

VOL 31 ISS 2 ART 4 | I | JUDICIAL LIABILITY IN ENGLAND

Most of the major judicial liability cases use the common-law origins of judicial immunity as a justification for the doctrine. For example, as noted above, *Bradley v. Fisher*,⁹ the case principally relied on by the Court in *Stump*,¹⁰ used an extensive discussion of English case law to show the antiquity of the rule and to support its continued application. In this section, we demonstrate that these conclusions about English law simply are incorrect. A careful analysis of English law shows that the basic rule was one of liability, that no simple rule of immunity ever existed, and that application to American law of those instances in which immunity was granted has been inappropriate. In sum, the English law provides little support for a rule of absolute judicial immunity.¹¹

A. The Early Law

In earliest English law not only was immunity of judges not recognized, but review of judicial decisions was in the form of a personal action against the judge.¹² The consequences of a false judgment, a malicious judgment, or an action outside the judge's authority were severe for the judge and the jurisdiction he represented.¹³ Not until the fourteenth century did the courts distinguish between complaints against a judgment and complaints against a judge.¹⁴ The source of this distinction, the special status of the record of a court of record, is also one of the sources of the modern doctrine of judicial immunity. Although the present importance of that distinction is not great, in English law generally and in the English law of judicial liability particularly,¹⁵ the distinction was of considerable importance in shaping the law of judicial immunity.

The special status of the record of a court of record had its origin in the royal assertion that the King's word on events that had taken place in his presence was indisputable. When this privilege was extended from the King to his judges, the court of record was born and the foundation for limited judicial immunity was set. Since the record of the court was incontrovertible, no party could allege that an act noted therein was wrong, and thus the source of the record - the judge - could not be subject to civil or criminal liability for an abuse of power.



This interpretation, established by the middle of the fourteenth century,¹⁶ had as corollaries the notions that a judge of a court not of record had no such protection and would be subject to various actions at the hands of disappointed litigants, and that the immunity of a judge of a court of record was limited to acts within his jurisdiction.¹⁷ Acts outside his jurisdiction were unprotected by the record; in such cases, a judge was perceived to be acting as a private person and therefore he could not assert immunity based on his official position.¹⁸ Thus, through the sixteenth century the common law provided a limited immunity for a limited group of judges on the basis of a technical proposition concerning the nature of the record of a court of record.¹⁹

B. The Law in the Time of Coke

The transformation of the law of judicial liability was begun by Sir Edward Coke. The seventeenth century revision of the law was based on the earlier technical distinction between courts of record and courts not of record; however, it was motivated not only by the extrapolation of that legal distinction, but also by the contemporary political struggle of larger consequence.²⁰ In two leading cases in this area, *Floyd v. Barker*²¹ and *The Case of the Marshalsea*,²² the bearing of the political dispute on the law of judicial liability is evident.

In *Floyd*, a judge of assize, Barker, presided at the murder trial of William Price and, upon a verdict of guilty, gave judgment and sentenced Price to death. Subsequently, Barker was charged in the Star Chamber with conspiracy. Coke held that neither Barker nor others involved in the prosecution of Price "ought to be charged with any conspiracy, in the Star Chamber, or elsewhere,"²³ and that "the said matters done at the Bar were not examinable in the Star Chamber."²⁴ The immunity was total: "And as a Judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King."²⁵ His reasoning was related to the sanctity of a record on one hand and to broader policy considerations on the other.

The record was a potent weapon to use in the political struggle because of the unimpeachable authority of its origins, the King himself. Impugning the integrity of the



record verged on impugning the integrity of the monarch.²⁶ Coke drew on the traditional basis for immunity, the record, and thereby provided the law courts a dual advantage over their rivals, the Star Chamber and other allies of the crown. First, no actions of a judge would be subject to examination against the record in the Star Chamber or elsewhere. Furthermore, such protection would not be available to judges of the rival courts, such as the Star Chamber, which were courts not of record.²⁷ Thus, Coke was able to use effectively an ancient distinction based on the King's position against the King himself.

Coke's analysis of judicial liability preserved the distinctions of prior law. Judges of courts not of record still had no protection against reexamination of their acts; Coke's example was a judge of a hundred court.²⁸ Moreover, because judges of courts of record derived their immunity from the record, they had immunity for certain judicial acts done outside the courtroom, but lost that immunity for acts taken outside their judicial capacity.

[If he hath conspired before out of Court, this is extrajudicial; but due examination of causes-out of Court, and inquiring by testimony, *et similia*, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.²⁹

In short, Coke's analysis was based on the particular status of a court of record and resulted in a formulation consistent with the doctrine that a judge of a court of record was immune from suit for all acts within the scope of the record, but like a judge of a court not of record, was liable for all other acts for which he could not invoke the protection of a record.

