THE EARLY COURTS OF THE PROVINCE

BY

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I.

The judicial history of that part of British America which is now our Province lends itself to a division into four periods.

1. Before the King's Bench Act, (1794) 34 Geo. III. c. 2. During all this period the Superior Courts of civil jurisdiction in the province of Upper Canada were the four Courts of Common Pleas, one in each District. From and after 1792, 32 Geo. III. c. 6, there were also Courts of Requests for small debts, which ultimately and long after became our Division Courts.

2. From the establishment in 1794 of the Court of King's Bench till 1837, when by the Act, 7 Wm. IV., c. 2, a Court of Chancery was established. The King's Bench was the only Superior Court: the Courts of Requests were continued and intermediate District Courts (which ultimately became County Courts) were established in 1794 by 34 Geo. III., c. 3.

3. From the erection of the Court of Chancery in 1837 till 1881 when all the Superior Courts, *i.e.*, the Court of Queen's (King's) Bench, the Court of Common Pleas established by (1849) 12 Vic. c. 63 and the Court of Chancery as reorganized by (1849) 12 Vic. c. 4, were combined (with the Court of Appeal) in one Supreme Court of Judicature by the Statute (1881) 44 Vic. c. 5.

4. The period of unification since that Statute. Trifling, and perhaps also important, changes have been made but not such as to affect the principle: the County and Division Courts have been continued: I do not think it necessary to do more than mention the new District Courts, which are in effect temporary inferior Courts in the unorganized parts of Ontario.

In the first period Law and Equity were rather loosely combined: in the second, there was no equitable jurisdiction: in the third, Law and Equity were administered by different

Courts (speaking generally), and in the fourth there is the complete and formal fusion of Law and Equity.

Only the first period is to be dealt with in these papers.

When by the Treaty of Paris, Canada was ceded to Britain in 1763, the number of white settlers in what afterwards became the province of Upper Canada and later the province of Ontario, was very small—and the chief part of that small number was on the south or left bank of the Detroit River. The first official report we have of that settlement[1] shews that in 1752 there were twenty 'habitants établis sur le côte sud de la rivière.' These were continually increasing in number till in 1761 we find between three and four hundred of a population. In this year the settlement was detached from the parish of Ste. Anne de Détroit and attached to the parish of the Huron Indians at L'Assomption (Sandwich)[2]. They remained subject to the civil rule of the Governor of Detroit and the whole settlement was considered an appendage of Detroit.

All other settlers in what is now Ontario (if there were any) were close to and considered as belonging to the several military stations and forts.

During the period of French domination, the Commandant at the Fort was the judge and exercised almost unlimited power; and in this territory practically the same rule obtained after the British Conquest for a time.

In 1763, Murray received power[3] as Captain-General and Governor-in-Chief of the province of Quebec to erect Courts of Civil and Criminal jurisdiction within the province of Quebec—this province was formed by Royal Proclamation of October 7th, 1763; it contained all the territory now the provinces of Ontario and Quebec and included also the Detroit country.

Accordingly, September 17th, of the following year[4] Murray established a Court of King's Bench for the province to

[1] See "Notes Historiques sur la Colonie Canadienne de Détroit," by Mr. Rameau, Montreal, J. B. Rolland & Fils, 1861, at p. 30.

[2] *Ibid.*, p. 30 *ad fin.*

[3] See his commission, Nov. 21st, 1763, "Constitutional Documents, 1759-1791," Short & Doughty, Canadian Archives Report, 1905, vol. 3, pp. 126-132; his instructions, *ibid.*, p. 132 *et seq.*, Ont. Archives Report for 1906, pp. 7 *et seq.*

[4] "Ordinances made for the Province of Quebec, etc.," Quebec, 1767, pp. 6-9. (Where it is, in these papers, stated that a "Governor" made an Ordinance, etc., what is meant is, of course, "Governor-in-Council.")

sit at Quebec and with jurisdiction in all cases civil and criminal. This Court was presided over by the Chief Justice of the province: and an appeal lay from his decision to the Governor and Council, (including the Chief Justice), in cases of over £300 sterling: where the amount in dispute was £500 sterling or more an appeal lay from the Governor and Council to the King in His Privy Council.

It had been intended that the Chief Justice should sit twice a year in a Court of Assize and General Gaol Delivery at Montreal; but this was found unnecessarily expensive, and the direction was given that this Court should sit only once a year at Montreal, as well as once a year at Three Rivers. In these Courts the trials were by jury.

At the same time[5] a Court of Common Pleas was established with civil jurisdiction only and that only in cases above £10. In cases above £20, an appeal lay to the Court of King's Bench: in cases over £300 to the Governor and Council, with a further appeal to the King in Council in cases of £500 and upwards. This Court had three judges: it sat at Quebec and Montreal and was intended "only for Canadians" i.e., French-Canadians.

The province was divided into two Districts by the Rivers Godfroy and St. Maurice: and Courts of Quarter Sessions[6] were formed for these Districts, to sit at Quebec and Montreal respectively every three months. Three or more Justices sitting in Quarter Sessions could hear and determine actions above £10 currency ($40) and not exceeding £30 currency ($120) subject to an appeal to the Court of King's Bench. Any one Justice of the Peace could decide cases in his District not exceeding £5 currency ($20) and any two Justices, cases not exceeding £10 currency, ($40), no appeal being allowed in either case. Two Justices of the Peace were to sit weekly in rotation at Quebec and Montreal for these purposes.

The Courts of Quarter Sessions had also their common law jurisdiction in criminal cases.

The jurisdiction of the Courts of King's Bench and Common Pleas extended, of course, over what is now Ontario as did that of the Quarter Sessions and Justices of the Peace of the District of Montreal.

[5] By the same Ordinance, pp. 6, 7.
[6] *Ibid.*, p. 7.

In the Court of King's Bench all cases were to be decided 'agreeable to the Laws of England and to the Ordinances of (the) Province.' In the Court of Common Pleas the judges were 'to determine according to Equity having regard nevertheless to the law of England as far as the circumstances and present situation of things will admit': but in cases in which the cause of action arose before October 1st, 1764, the French laws and customs were to be followed where the actions were between natives of the province: no express direction is given for the law to be administered by the Justices of Peace in or out of Sessions, but no doubt the same course was expected to be followed by them as in the Court of Common Pleas.

In Criminal cases the existing criminal law of England governed.

The well-known Governor Sir Guy Carleton in 1770[7] abolished the civil jurisdiction of the Justices of the Peace in and out of Sessions: and directed all cases not exceeding £12 currency ($48) to be tried by the judges of the Courts of Common Pleas. The former Court of Common Pleas had sat both in Quebec and in Montreal: but now there were to be two independent Courts one in Quebec, the other in Montreal, limited in local jurisdiction to their own Districts, open at all times except Sunday and certain vacations. One judge was to sit every Friday to try cases not exceeding £12.

The English civil law never recommended itself to the French-Canadians: the new settlers from the British Isles and English colonies preferred it, and there was much agitation for and against a change. The French-Canadian prevailed; the Act of 1774, 14 Geo. III. c. 83, reintroduced the French civil law, at the same time repealing all the Ordinances, Commissions, etc., of the Governors.

Carleton was instructed[8] to create a Court of King's Bench for the province for criminal cases: and, dividing the province into two districts, to establish a Court of Common Pleas for each District with jurisdiction over all civil cases, 'cognizable by the Court of Common Pleas in Westminster Hall.' The Court of King's Bench was still to be presided over by the Chief Justice: each Court of Common Pleas was

[7] Const. Docs., pp. 280 *seq.*, Ordinance dated February 1st, 1770.

[8] *Ibid.*, pp. 419 *seq.*, dated January, 3rd, 1775.

to have three judges, one Canadian and two from the British Isles or "Our other Plantations."

It was also intended that there should be an Inferior Court of King's Bench for 'each of the Districts of the Illinois, St. Vincenne, Détroit, Missilimakinac and Gaspée' but nothing came of this as the American Revolution intervened. *Inter arma silent leges.* But it was necessary in view of the repeal of all the former Ordinances, etc., to erect some kind of judicial system in the older parts of the British dominions. In 1775 three judges under the name of "Conservators of the Peace" were appointed for each of the Districts of Quebec and Montreal although nothing was done for the outlying regions.

Arnold and Montgomery's invasion coming to nought, Carleton in 1777 made an Ordinance[9] dividing the province into two districts at the River Godfroy and St. Maurice, establishing a Court of Common Pleas in each District, each to sit on one day in each week (excepting 'three weeks at seed-time, a month at harvest, and a fortnight at Christmas and Easter, and excepting during such vacations as shall be appointed by the judges for making their circuits twice every year') to hear cases up to £10 sterling, and on another day to hear those above £10 sterling. Under £10 one judge could sit: for £10 and over, two were required: in the first case unless the matter in controversy related to a duty payable to the Crown, fee of office, annual rent, or such like matter where future rights might be bound, there was no appeal; in the latter an appeal was allowed to the Governor in Council on security being given. A further appeal lay to the King in cases involving £500 or more, on security being given—this appeal lay also in the excepted classes of cases above mentioned. Very elaborate regulations were prescribed for the practice which may be passed over for the present.

