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THE FIRST AND FUTILE ATTEMPT TO
CREATE A KING'S COUNSEL IN
UPPER CANADA

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D.,
F.R.S.C., &c.,

With the Compliments of

WILLIAM RENWICK RIDDELL.

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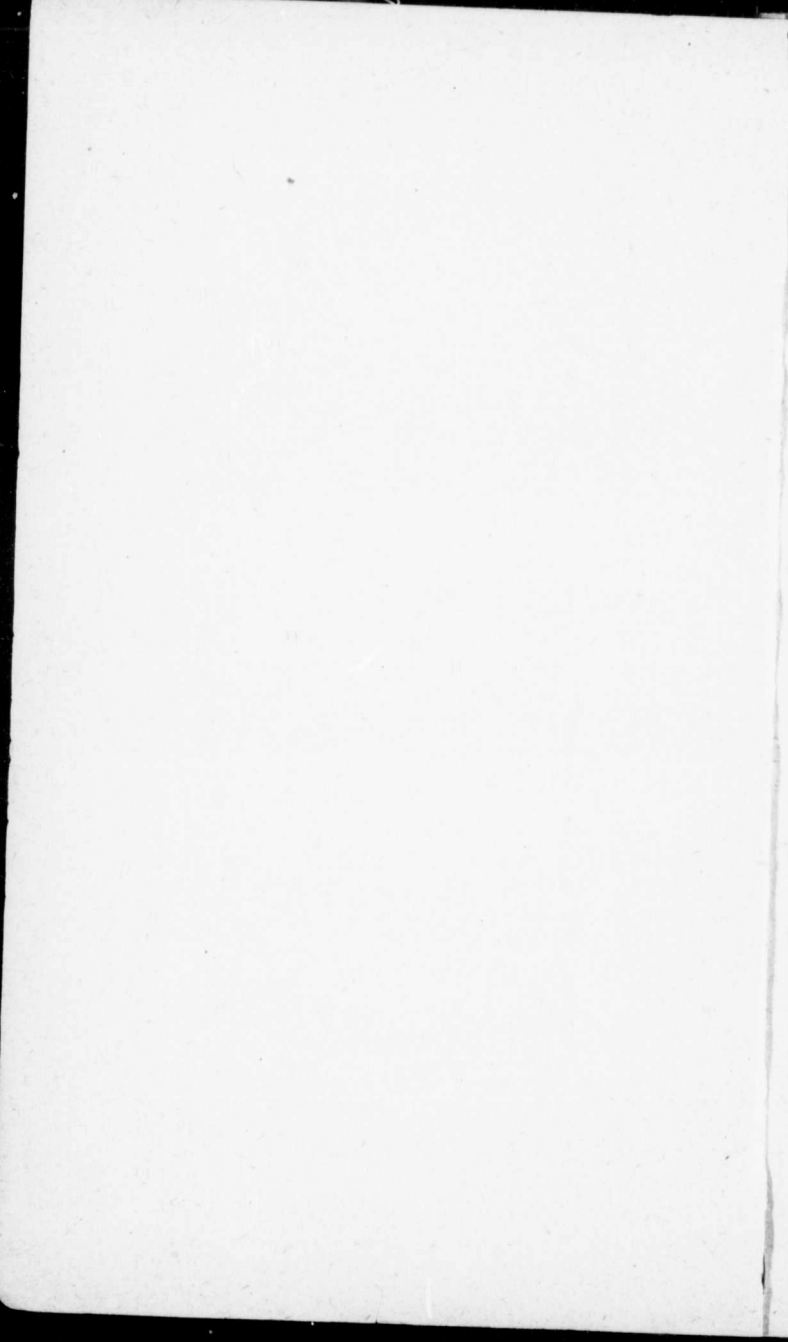
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JUSTICE OF THE SUPREME COURT OF ONTARIO.



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Justice of the Supreme Court of Ontario.