Coke introduced a new element into this area of the law by explaining on policy grounds why a judge of a court of record was entitled to immunity. One of his reasons is still today the principal policy argument advanced for judicial immunity - the potential for a multiplicity of suits, frivolous and otherwise, against judges. Coke's statement of the problem is succinct: without a rule of immunity, "there never will be an end of causes: but controversies will be infinite...."³⁰ The



difficulty with this formulation is identical to the difficulty with similar arguments in later times; any rule other than an absolute rule of immunity for all judges that gives no consideration to jurisdiction or the nature of the act committed has the potential for generating suits of great, if not "infinite," numbers.

Coke's second policy argument concerned the necessity of maintaining respect for the judiciary and the government. The origins of judicial office lay in the role of the monarch as the dispenser of justice to his subjects.³¹ Even though the administration of justice had become formalized by the time of Coke, the relationship between judges and King was still quite clear. For Coke, because the administration of justice "concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other."³² If the King's judges were liable to answer to others inferior to the King (including, specifically, the Star Chamber), it would tend to the "slander of the justice of the King."³³ Thus, royal judges "are only to make an account to God and the King."³⁴

Coke's second major opinion on judicial immunity followed three years later in *The Case of the Marshalsea*,³⁵ in which he explored the limits of jurisdiction that developed out of the characterization of a court as a court of record. An act outside the jurisdiction of the court, as noted in *Floyd*,³⁶ was not considered to be the action of a judge and therefore was not within the record. An erroneous decision by a judge on a matter within his jurisdiction, however, was viewed as a matter of record, and therefore the judge was immune from suit for such a decision. Coke gave the example of the Court of Common Pleas holding plea in an appeal of felony and attainting the defendant as representative of an act *coram non iudice*,³⁷ which would render the judge liable. Coke's example of an erroneous decision was a plea of debt by the common pleas court awarding a *capias* against a duke; this was illustrative of error because the law prohibits issuance of a *capias* under these circumstances.³⁸ The *capias*, though void, arose in a matter within the court's jurisdiction, thus shielding the judge issuing the writ from liability. Coke preserved the limitation of immunity from earlier law and his examples suggest that he also sought to preserve the qualification that a judge would be immune only if he did not and could not know of the facts limiting his jurisdiction.



Thus, the law of judicial liability at the time of Coke was clear and simple. The basic principle was liability, not immunity. A judge of a court not of record was liable for all his wrongful acts. A judge of a court of record only was liable for wrongful acts committed outside his authority. Following the seventeenth century formulation of those basic principles of judicial liability and immunity, development proceeded along the following lines: (1) further development of the distinction between abuse of-jurisdiction and absence of jurisdiction and the related distinction between judicial and nonjudicial acts; (2) creation of the distinction between superior and inferior courts; and (3) creation of the distinction between malicious and non-malicious acts. We now discuss each of these points before returning to a summary review of English law.

C. The Law After Coke

1. Abuse and Absence of Jurisdiction.

The importance of the distinction between abuse and absence of jurisdiction is apparent when one considers that judicial immunity is a defense. Once the law develops a body of tort rules that state when a person will be liable in damages for injury caused to another - and this development can be as basic as the limited generalization of the writs of trespass and case - then a judge, like any other person, will be liable for his torts unless he is able to assert an effective defense on the basis of his office. In English law, the necessary elements of that defense were that the action causing the injury was within the judge's jurisdiction, or if outside his jurisdiction, that he did not know and had no facts before him to suggest that it was outside his jurisdiction.³⁹ While we will discuss later⁴⁰ the analogous distinction between excess and absence of jurisdiction drawn by the Court in *Bradley v. Fisher*,⁴¹ it is notable that the *Bradley* test is simultaneously more and less restrictive of liability and harder to reconcile with its premises than the English rule.

The early common-law notion that a personal action would not lie against a judge of a court of record for an error in judgment within his jurisdiction continued to be the basic rule of immunity. Since the source of this rule was the sanctity of the record of a court of record,



there was little discussion of any other basis for the rule prior to the modern period, with the exception of Coke's policy argument.⁴² Further reasons are suggested in the leading case, Hammond v. Howell,⁴³ in which the court held that the nature of the judicial office required a judge to make decisions on matters properly before him, rendering it inappropriate to sanction a judge for making an incorrect, though "judicially" proper,⁴⁴ decision. This conclusion is especially valid, the court suggested, because the harm caused by the mistaken action was, as it usually is, remediable.⁴⁵

This analysis of the nature of the judicial office and the notion of jurisdiction appears to have been the basis for modifying the rule of liability for judges of courts not of record. At some point, by a process we have not been able to identify precisely, judges of courts not of record were considered sufficiently similar to other judicial officers to be accorded a protection for judicial acts within their jurisdiction. This step in the development of the law is usually glossed over in the cases and commentary, perhaps because the answer is unclear.⁴⁶ This development must have occurred after the time of Coke,⁴⁷ but probably was settled before the series of nineteenth century cases discussed below.⁴⁸