In the same year[10] a Court of King's Bench was established with criminal jurisdiction to hold two sessions each year in each of the cities of Montreal and Quebec. A Court

[9] *Ibid.*, pp. 464 *seq.*, dated February 25th, 1777. "Ordinances made and passed . . . Province of Quebec," Quebec, 1777, pp. 1-8 (Osgoode Hall General Library, D 2935). This Ordinance is 17 George III. c. 1.

[10] Const. Doc., pp. 471 *seq.*, dated March 4th, 1777. "Ordinances, etc. (*ut supra*), pp. 39 *seq.* This is Ordinance 17 George III., c. 5.

of Quarter Sessions to sit four times a year was erected for each district.

Detroit with the adjoining territory on both sides of the river was of course in the Montreal district from the first division of the province; but for some time, this remote region lived an almost independent juridical life. The Governors appointed Justices of the Peace with large powers —indeed one of these Justices, Dejean, in 1776 went so far as to try a man and a woman for arson and larceny with a jury of six English and six French. On a conviction, the man was hanged, it is said, by his fellow convict, who thus saved her own neck. For this both the Governor, Hamilton, and the magistrate were presented by a Montreal Grand Jury: but their offence was forgotten or at least condoned by reason of the troubled state of the country.

For a time a Board of Arbitrators formed by the merchants at Detroit filled the place of a court for the merchants and traders: the habitant had no Court and does not seem to have needed one.

The Treaty of Peace in 1783 brought a very large number of immigrants from the revolted colonies: most of these settled along the international rivers, and their numbers rapidly increased. This new element demanded Courts: in Detroit particularly the arbitration system became unsatisfactory and the great length of time needed to obtain and serve process from the Court at Montreal became a matter of much complaint.

Carleton at length in 1788[11] solved the difficulty by dividing the new country (i.e. Canada, west of what is now the province of Quebec) into four Districts—Luneburg 'to the mouth of the River Gananoque,' Mecklenburg to the River Trent, Nassau 'to the extreme projection of Long Point into the Lake Erie' and Hesse west thereof.

In each of these Districts, there was established a Court of Common Pleas with three judges, with unlimited civil jurisdiction and it is (mainly) of these Courts of Common Pleas it is proposed to speak in these papers.[12]

[11] Const. Doc., p. 651, dated July 24th, 1788: Ont. Arch. Report for 1906, pp. 157, 158.

[12] Mention should perhaps be made of the local and temporary Courts which were established in 1785 for what is now the eastern part of Ontario 'for the ease and convenience of His Majesty's subjects who have settled or may settle in the upper part of this province from and above point Baudet, on the north side of Lake St. Francis to the head of the Bay of Quintiz, on Lake Ontario.'

II.

The state of affairs when the province of Upper Canada came into existence in 1791 [13] was that the province was divided into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, and in each of these Districts was a Court of

A large number of United Empire Loyalists had settled and more were expected to settle along the River St. Lawrence and Lake Ontario, including the Bay of Quinte (Quintiz), and provision was made by Ordinance, 25 Geo. III., c. 5, for them.

From and after September 1st, 1785, any justice of the peace was empowered to issue one or more writs of summons to call before him any person or persons residing within the district and hear and determine any matter in dispute for the recovery of any debt respecting personal estate where the sum demanded should exceed 2s. 6d. (50 cents) and not exceed 40s. ($8). Any two justices of the peace might issue writs of summons and try like cases where the sum demanded exceeded 40s. and did not exceed £5 ($20). The trial Court could issue writs of execution for the debt adjudged and costs of suit, which costs were not to exceed 3s. (60 cents) in the first case or 5s. ($1) in the second: the debt might be ordered to be paid in instalments, but all within four months. There was no appeal from these Courts.

It will be seen that the territory thus provided for was precisely that which became the Districts of Luneberg and Mecklenburg—a similar provision was in and by the same Ordinance made for the far east of the province which in 1788 became (in part) the District of Gaspée.

No provision was made for the settlers on the Niagara or the Detroit. I find no record of any litigation in the Court of Common Pleas of Montreal from the Niagara district, though there was considerable from the town of Detroit.

[13] The division of the Province of Quebec into two provinces, i.e., Upper Canada and Lower Canada, was effected by the Royal Prerogative: see 31, Geo. III., c. 31, the celebrated Quebec Act. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Quebec Act, an Order in Council was passed August 24th, 1791 (Ont. Arch. Rep. 1906, pp. 158 *seq.*), dividing the province of Quebec into two provinces and under the provisions of sec. 48 of the Act directing a Royal warrant to authorize 'the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement' of the effect of the legislation in the new provinces, not later than December 31st, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12th, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (see Ont. Arch. Rep. 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant-Governor of the province of Quebec, issued, November 18th, 1791, a proclamation fixing Monday, December 26th, 1791, as the day for the commencement of the said legislature (Ont. Arch. Rep. 1906, pp. 169-171). Accordingly technically and in law, the new province was formed by Order in Council, August 24th, 1791, but there was no change in administration until December 26th, 1791.

Common Pleas of unlimited Civil but no Criminal jurisdiction. In each of the Districts, too, there was a Commission of the Peace, the Justices of the Peace forming the Court of Quarter Sessions—before December 26th also the Court of King's Bench of the province of Quebec had criminal jurisdiction but all the original criminal jurisdiction was exercised by Courts, sitting from time to time under Commissions of Oyer and Terminer—these with Courts of Quarter Sessions were the Courts dealing with criminal matters.

The Courts of Common Pleas were presided over each by three judges, (not skilled lawyers) with the exception of that of the District of Hesse. Many of the inhabitants of this District were Canadians, i.e. French-Canadians.

With that tenderness and regard for the conquered people which almost invariably characterized the British conqueror, Sir Guy Carleton had in his Instructions of January 3rd, 1775,[14] been directed when establishing Courts of Common Pleas in the two existing Districts of the province of Quebec to appoint three judges for each of these Courts 'that is to say, two of our natural born subjects of Great Britain, Ireland or our other Plantations and one Canadian'[15] i.e. French Canadian. Before this time there had been four judges in all for both Districts, three natural born subjects and one a Canadian.[16] The Instructions of 1775 were superseded by those of August 23rd, 1786,[17] which contained no such provision; but the spirit of the former Instructions continued to be carried out. Accordingly where the Districts were created by the Proclamation of 1788 and Courts of Common Pleas came to be formed in and for each, or that one District, Hesse, which contained a considerable number of Canadians, the Court of Common Pleas received one judge a French-Canadian, with two natural born British subjects—

[14] Ont. Arch. Rep. 1906, p. 58 *seq.*, esp. p. 63.

[15] It is worthy of remark as illustrating the consideration paid to the Canadians that in the proposed local Courts of King's Bench intended to be set up in the 'District of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspé,' while the single judge was to be a natural born subject, there was to be associated with him 'one other person being a Canadian by the name of Assistant or Assessor, to give advice to the judge in any matter when it may be necessary.' The districts named were inhabited mainly by French-Canadians.

[16] See Proclamation of April 26th, 1775, Ont. Arch. Rep. 1906, p. 92.

[17] Ont. Arch. Rep. 1906, pp. 135 *seq.*

there were Duperon Baby, Alexander McKee, and William Robertson.[18]

[18] Duperon Baby of an old French-Canadian family: one account is that his ancestor was a merchant of Three Rivers, who visited Detroit in 1703, and a little later established a branch of his family there (Colonie Canadienne de Détroit, p. 12). Another and apparently a better account is that Duperon was the son of Raymond Baby, of Montreal, and after serving with credit in the West under the orders of the Commandant of Fort Duquesne, came with his brother Louis after the conquest and settled in Detroit ("Les Canadians du Michigan," p. 185). Duperon Baby was born in 1738 and became a prominent citizen of Detroit, and a trader of great enterprise. At the time of the conquest of Canada by the British, he was at Fort Pitt: he declined to take the oath of allegiance and desired to go back to Detroit, Michilimackinac, and Montreal to recover his debts, and pass to France: Bouquet hesitated to let him go on account of the influence of Baby's family among the Indians. Leave was ultimately given, and Baby went to Detroit. During the Pontiac siege, he encouraged Major Gladwin, and on the final cession of Canada, he seems to have become a loyal British subject—he was appointed Interpreter and Captain in the Indian Department, and was a prominent and trusted official. He took a leading part in society: it is of record that his dancing bills for one winter was over £20. At the time of his appointment as judge, he was the only French-Canadian trader in Detroit, and the chief objections to his appointment (in which he fully shared) were his ignorance of law and his large business connection. He was appointed a member of the Land Board for the district of Hesse and rendered valuable services in interpreting and otherwise. He died at Sandwich in 1789, having in his by no means long life seen Detroit owned by the French, the British and the Americans.