When Upper Canada began her separate provincial life, 1792, the English Bar had three grades of counsel—Serjeants at Law, King's Counsel and ordinary Barristers. The first—the "Order of the Coif"—go very far back in the history of the English law, their origin being quite obscure, but it could not have been many years after the Conquest. Serjeants had the monopoly of practising in the Court of Common Pleas until 1846. Campbell, the Attorney-General, afterwards Lord Campbell, attempted to open the Court of Common Pleas to the whole Bar, and had a warrant under the Sign Manual of King William IV in April, 1834, to be sent to the Judges of the Court of Common Pleas, directing them to give all Barristers the right to practise before them.¹ This was read in open Court April 25, 1834, and the Judges obeyed. But the Serjeants were not content: they raised the legal question as to the power of the Court and prevailed so that January 21, 1840, they were reinstated in their monopoly.²

Their triumph did not last long—in 1846 the Statute of 9-10 Vic. c. 54, put an end to their exclusive privilege.

The Order of the Coif, however, was never known in Canada and the learning concerning Serjeants-at-Law is here purely academic.

¹ The warrant was in form directed to the Lord Chancellor, Brougham: it will be found in 10 Bingham's Reports of Cases, pp. 571, 572.

² The reasons are given in 6 Bingham's New Cases, pp. 235-239; the reporter says: "During the delivery of the above, a furious tempest of wind prevailed which seemed to shake the fabric of Westminster Hall and nearly burst open the windows and doors of the Court of Common Pleas." *Tantaene coelestibus ira.*

The first King's (Queen's) Counsel³ at the English Bar was the celebrated Sir Francis Bacon—he was appointed by Queen Elizabeth her Counsel Extraordinary.⁴

In the 18th century as now the King's Counsel was well recognized: the title was an honorary one and those who had it were prevented from taking a brief against the Crown without taking out a Royal license so to do, which cost them £9.

In the earliest times of British rule in Canada, barristers, attorneys, etc., received a license to practice from the Crown, *i.e.*, the Governor. These were a plain matter of favouritism; the Governor licensed whom he listed, without responsibility to any one, and without regard to qualification or character.⁵ In 1785 the Courts were given the power of licensing practitioners, and this was the state of matters when Upper Canada began her career.

In all the enormous territory of the new Province, there were only two regularly licensed legal practitioners; and in 1784 the Lieutenant-Governor was given the power to appoint sixteen more, which he did. But in 1797 the Law Society of Upper Canada was called into existence by the Legislature, and given the sole power of calling to the Bar—the Court of King's Bench retaining the power of admitting attorneys to practice. For more than a quarter of a century nothing is heard of King's Counsel, although the laws of England were explicitly introduced in civil matters by the first Statute of the first Parliament

³The Serjeants were often called King's Serjeants and occasionally King's Counsel—the King had his own Attorney-General and Solicitor-General; but Bacon was the first King's Counsel in the modern sense. King's Counsel extraordinary and *honoris causa*.

⁴The date is not quite certain: the D. N. B. conjectures about 1594. I should place it rather earlier.

⁵This was the original English way—the "Counter," or Counsel, received a Royal License. It was not until 1285 that a subject received the right to appear by attorney; in 1292 the Judges of the Court of Common Pleas were required to see to it that there was a sufficient number of attorneys in every shire; in 1402 they were ordered to admit only those who were "good, virtuous and of good fame." By a course of evolution quite obscure in minutiae, the Inns of Court acquired power to call to the Bar; but the Courts continued to admit attorneys.

(1792), 32 George III. c. 1 (U.C.), and the Criminal law of England remained in full force.

Shortly after the termination of the War of 1812-15, Sir George Murray, being called on active service, was succeeded as provisional Lieutenant-Governor of Upper Canada July 1, 1815, by Sir Frederick Philipse Robinson.⁶ Robinson was a soldier of some distinction, but at Little York he was known rather for his unbounded hospitality than any special ability as Administrator of the Government or knowledge of law, constitutional or otherwise.⁷

One of the military who frequented his house was Lieutenant-Colonel Hagerman. Christopher Alexander Hagerman⁸ was the son of Nicholas Hagerman, a United Empire Loyalist of Dutch descent, who came to Upper Canada from New York after the peace of 1783. He is believed to have studied law in his native colony: at all events while he took up land in Adolphustown, he applied to Lieutenant-Governor Simcoe, September 29, 1794, for a license to practise law, and Simcoe gave it to him.⁹ He was one of the ten practitioners who met at Wilson's Hotel at Newark (Niagara on the Lake) July 17, 1797, and organized the Law Society of Upper Canada, still in full vigour after nearly a century and a quarter, and he practised at Adolphustown. There, March 28, 1792, on Hagerman's Point, near the edge of the Bay of Quinte, was born his son Christopher Alexander, so well known in the Province in later times. The house has long been washed away by the advancing waters of the Bay: it was of the usual log, pioneer construction, with a ground floor, and a loft reached by a ladder. The young Christopher one day coming down the ladder heavy with sleep he

⁶ His second name is often written "Phipps," but apparently it was "Philipse." D. N. B., Vol. xlix, p. 11.