The converse of the principle of immunity based on the judicial act of the judge within his jurisdiction was that a judge who injured another by knowingly committing a wrongful act outside his jurisdiction could not assert a defense on the basis of his office. Essentially, a judge in such a case was unable to establish the elements of the defense required by the basic rule. Yet the underlying reason for this limit to the defense was the formalistic and definitional idea that a judge acted as judge only when he exercised the functions assigned to him by law. If a judge exceeded his authority, not only was his act *coram non judio*⁴⁹ and therefore void, but it was also considered the act of a private person. The recitation of this analysis in numerous cases⁵⁰ is formulaic, but sensible; when the judge knowingly acted outside his jurisdiction, it would have been difficult for the law to be consistent in allowing him to assert his judicial status as a defense.



The intermediate case between erroneous judgment clearly within the jurisdiction of the court and knowing action in the absence of jurisdiction provided the opportunity to test the extent to which the law was being shaped by mechanical application of formal concepts and the extent to which it was being shaped by instrumental concern for the underlying objectives. When a judge exceeded his jurisdiction without actual or constructive knowledge of the facts that would indicate the absence of jurisdiction, the English courts' at an early point permitted the judge to plead his lack of knowledge of jurisdictional facts as a valid defense. Gwinne v. Poole,⁵¹ the earliest reported judicial immunity decision, is generally regarded as the seminal case for the doctrine *ignorantia facti excusat* - ignorance of the jurisdictional facts excuses the lack of jurisdiction.⁵² Following Gwinne, there was a considerable gap before a series of nineteenth-century cases further articulated the principle and its effects.

In one such case, Pike v. Carter,⁵³ defendant was a justice of the peace who asserted jurisdiction over a dispute that was not within his jurisdiction due to a statutory exception. At the first hearing on the matter before the justice, one of the parties appeared as defendant but did not raise the exception; at a second hearing, none of the defendants appeared. When the defendants in the first case attempted to bring an action of trespass against the justice, the court held the action would not lie, Lord Chief Justice Best stating: "an action of trespass will not lie against a public officer for anything which, in the discharge of his duty, he has been called on to do, without an opportunity having been afforded him of judging of all the circumstances under which he is to act...."⁵⁴ The court's decision is closely tied to the rationale for the basic rule of immunity expressed in Hammond v. Howell - the necessity of exercise of judgment⁵⁵ Without the facts necessary for exercising judgment or any reasonable means of obtaining those facts, the judge could not be liable.

This principle was limited to *ignorantia facti* and was not extended to *ignorantia juris* - ignorance of the law. A judge was presumed to know, or at least was obligated



to ascertain, the law. When facts indicating an absence of jurisdiction were before the judge, he could not claim immunity from liability for misapplying those facts. In *Houlden v. Smith*,⁵⁶ for example, the facts showed that the plaintiff resided and worked outside the jurisdiction of the court, but the judge erroneously believed that he had jurisdiction to commit plaintiff for contempt for refusing to obey a summons. The judge's misapplication of the law governing jurisdiction was not a ground for immunity and he was found liable in trespass.

There is some inconsistency between the treatment of ignorance of fact and ignorance of law. In a formal sense, the judge is acting no more judicially when he lacks jurisdiction but does not know it because of his ignorance of the jurisdictional facts than when he lacks jurisdiction but does not realize it because of his mistaken opinion of the law. The only explanation for the distinction is the lack of opportunity available to the judge in the first situation to discover his error; in the second situation, however, the opportunity is present and thus his failure to do so may be his own fault. The existence of this inconsistency suggests that although the underpinnings of the law are formal concepts, the development of the law also was shaped by responses to equities presented by particular situations and their relation to the policies inherent in the concepts. This conflict continued to shape the law, even for modern judges who arguably are more sophisticated than their common-law predecessors.