The family does not seem to have been of the noblesse, but it was of the highest respectability, and members of it played some part in the after history of Upper Canada.

Alexander McKee (the name was also frequently written McKay), a native of eastern Pennsylvania, was Deputy Indian Agent at Fort Pitt (Pittsburg) as early as 1772: he was a Justice of the Peace and carried on a large and lucrative business there at the time of the American Revolution. He was, with others, imprisoned by General Hand, of the American forces, in 1777, but released on parole. Threatened with a renewed imprisonment, he made his escape in 1778 with the noted Simon Girty and others and came with them to Detroit. Appointed an Interpreter and Captain in the Indian Department, he took part in practically all the operations of the Loyalist troops in that part of the world. He was present at many meetings with the Indians, over whom he had a very great influence.

He went into business at Detroit and was appointed Deputy Superintendent of Indian Affairs—later in 1794, he became a member of the Land Board of Hesse (at Detroit) and received large grants of land. He died in 1799: his descendants are still prominent members of society in and near Windsor. He was a man of the strongest character and his services were invaluable to the British cause.

William Robertson was a Scotsman and a trader in Detroit in a large way. He was much in the confidence of the authorities—he became a member of the Hesse Land Board, which for a time sat at his house. He left for England in 1790: while absent from the country, he was recommended by Lord Dorchester as one of the Legislative Councillors for the proposed province of Upper Canada. He was so nominated, but never returned to Canada, never was sworn in and never took his seat: he resigned not long after his appointment.

Robertson took the most active part in having the Court for Hesse provided with a lawyer-judge.

All these were laymen; the inhabitants of District, the chief place from which litigation would originate, were largely mercantile and they wanted a lawyer judge. Two of the judges themselves went to Quebec to see the Governor and to have a lawyer appointed—and at length the Commissions to these gentlemen were revoked and William Dummer Powell,[19] a prominent lawyer of Montreal, was appointed the first judge of the Court. An ordinance of May 7th, 1788, 29 George III., c. 3, by section 3 enacted that he should have all the powers and authorities of the whole number of judges until three should be appointed. He presided until the Court was abolished: the sittings of this Court were at L'Assomption (Sandwich).[20]

Three Districts was almost entirely populated by United Empire Loyalist refugees, English-speaking and consequently not requiring a French Canadian judge to protect their interests. Accordingly we find that in none of the other three Courts was there a Canadian appointed.

In the farthest eastward District, Luneburg, were appointed Richard Duncan, Edward Jessup and John McDonell (Macdonell). Jessup did not serve after September, 1790, and John Munro took his place in December, 1792.[21] Duncan's last appearance as judge was February

[19] William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England and on the Continent. He took part in the siege of Boston on the Loyalist side, but afterwards went to England and studied in the Middle Temple. He came to Canada in 1779, received a license to practice law, and did practice law in Montreal. Being created first judge of the Court of Common Pleas for the district of Hesse, he went to Detroit in 1789; when the Court of King's Bench in Upper Canada was organized under the statute of 1794, he was made the Senior Puisne Justice. He became the Chief Justice in 1815, and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature, he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813. He was also recommended by Dorchester for a Commission as Legislative Councillor of the new province of Upper Canada, but was not appointed. The story of the cabal against him in Detroit is one of the most extraordinary in our (or any) history. It is too long to relate here: sufficient to say that he was charged with treason, evidence was brought against him in the way of a forged letter, etc., so that he had to go to England to clear himself. Powell was really the first judge in our Court of King's Bench: Osgoode never sat in that Court, but left for Lower Canada before it began operations.

[20] It is sometimes said that the Court of Common Pleas for Hesse sat at Detroit: I have, in an address before the Michigan State Bar Association, in June, 1915, examined the question, and have shown (as I think conclusively) that this is not so—that the Court sat only at L'Assomption (Sandwich).

[21] All these four—Richard Duncan, Edward Jessup, John McDonell, and John Munro—were men of prominence in the settlement. Duncan and Munro were afterwards members of the first Legislative Council. John McDonell (or Macdonell) was possibly the

28th, 1793, after which until its abolition, the Court was presided over by McDonell and Munro. This Court according to extant records sat at Cornwall, Osnabruck, Stormont and New Johnstown.[22]

In the next District, Mecklenburg, the commissions issued to Richard Cartwright, Neil McLean and James Clark, James Clark did not sit after July 8th, 1789, and Hector McLean took his place January 3rd, 1791,[23] and these three, i.e. Messrs. Cartwright and the two McLeans continued to preside over the Court until its abolition—often, however only two of them sat.

This Court sat at Kingston except on one occasion, January 14th and 15th, 1793, when it sat at Adolphustown and tried two cases.[24]

first member in the Legislative Assembly (1792) for the second Riding of Glengarry and the first Speaker of the House. Edward Jessup was born at Albany, was a Loyalist and fought on the loyal side during the Revolutionary wars: came to Canada and settled on land now in part occupied by the Town of Prescott: he became member of the Assembly for the second Parliament, 1796, representing the County of Grenville. In 1800, he became Clerk of the Peace for the District of Johnstown, and died at Prescott, 1815.

[22] New Johnstown was a settlement in the township of Cornwall, upon the River St. Lawrence, below the Long Sault; and was afterwards called Cornwall—the present name. The name New Johnstown still lingered and was for long used occasionally. The township of Osnabruck was above Cornwall, also on the St. Lawrence: it does not appear at what precise part of the township the Courts were held; Judge Pringle thinks probably it was near what is now Dickenson's Landing: Luneburg or the Old Eastern District, by J. F. Pringle, Cornwall, 1890, p. 47. I see no reason to doubt the accuracy of this identification.

[23] Richard Cartwright was born at Albany in 1759 and educated there: he took the Loyalist side during the Revolution and served two campaigns with Col. Butler, of the Queen's Rangers, as his Secretary. At the close of the war, having in the meantime come to Kingston, Canada, he joined the Honourable Robert Hamilton in business. The partnership dissolving, Hamilton went to Niagara, and Cartwright remained at Kingston. Cartwright was afterwards a member of the first Legislative Council of Upper Canada, and was most attentive to his duties as such. He was the grandfather of Sir Richard Cartwright, of the late Master in Chambers, and the present efficient Deputy Attorney-General.

Niel McLean and Hector McLean were prominent settlers of Scottish descent.

James Clark was afterwards one of the first members of the Law Society of Upper Canada, having been so fortunate as to be one of those receiving a license to practise, under the provisions of the Act of 1794, 34 George III., c. 4. It is said that a Commission as judge was offered to the Reverend John Stuart, but declined by him; and that Richard Cartwright was appointed in his stead: The Story of Old Kingston, by Miss Machar, p. 78.

[24] Kingston had been called Frontenac during the French regime: it rapidly assumed and continued to hold a position of great prominence in the St. Lawrence District.

Adolphustown was for some time of great relative importance, but has long lost its place in the advance of the rest of the province.

In the District of Nassau, there was a curious mistake made. It had been intended to appoint Benjamin Pawling, Colonel John Butler and Robert Hamilton, judges of the Court, but Jesse Pawling's name was inserted in the Commission instead of Benjamin Pawling's—however this was speedily rectified, and on October 22nd, 1788, Jesse Pawling's Commission as judge was revoked (he being appointed a Coroner for the District), and Benjamin Pawling, Peter Tenbrook and Nathaniel Petit were added as judges to the two already appointed, Colonel Butler and Robert Hamilton.[25]

There is no record of the proceedings of this Court extant but no doubt it sat at Newark.[26]

[25] John Butler, the celebrated Coloner Butler of Butler's Rangers, was the son of Lieutenant Butler, a native of Ireland, who came to New York in 1711. The father accumulated a large estate by dealing with the Indians; he died in 1760. The son was born in New London, Connecticut, in 1728, he joined the British forces against France for the Conquest of Canada. He was present at Lake George (1755), Ticonderaga and Fort Frontenac: he also took a distinguished part in the siege of Fort Niagara by Sir William Johnson (1759): his great *forte* was the management of Indian troops—in 1778, he built the Butler's Barracks at Niagara on the Canadian side. He fought on the British side during the Revolution, and at its close came to Niagara, where he survived till 1796, dying after a life of service to the Crown.

Peter Tenbrook (should be Ten Broeck), also a resident of Niagara.

Nathaniel Petit (or Pettit) was recommended by Dorchester for appointment as Legislative Councillor, but failing this, he became member of the first Legislative Assembly for the Riding of Durham, York and first Lincoln; he was also a member of the Nassau Land Board. A farmer, he owned the land on which the Town of Grimsby stands.

