorce the administration of justice from the rancorous politics of the colony.

<sup>38</sup> P.C.I.C.A. Vol. 28, (1838) Report in long hand of the Committee, dated 5 July, 1838.

<sup>39</sup> See Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and the Legislature 1791-1899* (Toronto: Osgoode Society, 1986) 151; Peter Oliver, "Power, Politics and the Law", 456-457

<sup>40</sup> See See Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005); Julie Evans, *Edward Eyre: Race and Colonial Government* (University of Otago Press, 2005).