2. *Superior and Inferior Courts.*

The notion that judicial immunity is based on jurisdiction, or at least based on jurisdiction as it reasonably could have been determined at the time of the act complained of, was important in the development of a second distinction. That distinction, rather obscure for purposes of judicial immunity, was between superior courts and inferior courts. The cases already discussed distinguished between courts of record and courts not of record, but English law through the mid-seventeenth century drew no distinction between superior and inferior courts.⁵⁷ At that point, the courts began to



approach such a distinction. The process was gradual, and the results uncertain, but examination of the issue is crucial because the notion of a superior court later would be transported to the United States, incorrectly interpreted, and made a basis for a broad judicial immunity.⁵⁸

Holdsworth has suggested⁵⁹ that two sources of the distinction between superior and inferior courts lay in Coke's analysis of judicial liability in *The Case of the Marshalsea*⁶⁰ and *Floyd v. Barker*.⁶¹ First, because the jurisdiction of a superior court is not limited, the law presumes that nothing is outside the jurisdiction of such a court except as specially appears, and the court itself may determine its own jurisdiction. Accordingly, an erroneous conclusion concerning jurisdiction by a court that has power to determine its own jurisdiction is an abuse of jurisdiction, not an act in absence of jurisdiction, and thus it imports immunity from suit under the basic rule of immunity. On the other hand, an inferior court has no authority to determine its own jurisdiction and a wrong decision by it concerning its jurisdiction is an act in absence of jurisdiction, not an abuse of jurisdiction, and thus there is no immunity. Second, a judge of an inferior court is answerable to a superior court by prohibition or other process for acts in absence of jurisdiction, but superior court judges answer only to God and King. Thus, judges of the latter type of court, but not the former, are immune from suit in another court for acts in absence of jurisdiction.

Holdsworth, like others, uses the terms "superior" and "inferior" in an ambiguous manner.⁶² In his first point, he defines a superior court as one presumed to have jurisdiction in all cases. His second use of the term is to describe a court that is not subject to prohibition. The two definitions are not coextensive, the second use of the term being more limited than the first. Other commentators have offered different definitions of superior and inferior courts.⁶³ To understand the meaning of the concepts in the judicial liability context, we turn to the case law.

The first case that suggested the present distinction between superior and inferior courts, although not an



immunity case, was Peacock v. Bell,⁶⁴ which involved a complaint in the Court of County Palatine of Durham. The complaint did not state specifically that the defendant had been indebted at a place within the jurisdiction of the court. The King's Bench held the complaint to be good because the palatine court was a superior court, so the action would be presumed to be within the jurisdiction of the court. The palatine court was a superior court, even though it was inferior to the courts at Westminster and could be restrained by prohibition,⁶⁵ because executions on its judgments could not be stayed by writ of error without security. Although not an immunity case, Peacock v. Bell is important because it usually is cited for the proposition that a superior court has unlimited jurisdiction.⁶⁶ In this different context, the King's Bench used the broader interpretation of superior court.

Terry v. Huntington⁶⁷ was the first judicial immunity case to address the distinction between inferior and superior courts. Chief Baron Hale held that remedial action, including actions against judges in appropriate cases, was available for errors committed outside the jurisdiction of a court for all courts except the "King's courts at Westminster."⁶⁸ This decision suggests a restricted view of which courts are superior courts, including only a few royal courts.

This narrow view was echoed in Taaffe v. Downes,⁶⁹ which is usually cited as one of the leading cases stating a rule of absolute immunity for superior court judges.⁷⁰ The court's definition of "superior court" was quite narrow indeed, consistent with the view in Terry v. Huntington that only the King's judges at Westminster were entitled to so high a status. Taaffe was an action in trespass for assault and false imprisonment on a warrant against William Downes, Lord Chief Justice of the Court of King's Bench in Ireland. The Court of Common Pleas in Ireland held that the action would not lie, stating reasons characteristic of such cases, including the relation of the judges to the King, judicial independence, and the prevention of vexatious suits. Justice Mayne drew the distinction between superior and inferior courts:

The difference between the Judges of the superior and inferior courts has not been sufficiently attended to. The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his justice done by them, and by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King, and are subject to the control and direction of the superior Courts. An action before one Judge for what is done by another, is in the nature of an Appeal; and is the Appeal from an equal to an equal.⁷¹

In this and subsequent passages, the court made clear that only the judges who "stand next to, or with the King"⁷² were the highest royal judges. Inferior judges "are subject to the control and direction of the superior Courts,"⁷³ presumably by writ of prohibition, writ of error, or other means of judicial control. The final sentence quoted above indicates that only the few judges who are "equals" are granted the immunity. Actions could be brought "in the nature of an Appeal" before high court judges to review the decisions of many inferior judges, and all of those in the latter category lacked judicial immunity. Superior judges, however, answered only in "the high Court of Parliament" for their conduct.⁷⁴ The advancement of this argument was especially easy in this case, since the court repeatedly emphasized the unique position of the defendant, the Chief Justice of King's Bench in Ireland, who possessed the most general jurisdiction of any judge; this position contrasts sharply with that of a justice of the peace, an officer of limited and defined jurisdiction. Finally, another specific indication of the court's interpretation is the statement of Justice Mayne,⁷⁵ reviewing the authorities, that no action against a judge was ever sustained and only two such actions were ever attempted, one against the Lord Lieutenant of Ireland⁷⁶ and one in King's Bench in England.⁷⁷ Justice Mayne could not have been ignorant of the numerous actions against lower judges prior to



1813 heretofore discussed and the inescapable implication is that he referred only to actions against high court judges.