Robert Hamilton was of Scottish extraction: a partner of Richard Cartwright on Carleton Island, near Kingston, on the dissolution of the partnership, he came to Niagara: he built at Queenston a large stone residence, a brewery and a warehouse, and was the most important personage commercially in that little community. He became a member of the Land Board for Nassau and also one of the first Legislative Councillors of Upper Canada. He and Cartwright generally saw eye to eye, but did not always agree with Simcoe, who did not hesitate, most unjustly, to call them Republicans.

Benjamin Pawling was a native of Pennsylvania, of Welsh descent, who served seven years in the Butler's Rangers. He had been a farmer, and in the close of the war, settled in Niagara. He was the first representative of the second Riding of Lincoln, in the Legislative Assembly, having then become a Colonel. Jesse Pawling was a brother of Benjamin's.

It is much to be desired that some one of local or family knowledge should write a full account of these pioneers, men of sterling character and loyalty above reproach, who did much to make our Queen Province what it is.

[26] Niagara-on-the-Lake was called Niagara, West Niagara, Loyaltown, Butlersburg, Nassau and Newark at different periods of its history.

The Law Administered.

The law administered in these Courts was, until 1792, the French Canadian law.

The Quebec Act, 1774, 14 George III. c. 83, by sec. 8 provided that in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of Canada as the rule for the decision of the same.

The Constitutional Act of 1791, 31 George III. c. 31, however, by sec. 33 authorized the Legislatures of the new Provinces of Upper Canada and Lower Canada to repeal or vary the existing law; and the Legislature of Upper Canada at its first session promptly passed (as the first exercise of its legislative power) the Provincial Act, 32 George III. c. 1, which by sec. 3 enacted that "from and after the passing of this Act, in all matters of controversy relative to property and civil rights resort shall be had to the Laws of England as the rule for the decision of the same." After October 15th, 1792, the French Canadian law was no longer invoked in Upper Canada.

Method of Trial.

The French (and French Canadian) method of trial was by judges alone. Frenchmen of France and Frenchmen of Canada never tired of expressing their amazement at Englishmen thinking their property safer in the determination of tailors and shoemakers than of judges.

By his Commission of November 21st, 1763, Governor Murray was empowered to establish Courts; and he did so. In the Court of King's Bench, cases were by his Ordinance of September 17th, 1764, to be tried by a jury; and in cases in the Court of Common Pleas, "all tryals . . . to be by jury if demanded by either party."[27]

In 1775 the old Courts being abolished by the Quebec Act of 1774, a new Court of Common Pleas for each of the two Districts of Quebec and Montreal was erected for trial by judges alone.

But April 21st, 1785, by Ordinance 25 George III. c. 2, sec. 9,[28] it was enacted that either party might require a jury in "debts promises contracts and agreements of a mer-

[27] Dom. Arch. Rep. 1905, vol. 3 (Can. Cons. Docs.) pp. 149 *seq.*: Ordinance of Quebec, 1764, pp. 6 *seq.* (Osgoode Hall, General Library, D. 2934.)

[28] Dom. Arch. Rep. 1905, vol. 3 (Can. Const. Docs.) pp. 464 *seq.* Ordinances of Quebec, 1777, pp. 1-26 (Osgoode Hall General Library, D. 2935.)

cantile nature between merchant and merchant, and treader and treader . . . and also of personal wrongs;" nine out of the twelve were empowered to render a verdict. These juries were in cases between Canadians to be Canadian, between natural-born subjects, natural-born subjects, and in equal number of Canadians and natural born subjects in other cases.

After the new Districts were established in 1788 an ordinance, 29 George III., c. 3, was passed April 30th, 1789, reducing the qualification of jurors for these districts; but the right to a jury was not interfered with.

Finally the first Parliament of Upper Canada by the Act of 1792, 32 George III., c. 2, enacted that from and after December 1st, 1792, "all and every issue and issues of fact which shall be joined in any action real, personal and mixed and brought in any of His Majesty's Courts of Justice within the Province . . . shall be tried and determined by the unanimous verdict of twelve jurors duly sworn for the trial of such issue or issues, . . ." the jurors being empowered to bring in a special verdict.

It has been frequently said that all cases were tried without a jury before the passing of the Act; no doubt the mistake was from the fact that until very recently the records of the Court of Common Pleas for Hesse alone were available; no instance of trial by jury appears in these records either before or after the passing of the Act, 32 George III. c. 2. But the original records for two other courts have now been discovered; and in the Courts for Luneberg and Mecklenburg, the records show that jury trials were not uncommon in these Courts from the beginning. The first jury trial in Mecklenburg was July 4th, 1789, Georgeon v. Howard, an action for damage for non-payment of money due on a purchase of wheat: the first in Luneburg (so far as extant records show) was June 2nd, 1790, Drew v. Daugherty, an action for slander. There are available records for Nassau, but there is no reason to doubt that the jury system was in vogue in that Court also.

As has already been said the Court in Hesse continued to try cases without a jury to the end—probably the parties preferred the decision of a trained lawyer like Powell to the arbitrament of twelve laymen.[29]

[29] Dom. Arch. Rep. at *supra*, pp. 539 *seq.*; Ordinances of Quebec, 1786 (Osgoode Hall Library, D. 2937), pp. 25 *seq.*

[29] Why the Jury was not called into play in Hesse remains a mystery.

The Records.

The Act of 1794, 34 George III, c. 2, which established a Court of King's Bench for the Province also by sec. 30 abolished the Courts of Common Pleas, and by sec. 31 directed the records of pending actions to be sent to the Court of King's Bench: sec. 32 provided for the Records of the Courts being transmitted to and deposited in the Court of King's Bench. This was done in the case of three of the Courts, Luneberg, Mecklenburg, and Hesse; but no trace can be found of the Records of Nassau. The extant Records are in the office of the Archivist of the Province of Ontario, Dr. Fraser the Archivist having found all but one in an obscure corner of the vaults at Osgoode Hall: I found the other (one of the books from Hesse) in the volume afterwards used for Term Book No. 10 of the Court of King's Bench.[30]

III.

Practice of the Courts.

The practice of the Courts next calls for attention.

However interesting from a historical point of view may be the practice of the Courts of the Province of Quebec before 1785, it is to the Ordinance of that year prescribing the practice of the existing Courts of Common Pleas that we must look for the practice in the Courts now under review.

On April 21st, 1785, was enacted, Henry Hamilton,[31] being Lieutenant-Governor, the Ordinance 25 George III. c.

[30] See Transactions of the Royal Society of Canada, vol. 7, 43 *seq.* "Practice of the Court of Common Pleas of the District of Hesse," by the present writer.

[31] Henry Hamilton first appears in the History of this Continent as Governor of Detroit in 1777. The following year he captured Vincennes, whose commander Helm was taken prisoner with a small force of defenders. The well-known George Rogers Clark shortly afterwards besieged the fort: and Hamilton was in his turn forced to surrender. He was treated by Clark with much barbarity, and on Jefferson's order was sent handcuffed to Williamsburg, where his treatment was still worse. Probably as an effect of a letter from Governor Haldimand to Washington, Hamilton was paroled: and he got to England in 1781. He was made Lieutenant-Governor of Quebec in 1784, filling that position a little less than a year. He was a man of no great capacity and but little judgment, although perfectly honest and sincerely desirous of doing his duty. It is probable that the Ordinance of April 30th, 1785, 25 George III. ch. 4, mentioned later, was due to the influence of the British newcomers in the Province. See "The Legal Profession in Ontario and the Law Society of Upper Canada," an address by the present writer, before "The Chicago Society of Advocates," Nov. 9th, 1914, and published by that Society in their "Book" for 1915.

2.[32] By this Act, provision was made for two classes of action (1) those "in . . . causes or matters of property exceeding the sum of £10 sterling,[33] (2) those "in matters not exceeding or under £10 sterling." It will be convenient to consider these in the reverse order.

Where the matter did not exceed £10 sterling, sec. 36 provided that the person claiming a right of action against another should either himself prepare or procure from the Clerk of the Court a "declaration" in the following form:

"Quebec day of 17
(or Montreal)

A.B. Plaintiff,
C.D. Defendant.

The plaintiff demands of the defendant the sum of due to the plaintiff from the defendant for which sum, though often demanded, still remains due, therefore the plaintiff prays judgment."

Of this form it may be remarked that the allegation that the debt was "often demanded" or "unjustly detained" or the like, almost always was to be found in the old "declaration;" such an allegation was never proved or expected to be proved.