⁷ He was of the Loyal New York family of that name, and was distantly related to Sir John Beverley Robinson's branch—they came from Virginia.

⁸ The name now always thus spelled was often in those and earlier days spelled "Haggerman"—the original was the German Hegemann; the English Hayman or Hedger.

⁹ The petition is among the Wolcott Manor Papers, vol. 5 (John Ross Robertson collection), p. 138; that he received a license appears from the Court Rolls at Osgoode Hall.

forgot that there was a missing rung, and fell heavily to the floor. He had the misfortune to strike his nose against the lip of a kettle, disfiguring that feature for life.¹⁰ He was an active, vivacious, "saucy" lad with great powers of body and mind. He received such education as could be afforded by the neighbourhood and spent a short time at school at Kingston; but his education was very slight and by no means such as some of his contemporaries received from the Reverend John Strachan at his celebrated school at Cornwall.¹¹ But while his schooling was not extensive, it was frequently remarked in his after life, that he never betrayed any deficiency in general culture—for an eloquent man he had the somewhat rare faculty of remaining silent when matters were discussed beyond his range. Shortly after he became fifteen years old he was articled to his father, who was practising law at Adolphustown.¹² In those days the student-at-law need be only three years on the books of the Law Society, though he must be five years under Articles before call. And as a fee of £10 (\$40) had to be paid when a student was admitted on the books, it was not unusual to delay application for admission on the books for two years after Articles. Money was not too plentiful in those days. Accordingly it was not until Michaelmas Term, 49 Geo. III. *i.e.*, November 1809,¹³ that Nicholas Hagerman (who was a Bench

¹⁰ I can sympathize with him: I had as a small boy an accident from the same cause, but I was fortunate enough to land on the top of my head and escaped much injury—there is a scar over three inches long to remind me of the incident. Some relatives of the Hagermans and of the same name, were neighbours in my youth: the story of Christopher's disfigurement is that of the family. Other stories, mostly slanderous, were current as to its cause. Gourlay gives two, that the nose was cut by an axe, the other that Mrs. Walker, of Walker's Hotel, Kingston, had struck him with a brass candlestick. See my "Robert (Fleming) Gourlay." Toronto, 1916, p. 59, n. 81.

¹¹ Read, in his "Lives of the Judges," Toronto, 1888, p. 202, says that he acquired "a sufficient knowledge of the classics to pass the Curriculum of the Law Society"—this is a mere guess, the Law Society at that time had no curriculum and no entrance or final examination. It was not until 1820 that even an entrance examination was required; not until 1831 that a final examination was required. See my "Legal Profession in Upper Canada." Toronto, 1916, pp. 39, 40, 18.

¹² From the records of the Law Society, the articles were before Michaelmas Term, 47 George III., *i.e.*, before the first Monday in November, 1807. See 37 Geo. III. c. 4, s. 3 (U.C.).

¹³ Read p. 202, gives the date as 1808, but I have examined the records of the Law Society and 1809 is undoubtedly correct—he is No. 47 in the official list.

“proposed that Christopher Alexander Hagerman be admitted upon the Books of the Society as a student-at-law articed to him, all the particulars in such case required having been complied with.”¹⁴ He was admitted as of the date of his Articles, “previous to Michaelmas Term, 1807.”

He would in the ordinary course have been called to the Bar and admitted as an Attorney¹⁵ in November, 1812; but before that time the fratricidal War of the United States against Britain had broken out.