The foregoing discussion of the distinction between superior and inferior courts should not be considered definitive. The law from the seventeenth century forward was somewhat confused, in part because of the paucity of cases in the area, especially cases involving superior court judges. This confusion is, however, important for our purposes, because it could not have permitted an easy adoption of English law in the United States; the English law was just not that straightforward. Holdsworth is instructive:

I think that, at the end of the seventeenth century, the courts were feeling their way to the distinction upon which the total immunity of the judges of the superior courts rests; but that the gradual way in which it was being arrived at prevented any very clear apprehension of its juridical bases.... Indeed, though we get statements of this rule in the eighteenth century, I doubt whether we get any very clear statement of its juridical basis until... 1867...⁷⁸

3. *Malicious and Non-Malicious Acts.*

The final distinction to be developed in English law was between malicious and non-malicious acts within the jurisdiction of a judge.⁷⁹ This later distinction reflected in part the earlier distinction between superior and inferior courts.

The question of liability for malicious acts arose most frequently with inferior judges and other lower judicial officers, particularly justices of the peace; the absolute immunity of superior court judges extended even to acts done maliciously.⁸⁰ Although there is considerable disagreement on this proposition,⁸¹ we conclude that inferior judges were liable for malicious acts within their jurisdiction.⁸² This liability developed in part to deal with malfeasance by election officials acting in a judicial capacity,⁸³ but it was extended to all inferior judges.⁸⁴ The basic principle



was summarized in *Taylor v. Nesfield*:⁸⁵ "If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of the motive; and, to establish this, the act must be shewn to be malicious."⁸⁶

The rules regarding malice have a two-fold origin. First, the notion apparently existed that a malicious act as much as an act in absence of jurisdiction could be characterized as *coram non iudice* and therefore unprotected. Second, the rule concerning malice developed as an adjunct to the doctrine *ubi jus, ibi remedium* - where there is a right, there is a remedy. Chief Justice Holt's dissenting opinion in *Ashby v. White*⁸⁷ has been described as the zenith of the influence of this principle⁸⁸ and the adoption of his dissent by the House of Lords in reversing the decision of King's Bench⁸⁹ added considerable weight to that position. In any event, the rule concerning malice continued in English law⁹⁰ and was carried over into American law.⁹¹

D. The English Law in Perspective

Before turning from the doctrinal development of the English law to the influence of that law in America, we can generalize about the conditions motivating much of the development. In England, as later would be the case in the United States,⁹² perhaps the busiest government officials and those closest to the lives of the folk were the local magistrates.⁹³ In turn, many, probably most, of the actions against judges through the nineteenth century were brought against justices of the peace; this in large part reflects their important role in the administration of justice and general governance during the period. The importance of their role and the unavailability of other means of redress⁹⁴ necessitated the limitation of immunity as a protection for the people. Lord Justice Ormrod's judgment in *Sirros v. Moore* noted both this fact and the nature of the response: "In many situations the law provided no other form of remedy, and the courts used this one [i.e., civil liability] so vigorously that Parliament had to intervene on several occasions to temper the wind to the shorn lamb."⁹⁵ Additionally, the central judges may have had less sympathy for the local justices and could less readily regard them as true judges, entitled to some of the prerequisites of that station, including immunity



from suit.⁹⁶ The royal courts may also have found liability to be a useful tool in asserting central authority over the local justices.

Parliament's response was a series of acts regulating the manner in which a civil action could be brought against a justice, although the substantive rules of liability were not changed. The earliest of these was enacted in 1609 and was designed to deter "causeless and contentious suits" brought by "evil-disposed and contentious persons."⁹⁷ The preamble of the Act of 1751 illustrates the duality of the problem, protection of the justices and protection of the people:

Whereas Justices of the Peace are discouraged in the Execution of their Office by vexatious Actions brought against them for or by reason of small and involuntary errors in their Proceedings: And whereas it is necessary that they should be (as far as is consistent with Justice, and the Safety and Liberty of the Subjects over whom their Authority extends) rendered safe in the Execution of the said office and trust: and whereas it is also necessary that the Subjects should be protected from all willful and aggressive abuse of the several Laws and Statutes committed to the Care and Execution of the said Justices of the Peace....⁹⁸

The remedies and procedures provided by the acts included the assessment of double costs against a losing plaintiff,⁹⁹ the requirement of written notice to a defendant justice at least one month before any action was brought, during which time the justice could offer a settlement to the party and pay the offered sum into the custody of the court,¹⁰⁰ and the limitation of damages to nominal amounts for certain wrongful acts except when done "maliciously and without reasonable and probable cause."¹⁰¹

The Justices Protection Act of 1848¹⁰² continued the procedures of the earlier acts and, for our purposes, demonstrates the substantive rules of liability. Section 1 of the Act, providing that actions alleging acts by a justice "done maliciously, and without reasonable and probable cause"¹⁰³ could be brought in case, demonstrates the lack of immunity for malicious acts. Section 2, providing that actions alleging acts by a justice "in a matter of which by law he has not Jurisdiction, or in which he shall have



exceeded his Jurisdiction"¹⁰⁴ could be maintained as previously provided by law, demonstrates the jurisdictional basis of immunity.