This declaration was filed by the Clerk in his office, a copy made by him and at the foot of the copy a summons was written in French or English according to the language of the defendant ordering the defendant to pay the sum claimed with costs (as stated in the summons) or else to appear in person or by agent before the judges of the Court of Common Pleas (at Quebec or Montreal as the case might be) on a day named in the Summons, otherwise judgment would be given by default. For this summons the Clerk was entitled to a fee of one shilling (20 cents).[34] The

[32] "Ordinances made and passed by the Governor and Legislative Council of the Province of Quebec, Quebec, MDCCLXXXVI" (Osgoode Hall General Library), pp. 25-56.

[33] The pound sterling at that time was usually considered worth $4.44.

[34] Ordinance of 20 Geo. III., ch. 3, "Ordinances, etc., MDCCLXXVII" p. 47 (Osgoode Hall General Library). Quebec currency was the same as that afterwards known as Halifax currency or Canada currency, in which £1=$4: 15=20 cents. This was still in use in my boyhood.

Summons was signed by a judge of the Court; and a copy of Summons and declaration was served on the defendant personally or left at his dwelling house or usual place of residence with some grown-up person there, the person so serving to inform the defendant or grown-up person of the contents; a fee of one shilling was allowed to the Bailiff for this service.[35]

If at the time mentioned in the summons, the defendant did not appear, proof of the service was produced in Court and the judges or any one of them were to hear the cause on the part of the plaintiff and "make such order, decree or judgment and award such reasonable costs of suit as to him or them shall appear agreeable to equity and good conscience."

If the defendant appeared in person or by agent but the plaintiff did not—or if he did, but did not prosecute, or prosecuting failed to prove his case—the action was dismissed with costs.

Judgment might be ordered to be levied by instalments but the time allowed was not to be more than three months from the date of the execution, and in any case execution was not to issue until eight days after judgment. The execution was only against "the moveables" (in substance the personal property); these were seized by a Bailiff appointed by the Court, the seizure published at the door of the parish church on the first Sunday after the seizure, and at the same time notice was given of "the day (at least eight days later) and place (which must have been in the parish) when and where he means to proceed to the sale."

The Clerk received one shilling for entering judgment and one shilling for the writ of execution; the Crier 2d and the Bailiff for seizure and sale 4 shillings.

No fees were allowed to an Attorney where the action was simply in contract; but if it were necessary to fix a line or fence between two different lands, to ascertain a water course, or if it were necessary to examine deeds or writings, an Attorney was to be allowed a fee for conducting the whole case of 5 shillings ($1.00).

In cases exceeding £10 sterling, a declaration was drawn up. This was presented to a judge—he was "empowered and required" to grant an order to compel the defendant

[35] 20 George III. ch. 3, pp. 49, 50, of "Ordinances, &c. MDLXXXVI."

"to appear and answer thereto"; this order was presented to the Clerk, whereupon the Clerk would issue a Writ of Summons in the language of the defendant and in the King's name, tested in the name of the judge granting the order and directed to the Sheriff of the District, commanding the defendant to appear in such Court on a day appointed by the judge in his order for the writ "regard being had to the season of the year as well as to the distance of the defendant's abode or place of service from the place where the Court may sit."

The writ and copy of declaration were handed to the Sheriff and he had it served on the defendant personally or left at his house with some grown-up person there belonging to his family and this was deemed sufficient service. Where the debtor was proved to be about to leave the province he might be held to bail on a *ca. re.*

If on the day appointed the defendant did not appear in self or by Attorney, the service was proved and the plaintiff was entitled to "a default" against the defendant: then if the defendant still neglected to appear without good reason for such neglect the Court was to hear the evidence of the plaintiff and direct "final judgment to be entered against the defendant and . . . award such costs thereupon as they shall think reasonable and issue execution" according to law. The plaintiff's proof was filed in Court and remained on record.

If the defendant appeared upon the return day or if he defaulted that day but appeared at the next Weekly Court and paid the costs of the default, he was permitted on that day or on some other day appointed by the Court, to "make his answer to the declaration either in writing or verbally" as he thought fit. If the answer was verbal the Clerk took it down and kept it amongst the records of the Court.

If the plaintiff did not appear on the return day or appearing did not prosecute his claim the action was dismissed with costs to the defendant. If either party desired a jury he was entitled to it (the verdict of nine was sufficient); but if neither desired a jury, the Court fixed a day for the hearing. The evidence was then taken down in writing by the Clerk in open court and signed and sworn to by the witnesses. Where witnesses were sick or about to leave the Province they might be examined before one judge in the presence of the parties or their attorneys.

The pleadings did not extend beyond Declaration, Answer and Replication. The qualification of jurors was carefully provided for: all merchants, traders and householders and also those occupying lodgings of the value of £15 ($60) per annum. A list was made out by the Sheriff each year in June: the clerk divided this into a list of those qualified for special jurors and one of those who were entitled to serve only as common jurors—the former to try cases over £50 ($200) the latter those not exceeding that sum.

Execution was tested by one judge and went against goods and lands (a *ca. sa.* was also provided for) the writ was directed to the Sheriff who seized and proclaimed as in the cases under £10 sterling; but he might on the request of the plaintiff take the goods for sale to Quebec or Montreal. Lands must have been advertised for sale three times in the Quebec Gazette, the sale at least four months after the first advertisement. Notice was given also at the Parish Church immediately after divine services on the three Sundays preceding the sale.

If the amount was under £30 currency ($120) the fees of the plaintiff's Attorney were £1. 10s. 8d. ($9.33), the defendant's Attorney £1. 10s. 0d. ($6.00). In these cases the fees of the clerk were fixed at £1. 2s. 6d. ($4.50), not including office copies of papers; the Sheriff was allowed 2/6 (50 cents) for serving process and 9d (15 cents) for entry by the Clerk; the Crier had also 9d; the Bailiff for serving any Rule of Court or the like one shilling (20 cents). This last also in cases over £30 Currency.

Where the amount exceeded £30 Currency, the Attorney had a reasonably liberal tariff of fees beginning with "Instructions 6/0" ($1.20). The Clerk also had his Tariff beginning with "Summons 3/0" (60 cents); the Sheriff for serving summons 5/0 ($1.00) and 1/0 for entry by Clerk; the Crier had one shilling.

If the Sheriff was required to arrest either on mesne process (*ca. re.*) or execution (*ca. sa.*) he had 10/0 ($2.00) for the arrest; the same amount for the bail-bond. He had also 2½% on executions (and his disbursements) and £1. 10s. 0d. ($6.00) for a deed of sale.

It should be mentioned that if the defendant was absent in the Upper Country or the lower parts of the Province

(that is beyond the Long Sault on the Ottawa River or Oswegatche (Ogdensburgh): or below Cape Chat on the south side or the Seven Islands on the north side of the St. Lawrence) and was not personally served with the summons, no execution was to issue until the plaintiff gave security to refund to the defendant so much as the defendant appearing within a year and a day might be able to set aside and reverse of the judgment. It is of course obvious that this provision could not become applicable to the Courts established in 1788. If the defendant concealed or conveyed away his goods or by violence or by shutting up his house, &c., opposed his effects being seized, execution might go against his person even in cases under £10, "to be taken and detained in prison until he satisfies the judgment." Executions might be awarded from one district into another in all proper cases, whether against goods, lands, or the person.

It may be a matter of some interest to give an actual example of a writ of execution of that period—the writ is the more interesting from the fact that it was issued by William Dummer Powell as attorney for the plaintiff, while he was practising in Montreal and almost immediately before his appointment as First Judge of the Court of Common Pleas for the District of Hesse (see note 19).

Angus McIntosh & Co., merchants, in Detroit, sued Maisonville & Boudy, and July 8th, 1788, recovered judgment in the Court of Common Pleas at Montreal for £48 2s. 9d. (Quebec currency) and £7 1s. 6d. costs. A writ of execution was placed in the hands of Edward Southouse, sheriff, at Montreal, but he could not conveniently travel to Detroit to execute it in person; accordingly, he appointed a bailiff on the spot and sent him the writ. The bailiff, it will be seen, received special instructions.

The writ is directed to John Smith, special bailiff, for this purpose appointed at the instance and risk of the plaintiff and not otherwise, to levy of the goods and chattels of said defendants the sum of forty-eight pounds two shillings and nine pence three farthings, current money of the province of Quebec, and seven pounds one shilling and six pence costs, which said plaintiffs, before the Judge of His Majesty's Court of Common Pleas, holden at Montreal, on the 8th day of July instant, recovered judgment against said defendants . . . and in case the goods and chattels of

said defendants do prove insufficient to satisfy said debt, etc., you are to seize and take in execution their lands and tenements or so much thereof, etc. Writ returnable on the 2nd day of January next at Montreal.

This writ is endorsed on the back in the usual manner. Style of cause, amount to be levied, and is signed ' Powell, Atty. for Plffs."

Accompanying the writ was the following:—

INSTRUCTIONS.