At the beginning of the War, he was a Lieutenant in the Adolphustown Company of Militia, and he went with his company to Kingston—there he was soon made Aide-de-Camp to the Governor-General Sir George Prevost. He became Aide-de-Camp to Colonel Morrison and served in that capacity at Chrysler’s Farm November, 1813, and when Sir Gordon Drummond became Administrator of the Government of Upper Canada, and took over the command from Rottenburg in December, 1813, he joined Drummond’s staff in the same capacity. He fought with Drummond through the rest of the War, including the bloody battle of Lundy’s Lane, and displayed the greatest courage, endurance and military capacity; he rose to the rank of Lieutenant-Colonel before he was twenty-three years of age; and was mentioned in Drummond’s despatches for gallant conduct at Oswego. At the close of the War, he resumed his study of law, and was called to the Bar in Hilary Term, 55 Geo. III., *i.e.* January 16, 1815, and admitted attorney the same day.¹⁶

When Sir Frederick Philipse Robinson became Administrator he did not long delay in showing his regard for the young soldier-barrister—he procured

¹⁴ At that time a Term’s notice of intention to present for admission and the Master’s declaration upon honour of the Articles and of the qualification of the students “by education, principles and habits of life to become a member of the Society.” “Legal Profession,” &c., p. 12.

¹⁵ The attorney was admitted by the Court of King’s Bench; it was not till 1837 that a Court of Chancery was erected in Upper Canada, and the Solicitor made his appearance.

¹⁶ The list at Osgoode Hall has the name “Chas. Alexr. Hagerman” for the Call, but correctly “Chris. Alexr. Hagerman,” for admission; the date is given January 16, 1813, instead of 1815. These are errors in copying from the parchment Rolls. I have verified the date 1815 by the original minutes of the Law Society.

his nomination as King's Counsel and the appointment was duly notified by the Official Gazette of September 5, 1815.

But an appointment of that kind must be followed by a Patent under the Great Seal: before such Patent¹⁷ could be issued Robinson vacated his office and was succeeded by Francis Gore, who returned to the Provincial Capital, September 25, 1815, after nearly four years' absence.¹⁸

Gore was at this time much under the influence of Mr. Justice William Dummer Powell, after Chief Justice of the Province: and it is reasonably certain that it was Powell's influence which prevented Hagerman getting his Patent as King's Counsel—at all events he did not succeed in getting it.

After waiting for some weeks, Hagerman wrote the Secretary of the Lieutenant-Governor, October 21, 1815, saying that he had been notified by Sir Frederick Robinson that he had been appointed King's Counsel for the Province, but had not received his commission; he asked that the commission should be sent or at least that the notification should be confirmed.

Gore sent the communication to the Chief Justice, Thomas Scott, and asked for the opinion of the Judges. Scott laid the matter before his colleagues, Powell and Campbell (afterwards Sir William Campbell, Chief Justice of the Province), and as the result of the conference he wrote to Gore November 4, 1815, in the following terms: "Having laid before the Judges your Excellency's letter of the 25th of October, with its inclosures, on the subject of the appointment of Mr. Christopher A. Hagerman to be King's Counsel in this Province.

¹⁷ All such Patents were passed upon by the Attorney-General, who was at this time D'Arcy Boulton (afterwards Mr. Justice Boulton of the Court of King's Bench); it requires no great stretch of the imagination and little want of charity to believe that he did not hurry the issue of such an unprecedented Patent.

¹⁸ He left on leave of absence in the Fall of 1811: by reason of the threatening attitude of the United States, the Home Administration decided that the Commander of the Forces in the Province should be the Administrator of the Government: Brock, Sheaffe, de Rottenburg, Murray, and Robinson filled that office in succession. With Gore's return civil administration resumed its sway.

“I concur with them in opinion that under all the circumstances of the intended appointment by the late Provisional Lieutenant-Governor, it is not expedient for the present to carry it into effect.”¹⁹

And surely the proposition was a monstrous one: it was proposed to give a young barrister but a few months at the Bar, and without experience, precedence over the Attorney-General, D'Arcy Boulton, the solicitor, John Beverley Robinson (who was in England temporarily), or if these were to retain their precedence, over such practitioners as Dr. W. W. Baldwin, Archibald McLean, Levins Peters Sherwood, Samuel Sherwood, George Ridout, Henry John Boulton, all longer at the Bar, and all as well versed in the law and practice of the Courts, several of them much more so. No more gross piece of favouritism was ever exhibited even in Tudor or Stewart times; and the proposition rightly received its *quietus*.