A brief review of the English law of judicial liability through the nineteenth century provides a perspective for the examination of the area in American law. The earliest English law provided for judicial liability. When a rule of immunity developed, it began and remained a limited exception to a general rule of liability to suit. The exception was based on formal notions of the judicial process and judicial office, as well as political considerations, although it later was justified by reference to policy issues. The policy arguments, however, were of limited force, and the exception never was extended very far. Most of those performing judicial functions continued to be liable for erroneous acts outside their jurisdiction even if done in good faith, and for malicious acts. This liability was regarded as a necessary check on improprieties in the administration of justice, although at times even this check had to be counterbalanced by legislative action. The necessity for legislative action itself illustrates the scope of liability.

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Footnotes

⁹. 80 U.S. (13 Wall.) at 347-49, 353.

¹⁰. 435 U.S. at 355-56.

¹¹. The leading articles on the English law of judicial liability are Brazier, *Judicial Immunity and the Independence of the Judiciary*, 1976 PUB. L. 397; Rubinstein, *Liability in Tort of Judicial Officers*, 15 U. TORONTO L.J. 317 (1964), and Thompson, *Judicial Immunity and the Protection of Justices*, 21 MoD. L. Rv. 517 (1958). Also useful are torts treatises such as J. CLERK & W. LINDSELL, TORTS 1108-18 (14th ed. 1975), and J. SALMOND, LAW OF TORTS 416-30 (16th ed. 1973). A helpful specialized work is P. WINFIELD, TAN PRESENT LAW OF ABUSE OF LEGAL PROCEDURE (1921). The commentators frequently disagree on what the law was or is, and we must therefore rely principally on original sources, except for the discussion of the earliest law in text accompanying notes 12-18 infra.

¹². 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 668 (2d ed. 1899) ("The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed.").



^{13.} 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-15 (3d ed. 1945); 2 F. POLLOCK & F. MAITLAND, *supra* note 12, at 664-69.

^{14.} 1 W. HOLDSWORTH, *supra* note 13, at 214.

^{15.} *Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.).

^{16.} 5 W. HOLDSWORTH, *supra* note 13, at 157-58; 2 F. POLLOCK & F. MAITLAND, *supra* note 12, at 669.

^{17.} 6 W. HOLDSWORTH, *supra* note 13, at 235-36.

^{18.} *Id.*

^{19.} See *Gwinne v. Poole*, 125 Eng. Rep. 522 (C.P. 1692); *Green and the Hundred of Buccle-Churches Case*, 74 Eng. Rep. 294 (C.P. 1589). *Green* was an action on the case against a justice of the peace for refusing to examine a complainant who had raised the hue and cry, resulting in a shipper being unable to recover goods stolen in a robbery. Defendant's answer was that "the justice of the peace is a Judge of Record, and for such thing as he doth as judge, no action lieth." 74 Eng. Rep. at 294. Plaintiff, recognizing the validity of this defense, could only reply that in this instance the justice was not acting as a judge of record, but rather as a minister appointed pursuant to statute for purposes of examination. If defendant had been acting within his jurisdiction as a judge of record, he would have been immune from suit despite any error in refusing to conduct the examination. The Court of Common Pleas in *Gwinne* defined more precisely the limits of the judge's immunity, stating that the judge would be liable in trespass for actions outside his jurisdiction if, at the time the cause of action arose, he was cognizant or might have been cognizant but for his own misunderstanding of the facts that rendered the action outside his jurisdiction.

^{20.} In addition to the standard histories, for an especially readable account see C. BOWEN, *THE LION AND THE THRONE* (1957). An important recent work is S. WHITE, *SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-28* (1979).

^{21.} 77 Eng. Rep. 1305 (Star Chamber 1607).

^{22.} 77 Eng. Rep. 1027 (C.P. 1610).

^{23.} 77 Eng. Rep. at 1306.

^{24.} *Id.* at 1307.

^{25.} *Id.*

^{26.} *Id.* at 1306 ("And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself."). See text accompanying notes 8-11 *supra*.

^{27.} 5 W. HOLDSWORTH, *supra* note 13, at 159.

^{28.} 77 Eng. Rep. at 1307.