"Angus McIntosh & Co. v. Maisonville & Bondy. } The Special Bailiff must go to the house of either of the defendants and shewing his warrant, must seize or attach as much as he thinks will fully pay the debt & costs. He must take an inventory of the articles so seized, and if the defendants cannot find a solveable person for Guardian to them, he must take them away to a safe place and cry the sale of them on the following Sunday at the Church Door, at the end of the service reading over the articles seized and informing the public that they were taken in execution at the suit of A. McI. & Co. and that he shall sell them to the highest bidder at a certain place on a certain day at least eight days after the advertisement. He should keep a minute of the sale, to whom such article is sold and at what price—get two witnesses to sign that minute—from the gross proceeds of the sale deduct the amount of the Execution as set forth in the special warrant together with reasonable charges for seizing, crying and selling—make a statement of the whole and annex it with the Inventory and Minute to the Special Warrant to be returned to the Sheriff's office, paying back to the defendant any surplus and giving him a copy of the account, inventory and sale if required.

(Sgd.) W. D. Powell."

In cases where an appeal lay, the appellant sued out a writ from the Court of Appeals, tested and signed by the Governor, Lieutenant-Governor or Chief Justice; he presented this writ to a judge of the Court of Common Pleas, gave the required security and had his appeal allowed. Within eight days he was required to file his reasons of appeal, otherwise the appellee obtained a Rule or order that

unless they were filed within four days the appeal should be dismissed; and if this was not done the appeal was dismissed with costs.

Reasons of appeal being filed, the appellee had eight days to file his answers; failing this the appellant took out a rule for the appellee to file his answers within four days. If default was made, the appellee thereafter could not file his answers but the Court proceeded "to hear the cause on the part of the appellant and proceeded to judgment therein without the intervention of the appellee." The Court had power to extend the time for delivering reasons or answers, upon good cause shown.

When reasons and answers were filed, the Court upon application of either of the parties fixed a convenient day for the hearing.

The costs in the Appellate Court were fixed by a tariff beginning "Instructions, etc., £1 0s. 0d." ($4.00), and a further tariff was laid down for appeals to the King-in-Council.

With the exception of some of these provisions (not applicable to the Courts we are considering), the practice laid down above was followed in the Courts of Common Pleas in the Districts formed by the Proclamation of 1788.

IV.

THE BAR.

Before 1785, the professions of Barrister, Advocate, Attorney, Solicitor, Notary, and Land Surveyor, were often practised by the same person. By the Ordinance, 25 Geo. III., c. 4[36] a "barrister, advocate, solicitor, attorney or proctor at law" was forbidden to practice as notary or land surveyor. To become a barrister, etc., it was necessary to serve five years under articles (unless the applicant had been entitled to practice in some Court of civil jurisdiction in some other British territory). The student must be examined by the Chief Justice of Quebec or two of the judges of the Court of Common Pleas and "approved and certified to be of fit capacity and character to be admitted."

[36] 25 George III., ch. 4, pp. 67 *seq.*, "Ordinances, &c., MDLXXXVI."

So far as is quite certain, in these Courts of Common Pleas concerning which we write, only one legally qualified practitioner appeared. That was Walter Roe[37] who practised in the Hesse Court. There was a practitioner in the Luneburg and Mecklenburg Courts, Thomas Walker, who was usually known as "Lawyer Walker." I cannot find any record of his being called, and it may be that he was an irregular practitioner.[38]

But many persons appeared as "Agents." These were required to file a warrant of attorney or a Power of Attorney, either special and for the particular case or general. It was not sufficient for the party to ask in open Court that a person named should plead for him; and defects in the warrant or power of attorney were noted with great rigour. Unless it was in perfect form, the agent "was not heard."[39]

[37] Walter Roe was the son of a wealthy merchant of London, England. His father died and his mother married again; dissatisfied, he went to sea. After following the sea for some years he was persuaded by his Captain to study law, which he did in Montreal. He was admitted to practise in 1789, and left at once for Detroit, where he practised till the Court was abolished in 1794, appearing in nearly every case of any importance. He became one of the first members of the Law Society on its creation in 1797. He had been entrusted with the duty of delivering up the Keys of the Detroit Fortifications on the surrender in 1796 of that place to the Americans. In the same year he was made Registrar of the Western District by Governor Simcoe (a copy of his Commission is in my possession). After 1794 he did not practise much; a very large amount of land in the western part of the Province passed through his hands, either as owner or as Conveyancer.

His son William was the Clerk in the Receiver-General's Department, who saved much of the Public Treasure of the Province on the capture of York by the Americans in the War of 1812-14, by burying it on John Beverley Robinson's farm on the Kingston Road, east of the Don. William's son Albert E. is in the employ of the Ontario Government in the Crown Lands Department.

[38] Thomas Walker is called "Lawyer Walker" in some of the accounts of early times. It is said that Robert I. D. Gray, the first Solicitor-General of the Province, was in his office; but I find that sometimes he filed a Power of Attorney to act for parties, which was not necessary in the case of a member of the Bar. It is true that frequently he is described as "Attorney" for one or other of the parties, but that is done with some who certainly were not legally qualified practitioners, *e.g.*, Mr. Antill, who is called Attorney for the defendant in Sherwood v. Adams, February 26th, 1793, and counsel for the defendant February 27th, 1793, in the same case (Luneburg Court).

[39] An Agent not appointed by a regular and formal document would be refused a hearing; *e.g.*, in the Mecklenburg (Kingston) Court, July 1st, 1790, before Richard Cartwright and Neil McLean, in the case of McLean v. Farley, "the plaintiff appears in person, James Clark, Jr., appears for the defendant and produced a Power of Attorney, which the Court do not consider to be sufficiently authentic"(ated). The case was adjourned.

In the same Court, in the very first case, Ferguson v. Dorland, March 17th, 1789, before Richard Cartwright, Neil McLean and James Clark, "the defendant appears in person. The defendant

Of course a member of a partnership was allowed to plead the cause of his firm.[49]

It may be well to take one or two cases to show the pains taken to do justice in the Courts presided over by lay judges.

In the Luneburg Court, November 5th, 1793, the case of Bennitt v. Stratton was called. Both parties appeared and the case was set for hearing on the following day. At this time all issues were by the Act of 32 Geo. III. to be tried by a jury. November 6th the sheriff returned the writ, the plaintiff by leave of the Court filed the declaration, the defendant moved that he might file a plea to the declaration —a plea in abatement—and also set up the proceedings in a former action; the plaintiff asked to file an answer to the proposed pleas; all of which the Court were to consider and give judgment in the next day. The following day the Court determined that "the said Pleas seems to have been drawn up by Counsel or Attorney, which the Plaintiff cannot be supposed to be able to answer, having neither Counsel or Attorney to do it; it would therefore be a hardship upon the plaintiff to proceed to judgment upon the abatement in this situation of the case." The case was therefore adjourned till the next term, "in order that the plaintiff may obtain Counsel."

November 8th the defendant says he is not ready for trial, as he "has not got Counsel, and prays that time may be granted him till next term." The following day the case is again called, the plaintiff files a note of hand, the Court refuse the request of defendant for an adjournment to pro-

prays that Peter Van Alstine may plead this cause for him. It is ordered that the defendant do plead for himself"—and he did. When it is remembered that Peter Van Alstine was a man of such influence and prominence as to be elected the first member for his Riding in the Parliament which sat in 1792, it will be seen how strict was the rule.

[49] *E.g.* In the Mecklenburg Court, January 3rd, 1791, in the case of "Robert Hamilton and Richard Cartwright, Junior, Merchants and co-partners, plaintiffs, Gotlieb Christian, Baron de Richtenstein, late of Marysburg, defendant." "Richard Cartwright, Junior, one of the partners of the House of H. & C. appears in person and filed Declaration." Curiously enough, Cartwright was one of the two judges on the Bench, but all that was done was to note the default of the defendant. On the next Court day, all three judges were present. Cartwright proved the note sued on (dated at Gananoque, November 20th, 1784), for £77 1s. 0d. Quebec Currency, and an account for £4 11s. 3d. He got judgment for £77 1s. 0d, on the note for principal, £25 8s. 6d. for interest, likewise £4 11s. 3d. for the account; in all £107 0s. 9d., "lawful money of this Province, and costs taxed at . . . ."

cure Counsel, as the action was on a "plain promissory note," and order him to plead *instanter* and that a jury be impanelled to try the issue. The defendant pleads payment; a jury is called, and a verdict found for the plaintiff for £15 Halifax Currency ($60) and interest. Judgment is directed to be entered for this amount and costs to be taxed. January 31st, 1794, the parties come into Court and say they have agreed to refer their case to arbitration (this I presume was instead of moving for a new trial). The Court agreed and arbitrators were chosen. April 12th, 1794, the plaintiff filed a certified copy of the award and asked to adduce evidence that the original had been stolen or maliciously destroyed. This was granted, and he called three witnesses, one to whom the original papers had been delivered for safe keeping but when "she went to look for them . . . the papers were gone and she has never been able to find them." The others had read the original award and the copy was in substance, as "nighly" as they could recollect the same as the original award. The award was made a rule of Court.