Hagerman never became a K.C.: he rapidly acquired a large and lucrative practice at Kingston and afterwards in York. His flexible and musical voice was the envy of his confrères of the Bar, and he used it with consummate skill. Never a profound lawyer, he succeeded better at *Nisi Prius* than in Term; but he at all times was astute in concealing any defect of knowledge, and was much sought after as a counsel. He attached himself to the Government side, and when Mr. Justice Willis was “amoved” in 1828, as a consequence of his own wrongheadedness, Hagerman was appointed by Sir Peregrine Maitland to succeed him. The appointment did not receive the approbation of the Home Administration, and Hagerman rejoined the Bar, Mr. (afterwards Sir) James Buchanan Macaulay receiving the coveted place. In July, 1829, he came Solicitor-General, succeeding Henry John Boulton, who became Attorney-General on John Beverley Robinson being made Chief Justice of the Province. Hagerman took an active part in the struggles of that troubled time; he was a bitter opponent of William Lyon

¹⁹ These letters are in the Canadian Archives, Sundries, U.C., 1815. So far as I know, they are now made public for the first time.

MacKenzie and the Radical or Reform element generally. His conduct in the MacKenzie expulsion from the House being complained of and Hagerman being called on by the Colonial Secretary for an explanation, declared with spirit that the Secretary stultified himself by paying such attention to the statements of a notorious libeller. Language such as that, plain speaking without mincing matters, the Home authorities were not accustomed to and could not stomach: and Hagerman was dismissed.²⁰

Hagerman who had so far been practising at Kingston, removed to York, and formed a partnership with William Henry Draper (afterwards Chief Justice).

Time brought about its revenges: Hagerman, who was so much of a Tory that he refused to call himself a Conservative, being a member of the House, recommended himself so much to Francis Bond Head that when in 1837 Robert Sympson Jameson resigned the Attorney-Generalship to become our first Vice-Chancellor, he was appointed by the Lieutenant-Governor to the vacant post. This place he filled until February, 1840, when he was appointed Puisne Justice of the Court of King's Bench,²¹ being succeeded as Attorney-General by his quondam partner Draper.

Hagerman was never at home on the Bench: he was by nature and choice an advocate—his direction to the jury on the trial in 1828 of Patrick Collins for libel on John Beverley Robinson was much assailed by Dr. Rolph and others, and while it was not expressly disapproved by the Imperial Law Officers of the Crown, it was at least indiscreet.²²

He was not satisfied with the calm of judicial life: and the union having completely changed the situation

²⁰ March, 1833. Henry John Boulton, the Attorney-General who was as little respectful, was also dismissed. At that time Upper Canada had not Responsible Government: the Home Government was still all powerful. I confess to some admiration of and sympathy with these Canadian Law Officers in the stand they took—in this one thing, perhaps the only one, they were in advance of their time.

²¹ The number of Judges was increased from three to five by the Act of (1837) 7 Wm. IV. c. 1. Hagerman was in England when appointed and did not return until Michaelmas Term, 5 Vic., i.e., the Fall of 1842. See 6 U. C. R. O.S., pp. 132, 149, 166.

²² See my Paper "The Mosquito in Upper Canada," Ontario Hist. Soc., Toronto, 1920.

at home, he determined to go into public life in England, but *l'homme propose*, he was taken ill and died in May, 1847, at the comparatively early age of 55.

While he was Attorney-General he passed patents for the only three Queen's Counsel created by the old Province of Upper Canada, all in January, 1838—they were Mr. (afterwards Sir) Allan Napier MacNabb, afterwards Prime Minister of Canada; John Solomon Cartwright, son of the original Hon. Richard Cartwright, and father of our John R. and James S. Cartwright, and uncle of Sir Richard Cartwright, and Henry Sherwood, afterwards Solicitor-General, West (1842) and Attorney-General, West (1849).

The story of these and some of those appointed by the United Canadas will be told in a subsequent paper.

WILLIAM RENWICK RIDDELL.

Osgoode Hall,

February 3, 1920.

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