²⁹. *Id.* at 1306.

³⁰. *Id.*

³¹. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 139-56 (5th ed. 1956).

³². 77 Eng. Rep. at 1307.

³³. *Id.*

³⁴. *Id.*

³⁵. 77 Eng. Rep. 1027 (C.P. 1610).

³⁶. 77 Eng. Rep. at 1306.

³⁷. The Latin phrase translates as "not in the presence of a judge" or "without jurisdiction." The use of the Latin form of expression is evidence of the style and process of judicial reasoning. We retain that usage deliberately to better convey the sense of the process.

³⁸. 77 Eng. Rep. at 1040.

³⁹. The elements of the defense were somewhat different for a superior court judge. See notes 57-78 and accompanying text *infra*.

⁴⁰. See notes 257-60 and accompanying text *infra*.

⁴¹. 80 U.S. (13 Wall.) at 351-53 (citing *Calder v. Halket*, 13 Eng. Rep. 12 (P.C. 1840), and *Ackerly v. Parkinson*, 105 Eng. Rep. 665 (K.B. 1815)). See notes 257-59 and accompanying text *infra*.

⁴². See notes 30-34 and accompanying text *supra*.

*⁴³. 86 Eng. Rep. 1035 (C.P. 1677).

⁴⁴. *Id.* at 1037 ("Though the defendants here acted erroneously yet the contrary opinion carried great colour with it, . . . so that they were mistaken, yet they acted judicially, and for that reason no action will be against the defendant."). Defendant judges had ordered the commitment of plaintiff, a jury member, for refusing, contrary to instructions, to convict Quakers indicted for riot.

⁴⁵. The wrongful order of commitment could be corrected by the Barons in Exchequer refusing to issue process on it. *Id.* at 1036.

⁴⁶. See, e.g., 6 W. HOLDSWORTH, *supra* note 13, at 235-37; Thompson, *supra* note 11, at 526-28.

⁴⁷. See note 28 and accompanying text *supra*.

⁴⁸. See notes 53-56 and accompanying text *infra*.

⁴⁹. See note 37 *supra*.

⁵⁰. E.g., *Moravia v. Sloper*, 125 Eng. Rep. 1039 (C.P. 1737); *Terry v. Huntington*, 145 Eng. Rep. 557 (Ex. 1668).



- ⁵¹. 125 Eng. Rep. 523 (C.P. 1566). See note 19 *supra*.
- ⁵². Again, the Latin form is retained as particularly evocative.
- ⁵³. 130 Eng. Rep. 443 (C.P. 1825). See also *Calder v. Halket*, 13 Eng. Rep. 12 (P.C. 1840); *Lowther v. Earl of Radnor*, 103 Eng. Rep. 287 (K.B. 1806).
- ⁵⁴. 130 Eng. Rep. at 445.
- ⁵⁵. 86 Eng. Rep. 816 (C.P. 1677). See notes 44-45 and accompanying text *supra*.
- ⁵⁶. 117 Eng. Rep. 323 (Q.B. 1850).
- ⁵⁷. 6 W. HOLDSWORTH, *supra* note 13, at 238.
- ⁵⁸. See notes 158-65 and accompanying text *infra*.
- ⁵⁹. 6 W. HOLDSWORTH, *supra* note 13, at 238-39.
- ⁶⁰. 77 Eng. Rep. 1027 (C.P. 1610). See notes 35-38 and accompanying text *supra*.
- ⁶¹. 77 Eng. Rep. 1305 (Star Chamber 1607). See notes 23-34 and accompanying text *supra*.
- ⁶². See Thompson, *supra* note 11, at 520-23.
- ⁶³. E.g., EARL OF HALSBURY, *THE LAWS OF ENGLAND* 11-13 (1909). Halsbury enumerates the following contemporary courts he defines as superior courts: House of Lords, Judicial Committee of the Privy Council, Supreme Court of Judicature, Court of Criminal Appeal, and Courts of Chancery of Counties Palatine of Lancaster and Durham; presumably their predecessors also were superior courts. The limited enumeration suggests the limits of the definition.
- ⁶⁴. 85 Eng. Rep. 84 (K.B. 1667).
- ⁶⁵. Thompson, *supra* note 11, at 523.
- ⁶⁶. E.g., *Sirros v. Moore*, [1975] 1 Q.B. 118, 138 (C.A.) (Buckley, L.J.); P. WINFIELD, *supra* note 11, at 211 n.3.
- ⁶⁷. 145 Eng. Rep. 557 (Exch. 1668) (action in trover and conversion of goods for acts of the commissioners of excise in levying beyond their authority).
- ⁶⁸. 145 Eng. Rep. at 559.
- ⁶⁹. 13 Eng. Rep. 15 (C.P. Ireland 1813).
- ⁷⁰. E.g., *Sirros v. Moore*, [1975] 1 Q.B. 118, 146-47 (C.A.) (Ormrod, L.J.); J. CLERK & W. LINDSELL, *supra* note 11, at 1110 n.20.
- ⁷¹. 13 Eng. Rep. at 17-18.
- ⁷². *Id.* at 18.
- ⁷³. *Id.*



⁷⁴. *Id.* at 23 (Fox, L.J.).