Take a case in the Mecklenburg Court; in 1791 "an action of debt" (really assumpsit) was brought by Titus Simons against Joseph Allen for an alleged balance of £150. 19s. 6d. The defendant set up payment of part of the account and non-delivery of some rum. The defendant asked the Court to compel the production of some receipts filed at a trial between the same parties in September, 1790. This was ordered; the Clerk produced the receipts; and the Court considered the matter. Giving judgment the following day "it being fully within their own knowledge and Recollection that on a former trial . . . the (present) plaintiff did ground his defence on a final settlement . . . (the Court) are fully convinced . . . that the plaintiff's demand for monies, etc., previous to that period is a most impudent attempt to pervert the forms of law to the Purposes of Knavery and Injustice"; but the Court awarded £4. 19s. 6d. for goods thereafter supplied.

There were, however, cases in which technicality—and worse—triumphed, e.g., in the Mecklenburg Court in Ferguson v. Carscallen, March 23rd, 1793, the plaintiff filed his declaration for defamation. The defendant appeared and pleaded "Nothing Guilty of the premises set forth in the declaration." The plaintiff "persists in saying that the

defendant is Guilty in Manner as set forth in his declaration, which he prays may be inquired of by the Country," —i.e., a jury. A *venire* was ordered to issue, returnable on the following Saturday. On that day a jury is sworn, the plaintiff opens and calls a witness who swears to sufficient to make the plaintiff's case. The plaintiff then produced a certain writing signed by the defendant's own hand. The defendant objected that no written evidence be allowed, as the declaration claimed for words spoken only—"the plaintiff saith that his Declaration sets forth 'speaking, uttering and publishing' and that the said writing is publishing"—in vain, for the Court "order that no written evidence can be given in this cause, for Reason that the damages laid in his Declaration are for speaking only." Verdict for the defendant and the Court took time to consider. March 31st the plaintiff moved for a new trial and the defendant acknowledged that he caused to be conveyed to the jury a paper containing the pleadings. The foreman swore that the jury had agreed that the defendant [sic] should have five shillings damages but that the sum was only to be mentioned if the judge should require to know what damage the defendant [sic] had sustained. Another juryman swore that the jury had agreed that the defendant [sic] should recover only five shillings from the plaintiff [sic]. The Court took the case under consideration. September 15th, 1791, the plaintiff was called and did not appear. The next day, Peter Clark appeared for him under a Power of Attorney and asked the case to stand over till the next term, the plaintiff being in Montreal. It was so ordered. January 3rd, 1792, a new attorney, Christopher Georgen, appeared for the plaintiff and asked for judgment on the motion for a new trial. The Court took time to consider. January 9th, a third attorney, James Clark, Junior, appeared for the plaintiff and renewed the motion. It was ordered that the defendant should show cause on the first day of the next term. March 13th the defendant appeared but not the plaintiff, and as it appeared to the Court that the plaintiff had from time to time put off the proceedings and "the defendant represents to the Court that the plaintiff does not appear to proceed according to the motion made by him the last term," the Rule to shew cause was discharged and the defendant dismissed from the action with £4 costs.

That the judges of this Court, at least, consulted authorities is certain. In a case of Belton v. Connor, the plaintiff, a resident of Kingston had been stopped on the street, insulted and struck by James O'Connor, Surgeon, of the same place, and shewed "marks of violence." September 16th, 1791, the plaintiff filed his declaration in Court. John Howard appeared for the defendant under power of attorney, and time was given to the plaintiff to procure his evidence. January 3rd, 1792, the case was set for the next day. That day, Howard for the defendant, demanded a jury, and a *venire* was granted. Saturday, January 7th, a jury was called, three witnesses for the plaintiff and one for the defendant gave evidence, and the jury found for the defendant. The Court took time to consider. January 9th, the plaintiff moved for a new trial; Howard shewed cause, and the matter was adjourned till the first day of the next term. Howard on that day asked to be dismissed as Attorney for the defendant, and the defendant took his own case and asked for time, which was granted. March 19th both parties appear and urge their respective contentions. March 23rd judgment is given, the two McLeans allowing the motion, Cartwright dissenting.

The judgments form interesting reading. It appeared that the assault and battery was clearly proved. Hector McLean said it would be making a dangerous precedent to allow a jury or the people to think that "however great the injury offered to one's person it should entitle him to no damages without he sustains pecuniary loss." Neil McLean said that the verdict was contrary to evidence, and "nothing but the matter being of so trifling a nature as not to merit a reconsideration can justify a non-compliance with the plaintiff's prayer." Citing Blackstone's Reports p. 1327 (2 W. Bl. 1327, Leith v. Pope), and Blackstone's Commentaries, Volume 3, page 391, he quotes with approval Blackstone's words: "Next to doing (right) the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress."

Cartwright quotes Buller, N. P. 327; Burrows' Reports, p. 609 (*Wittford* v. *Berkley*) *Burton* v. *Thompson*, Burrows'

R., p. 664; and thought that though the very intelligent and respectable jury had certainly gone too far and had contrary to the evidence found for the defendant, "the granting of a new trial would only be giving the plaintiff opportunity of harassing the defendant without any material benefit to himself, and it would be unbecoming a Court of Justice to assist the Passions of Mankind." He was of opinion to discharge the Rule. One cannot but think that Cartwright knew something of his fellow Kingstonians and imported into the judicial office some of his private information.

The plaintiff paid the costs, and, March 26th, 1792, obtained a new venire. March 30th a new jury was called, and a second verdict given for the defendant. Next day both parties appear, and on motion of the plaintiff, the defendant not objecting, the case was dismissed with costs.

V.

In the Court of Hesse, there was great regularity, the sole Judge there being a competent lawyer. From a paper read to the Royal Society of Canada, May 28th, 1913,[41] I extract a few cases of interest:

"John Robert McDougall, of Detroit, Gentleman v. Isaac Germain." On July 16th the inevitable Walter Roe filed his declaration and the defendant had a default entered against him: on July 23rd, the defendant again did not appear, a second default was entered against him and the defendant directed to proceed to prove his demand on the 20th August—on August 20th the defendant did not appear and the plaintiff "by his Attorney Walter Roe," called evidence. It was proved that the defendant put certain cattle for agistment upon the plaintiff's land on Hog Island (now Belle Isle) agreeing to pay well for them, also that 20 shillings a head was the usual price on the Island—"this action is continued, and remains en Delibere for eight days." On the 27th judgment is entered up for £30 9 5
and £9. 9s. 6d. costs, in all £39 18 11
and a Writ of fi. fa. issued 5 0

£40 3 11

[41] Transactions of the Royal Society of Canada (3rd Series, 1913), Vol. 7, pp. 43-56.

And an alias *fi. fa.* was issued October 2nd for thus sum—which writ was returnable the first Court day in June 1790—for

£40	3	11	and subsequent costs,
£1	15	0	
£41	18	11	

The costs seem fairly large; it may be that the Clerk did not tax too strenuously—in that respect being unlike a certain English Taxing Officer. Mr. Quirk, of Quirk, Gammon & Snap, had, we are told "never been seen actually to shed a tear but once—when five sixths of his little bill (£195 15s. 4d.) were taxed off in an action on a bill of exchange for £13."

A somewhat curious feature is that the evidence, given as it is, sometimes in English, sometimes in French, is taken down in the language employed by the witness—the orthography in neither language is unexceptionable and the syntax of the French sometimes is very bad—no doubt what appear to be solecisms are really the expressions of the witnesses themselves. The faulty orthography is just that of a man who understands French as spoken but has no need to write it.

For example, on May 26th, 1791, in Graham v. McKenzie v. Louis, Campeau, Mr. Roe appears for the plaintiff; the defendant made default. J. B. Marin was called as a witness and he deposed as follows: (I give the original French and all) "Qu'il est commis actuelment employer par le Demandeur et que de leur part il fut Dimanche dernier chez Defendeur pour lui demander sa raison pour avoir pas acquitte las demande actuel. Pour repomse le Defendeur a dit au Temoin que ce est bien vrai que lui devoit le vinght trois Ponds pour une Quart (This does not mean what we call a quart of rum—the 'quart' as is shewn in another case was 'more than thirty gallons'—so that the 'Romme' cost less than $2 a gallon) de Romme qu'il a eut téte passé mais peut pas faire ceste somme bien qu'il avoit demander en plusier maison." Accordingly judgment went for £23 16s. 0d, N. Y. Currency with costs—and the formal judgment for £14 17s. 6d. and costs £6 8s. 6d., in all £21 5s. 8d., Provincial Currency. The computation here is exact—the judgment was for $59.50 of our present currency.