⁷⁵. *Id.* at 18 (Mayne, J.).

⁷⁶. This case apparently is unreported.

⁷⁷. *Hammond v. Howell*, 86 Eng. Rep. 1035 (C.P. 1677). Hammond often is cited as authority for absolute judicial immunity. In Hammond, the judicial officer had general subject-matter jurisdiction over the cause before him, but misapplied the law in ordering the commitment of a jury member. Although the judge had the authority to punish a misdemeanor of a jury member in such a manner, he erroneously found that a misdemeanor had been committed. Thus, the court's broad language concerning the immunity of judges has little relevance to the question of whether a judge is immune for acts committed in absence of jurisdiction.

⁷⁸. 6 W. HOLDSWORTH, *supra* note 13, at 239-40.

⁷⁹. Malicious acts outside a judge's jurisdiction are treated the same as non-malicious acts.

⁸⁰. P. WINFIELD, *supra* note 11, at 207; Rubinstein, *supra* note 11, at 329. There seem to have been no actions brought against superior court judges on this ground, which is itself some support for the proposition.

⁸¹. See generally *Sirros v. Moore*, [1975] 1 Q.B. 118, 132 (C.A.) (Lord Denning, M.R.); P. WINFIELD, *supra* note 11, at 207, 216-19; Rubinstein, *supra* note 11, at 326-30; Thompson, *supra* note 11, at 526-33.

⁸². See also Rubinstein, *supra* note 11, at 331-32.

⁸³. See *Drewe v. Colton*, 102 Eng. Rep. 217 (Launceston Assize 1787) (citing *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), as reversed in the House of Lords, 1 Eng. Rep. 417 (H.L. 1703)).

⁸⁴. The Justices Protection Acts, discussed *infra* in text accompanying notes 95-102, contemplate an action for malice. Thompson, *supra* note 11, at 520-24, argues that lower judges were immune when acting of record.

⁸⁵. 118 Eng. Rep. 1312 (K.B. 1854) (Erle, J.).

⁸⁶. *Id.* at 1314.

⁸⁷. 92 Eng. Rep. 126, 134 (Q.B.1703) (Holt, C.J., dissenting).

⁸⁸. Rubinstein, *supra* note 11, at 317.

⁸⁹. See note 83 *supra*.

⁹⁰. See, e.g., *Linford v. Fitzroy*, 116 Eng. Rep. 1255 (Q.B. 1849); *Burley v. Bethune*, 128 Eng. Rep. 816 (C.P. 1814); *Morgan v. Hughes*, 100 Eng. Rep. 123 (K.B. 1788). The Justices Protection Act, 1848, 11 & 12 Vict., c. 44, § 1 contemplates actions for malice. See also Thompson, *supra* note 11, at 524-33.

⁹¹. See notes 192-205 and accompanying text *infra*.



⁹². See notes 210-18 and accompanying text *infra*.

⁹³. C. BEARD, *THE OFFICE OF THE JUSTICE OF THE PEACE IN ENGLAND* 155, 165 (1904; AMS ed. 1967); 4 W. HOLDSWORTH, *supra* note 13, at 144, 165. Beard describes the justices' constituency as "the lower orders of society, who had neither the money, the influence, nor the ability to bring their causes to the notice of the crown." C. BEARD, *supra*, at 155.

⁹⁴. C. BEARD, *supra* note 93, at 151.

⁹⁵. [1975] 1 Q.B. at 149.

⁹⁶. Cf. notes 210-22 and accompanying text *infra*.

⁹⁷. **Justices Protection Act**, 1609, 7 Jac. 1, c. 5.

⁹⁸. **Justices Protection Act**, 1751, 24 Geo. 2, c. 44. The protection of this Act was accorded to justices of the peace in Georgia when the Georgia Supreme Court held that the Act had been received into the law of Georgia. *Warthen v. May*, 1 Ga. 602 (1846).

⁹⁹. **Justices Protection Act**, 1609, 7 Jac. 1, c. 21.

¹⁰⁰. **Justices Protection Act**, 1751, 24 Geo. 2, c. 44.

¹⁰¹. **Justices Protection Act**, 1803, 43 Geo. 3, c. 141.

¹⁰². **Justices Protection Act**, 1848, 11 & 12 Vict., c. 44.

¹⁰³. *Id.*

¹⁰⁴. *Id.*