Dollars were not wholly unknown in those days; at a Court holden 9th June, 1791, in a case Samuel Edge v. John Vert, judgment was given that the defendant should pay four dollars and a half and costs.

Some other cases are worthy of note—for example, as shewing an "Equity" practice in this Court of Common Pleas, at the Court held 19th May, 1791, in the case of George Lyons v. Francois Chabut, Esquire, we find the following as the proceedings: "That the plaintiff having this day filed the affidavit of James May purporting that the best and only witness to prove his demands are without the jurisdiction of this Court, and being willing to refer the said demand to the decisive oath of the defendant, prays that a rule may be personally served on the said Francois Chabut, Esquire, requiring him to attend this Court in his proper person on Thursday the 9th of June next, then here to purge himself by his corporal oath from his said demand, failing whereof it shall be admitted and taken pro confesso. The Court order accordingly."

On June 9th the defendant did not appear, the declaration was taken as confessed and judgment was entered for £26. 10s. 4d. currency of New York, equal to £16 11s. 5d. currency of Quebec, with costs. The costs were taxed at £6. 11s. 5d. currency of Quebec. *Fi. fa.* was issued and the money made in full (there is a trifling error in calculation: £26. 10s. 4d. N.Y. currency is equivalent to £16 15s. 2½d. Quebec currency).

On the 20th August, 1789, in the action of Thomas Cox v. Guillaume Gyeaux of L'Assomption, "Walter Roe for the plaintiff filed his declaration and the defendant appeared in person:

"As judgment was rendered the 23rd of July last against the defendant and execution the 24th of August, and finding by the Return of the Sheriff that the defendants goods and chattels, Lands and Tenements are not sufficient to satisfy the said judgment creditor, and the plaintiff's Attorney suspecting that the defendant had property secreted in the hands of Joseph Pilet, he was therefore summoned before the Court to give his declaration on oath, whom being called and duly sworn and declared to have no effects of the defendant's in his hands at this time, nor have had at the time of the service of the declaration."

August 20th, 1789, "Isaac Dolson of L'Assomption, Yeoman, v. Joseph Perrier, dite Vadeboncoeur of the River of Ecosse, Walter Roe Attorney for the plaintiff, filed his declaration and the defendant being called and appeared in person and acknowledged that the plaintiff was in peaceable and quiet possession of the land in question, and that he did enter upon the premises in manner and in form as set forth in the plaintiff's declaration, which being duly considered, the Court ordered the Defendant to put the Plaintiff immediately in possession of the said premises (this is what we should now call an 'Interim Injunction'), and the action to be considered in the meantime." On August 27th, on consent, a continuance was ordered for eight days; on Sept. 3rd the defendant not appearing the case was again "continued at the instance of Mr. Roe"; on Sept. 10th the defendant still not appearing, the Declaration is set out and a judgment entered for re-entry and £9. 17s. 0d. currency of the Province for costs.

August 20th "James Fraser, Attorney to the Assignees of Thomas Cox v. Pierre La Bute, Walter Roe for the Plaintiff filed his declaration and the defendant being called and appeared in person—and after some altercation, Mr. Roe the Plaintiff's Attorney moved to discontinue the suit. The Court ordered the suit to be discontinued accordingly."

July 23rd "Leith & Shepherd of Detroit, and Copartners in Trade v. Jean Bte. Leduc, fils, of the Parish of L'Assomption, Yeoman." The Defendant admitted his signature to the note, but pleaded infancy. He was ordered to prove his plea, and on August 20th he "produced his *Baptistere,*" which proved that he was not a minor at the time of signing the note. His further plea that it was for his father's debt was equally ineffective and judgment went against him for note, interest and costs.

August 20th "Frederick Arnold v. J. Bte. Leduck fils, Walter Roe Attorney for the plaintiff and the defendant appeared and by consent of parties, Claude Rheaume and Isaac Dolson, is nominated to estimate the damages in the Detention of the plaintiff's horses, and to call in the third person in case of Differences reserving to the Court the right of imprisonment of said horses and to report in eight days." The action was, Aug. 27th, continued for eight days; Sept. 3rd "the Court took into consideration the Report of Auditors upon the matter in dispute who were nominated

by consent of the parties to report on their differences" and entered judgment for the plaintiff, that Jean Bte. Leduck fils should pay him the sum of £10 of the currency of New York, equal to £6 5s. currency of Quebec (the computation here is exact).

September 3rd "Magdalaine Peltier, spouse of Jacques Peltier, vs. Laurent Maure. The plaintiff filed her Declaration and the Defendant appeared in person. The Court having taken the matter into consideration and find that the plaintiff is under coverture and not authorized by a Letter of Attorney from her husband. It is ordered that the action be dismissed."

Sept. 3 "Antoine Jalbert v. Jonathan Schiffelin, Charles Smyth, Attorney for the plaintiff by Procuration filed his Declaration. The Defendant appeared and says that he owes nothing to the plaintiff, but that he is indebted to him Two hundred and Thirty-one Livres, for which he prays to become an incidental plaintiff, and filed the plaintiff's engagement subscribed by him at Detroit and offers to bring proof that the defendant did not perform his engagement, and also files the account, items of which he begs leave to prove." On the 10th he called "John McGregor of full age and not interested," but all he said was "that he does not know anything respecting the matter in question." Then he called Raphael Bellongir, who said "Que lui ettoit en compagne avec Antoine Jalbert quant le dite Jalbert avoit laisser le service du Defendeur le dix septieme de mai." The case came on again Sept. 17, when judgment was given dismissing the action with costs. It seems that Jalbert claimed that he had been employed by Schiffelin to go into the Indian Country to Saginan an Indian Post, to help him in the fur trade, but was discharged by him and accordingly claimed £20 16s. 8d., Halifax Currency, as wages—the defendant set up that Jalbert did not perform his engagement, and he claimed 231 Livres as due him by Jalbert. Nothing is said in the judgment about this counterclaim.

August 27th "Catherine Desriviere La Moinodiere Deguindre vs. Her Husband, Antoine Dagnio Deguindre" Declaration filed, defendant noted in default: Sept. 3, second default, Sept. 10 defendant still in default. Plaintiff ordered to produce her evidence next Court day at 9 o'clock in the morning; Sept. 17, the defendant being again

absent, the plaintiff produced her marriage contract and called witnesses, who gave evidence in French—I give a sample:—

"Question 2nd by Mr. Roe—Si lui connait les Ettat de ces affaire? Ans. Que non."

"Question 4th by Mr. Roe—Avez vous entendû dire que ce meubles ettes vendû, et par quil? Ans. Que lui avoit entendû dire l'ont ettè vendû a L'encon."

"Question 5th by Mr. Roe—Si L'ont ettè vendû par le Sheriffe? Ans. Je ne sai pas."

This is rather better than the French in another place "il se pas."

There is considerable evidence about "une Seizer au chez le Defendeur;" and then the case stands over till next Court. Sept. 24th it again stands over for eight days—and the record of all further proceedings is lost.

Sept. 3. In Thomas Cox v. William Gyeaux, the Sheriff had made a seizure, but could not proceed with the sale till "the claims of the different opponents are first satisfied and paid or secured upon the proceeds."

Nicholas Gyeaux, nephew of William, produced witnesses who testified that he "a proposer seminez la Terre de son oncle a motie" and the witness "croix dans sa conscience s'étté a mottier entre l'oncle et nephew."

So he got half of 12 bushels of oats, 12 of wheat and one of Pease, the other half to go to the Sheriff.

Charles Prout produced a witness who swore that the defendant and Prout "lui avez dit que ce derniere étté en Simmenser chez le primiere une Piece de Bled Fromment et une Piece de Voine a son proper profit"—and so Prout got his wheat (blé froment, what is called in the book bled fromment) and the proceeds of an Indian Corn patch, the oats (voine i.e. avoine) no doubt also.

Louis Gyeau offered his brother Nicholas as a witness, the plaintiff's Attorney, the ubiquitous Mr. Roe, objected on the ground of relationship, but this objection was overruled—and he proved the case well "son oncle Guillaume Gyeaux lui a dit que une de ce vache ettoit a Louis Gyeaux que lui a livre la vache a son Frere que lui a laisser sans le Park le opposent avec les otre annimaux de De-

fendeur, et que cette vache et une de cette prix en execution." That settled it—Louis got "cette vache."

(Perhaps the defendant's family name was Goyeaux, a well-known name of these parts.)

The same day Phillip Fox obtained judgment against Pierre Durand "that he return the meat of a Hog which he killed, belonging to the plaintiff (or to pay him three pounds New York currency)—and Francis Latour obtained judgment against Louis Trudell that he pay Ten pounds currency (or return to the plaintiff Four Hundred and Fifty Pounds of Flour).
